

APPENDIX xx

LEGAL INDEMNIFICATION

The September 1, 2008 Treasury Board Policy on Legal Assistance and Indemnification shall form part of this Agreement, with the following modifications:

3.1 Providing legal assistance and indemnification to employees is essential to the protection of the Crown's interest, the fair treatment of its employees, and the effective management of an organization. employees may be subject to legal claims/actions despite the fact that they are acting in good faith, within the scope of their duties or in the course of their employment. It is therefore necessary that they receive appropriate legal representation and be protected from personal liability as long as they are acting in good faith within the scope of their duties or in the course of their employment.

4.1 – Remove definition of “Crown Servants”. All references to Crown Servants in the Policy shall be replaced with “employee”.

Legal assistance (*services juridiques*)

includes the cost of the services of the Department of Justice Canada, a Crown agent or private counsel, as well as paralegal services and includes necessary travel costs, incidental costs and the use of expert witnesses.

5.1 -The objectives of this policy are to:

- protect employees from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment;
- protect the Crown's interest and its potential or actual liability arising from the acts, errors or omissions of its employees; and
- ensure continued and effective public service to Canadians.

5.2 Expected results

The expected results of this policy are that:

- Employees' and the Crowns are protected from potential or actual liability personal or otherwise arising from the acts, errors or omissions of employees occurring while they were acting within the scope of their duties or in the course of their employment;
- Employees are protected against personal liability;
- the Crown and employees are appropriately and promptly represented; and
- parliamentary proceedings, commissions of inquiry and inquests have the full collaboration of employees.

6.1.1 Decision making: There shall be no monetary limit on legal assistance and indemnification. Decisions in respect to a request for legal assistance or indemnification are the responsibility of the approval authority for the organization where the incident giving rise to the request first arose.

6.1.3 Eligibility: In making a decision on whether to approve a request for legal assistance or indemnification, ensuring that the employees meets:

- the two basic eligibility criteria as described in 6.1.5; or
- the exceptional circumstances as described in 6.1.8; or
- the two qualifying criteria pertaining to parliamentary proceedings, commissions of inquiry, inquests or other similar proceedings as described in 6.1.9; and
- the requirements set out in Appendix B.

The approval authority may seek the advice of any officials who may have knowledge of the facts, as well as the legal advice of the Department of Justice Canada prior to making this decision. The decision should be made before legal counsel engages with the employees to avoid a potential conflict situation, which would be detrimental to the interests of both the employees and the Crown.

6.1.5 Two basic eligibility criteria: In considering employees for legal assistance or indemnification, determining whether the employee:

- acted in good faith;
- acted within the scope of their duties or employment with respect to the acts, errors or omissions giving rise to the request.

6.1.6 Legal assistance: Deciding whether to approve legal assistance requests of employees who meet the two basic eligibility criteria in the following situations:

- when they are sued or threatened with a suit;
- when they are charged or likely to be charged with an offence;
- when they are named in a legal action or under threat of being named in a legal action; or
- when they are faced with serious personal liability before any court, tribunal or other judicial body; or
- when they are obliged to testify in quasi-judicial or judicial proceedings.

6.1.7 Indemnification: Providing indemnification when the employee meets the two basic eligibility criteria as described in 6.1.5.

6.1.8 Exceptional circumstances: Deciding whether to provide legal assistance or indemnification in the situations enumerated in 6.1.6 where the employee does not meet one or more of the two basic eligibility criteria as set out in 6.1.5, provided the approval authority considers that it would be in the public interest to approve the request, after having consulted the Advisory Committee on Legal Assistance and Indemnification.

If an employee grieves the Employer's decision not to provide him or her with legal assistance, he or she will be entitled to legal assistance during the grievance process, up to and including arbitration. If the grievance is denied at adjudication or if the grievance is withdrawn, the Employer shall recover any overpayment from the employee's pay, but such recovery shall not exceed ten percent (10%) of the employee's pay in each pay period, until the entire amount is recovered. Notwithstanding the foregoing, in the event that employment ceases, any overpayment still outstanding may be recovered in full from the final pay.

6.1.11 Ineligible requests: Ensuring legal assistance or indemnification requests are not approved for the following matters:

- matters arising while the requestor was engaged under a contract for services, with the exception of ministers' exempt staff;
- an action or claim initiated by an employee unless it forms part of a defence to a legal claim, action or charge for which legal assistance was approved under this policy;
- an internal investigation or an internal administrative recourse mechanism including grievances, staffing or disciplinary proceedings; and
- activities undertaken/carried out by a volunteer.

6.1.12 Termination and recovery of legal assistance: If at any time during or after the proceedings it becomes clear that the employee did not meet the basic eligibility criteria outlined in section 6.1.5 or did not continue to qualify under the exceptional circumstances described in section 6.1.8, a written notice of termination of legal assistance shall be issued to the employee, after which 30 more days of legal indemnification will be provided.

Where legal assistance was approved for a employee who met the criteria under 6.1.5, but it was subsequently established that he or she did not act in good faith or without instruction from the Employer, ensure that recovery action is considered and initiated for an amount equal to the legal assistance provided or the indemnification paid, and this amount shall constitute a debt owing to the Crown.

6.1.14 Responsibility for payment: Ensuring that:

- any amounts paid pursuant to this policy are paid from the budget of the organization in which the person worked at the time the act or error or omission giving rise to the request first occurred. If the approval authority is from a different organization, then ensuring that the amount is referred over to such organization for payment. If that organization no longer exists, the successor to that organization is to handle the request and bear the financial costs. If no successor organization exists, then an application to the Clerk of the Privy Council may be made to determine from which budget the amounts are to be paid;
- for cases involving offences, payment by the Crown does not include any fines or costs of prosecution; and
- payment is not made until the request and supporting information is provided, and the approval authority has issued an authorization in writing approving the request.

6.1.16 Private counsel: In cases where there is a conflict of interest or a probable conflict of interest between the Crown and the employee, or when the employee is charged with an offence, deciding whether to authorize payments for private legal assistance after consulting the Department of Justice Canada with respect to the appropriateness of engaging such private counsel. Such consultation shall include the name of the proposed private counsel as well as the private counsel's proposed fee schedule. If it is determined that this source of assistance is appropriate and private legal assistance is authorized, then the approval authority shall provide written authorization to the employee including the selection of private counsel or a probable

conflict of interest, and the approved fee schedules, and of the requirement for reviewing accounts by the Department of Justice Canada.

8.2 The Department of Justice Canada is responsible for:

- providing legal advice to approval authorities and their organizations;
- providing litigation services to the Crown and to the employees approved for assistance under this policy, including the conduct of the litigation, either through a Department of Justice counsel or an external counsel retained as an agent of the Attorney General, with the Minister of Justice having responsibility in consultation with the employee who requires legal assistance, for selecting and instructing the agent;
- ensuring, in cases where two or more employees are sued in the same action, that the same counsel is to conduct the employee' defence in the absence of a conflict of interest;
- treating, to the greatest extent possible and consistent with counsel's obligations to protect the interest of the Crown, all communications with the employee in confidence in any claim or proceeding for which the Attorney General of Canada has the authority under this policy to select and instruct counsel. The Crown will not use any information so disclosed in confidence by the employee in any disciplinary or civil action against the employee;
- when at any time during a proceeding a conflict arises for a Department of Justice counsel or an agent of the Attorney General representing the employee, the Attorney General could instruct such counsel to discontinue so acting. In such situations, the approval authority shall authorize the engagement of private legal assistance in accordance with the collective agreement;
- reviewing fees and disbursements proposed to be charged by private counsel and
- making recommendations in regard to a monetary settlement of a claim or an action made or brought against a employee.

Appendix A – Remove.

Appendix B - Requests by Employees

Process

In order to be considered for legal assistance and indemnification, a employee is required to:

1. inform the appropriate official (normally the employee's manager or supervisor) of the matter at the earliest reasonable opportunity after the employee becomes aware of a possible or actual suit, action or charge as a result of any alleged act or omission within the scope of the employee's duties or within their course of employment, so that the official has the opportunity to assist or guide the employee;
2. submit a request to the approval authority in the organization in which the act or omission giving rise to the request first arose. The request should include how he or she meets the applicable criteria and should specify if the request is for legal assistance, indemnification or both. If the employee's request exceeds deputy heads' approval limits listed in Appendix A and requires authority of the Minister or the Treasury Board, the request is to nonetheless first be made to the employee's own deputy head (as applicable);
3. where requesting to be represented by private counsel, state the reasons for such request and provide the name and proposed fee schedule of the preferred counsel;
4. make a factual report to organizational management of the incident leading to the request for legal assistance or indemnification; and
5. upon request by the requester's organization, authorize the Attorney General, or such other person as may be designated by the Attorney General, to defend his or her action, claim or charge using the required authorization form set out at the end of this appendix.

Failure of a employee to meet the above requirements may result in denial of legal assistance and indemnification and result in personal liability. An acquittal in offence cases, or dismissal of a civil suit, does not automatically entitle the employee to reimbursement of expenses that have been previously denied.

For each subsequent stage of the judicial process, including appeals, or for any significant change in the circumstances related to the case, a new request for payment

of legal assistance and indemnification is to be made and assessed in accordance with the considerations set out in this policy.

At the end of each stage of the judicial or quasi-judicial process, employees will be reminded of this requirement.

Authorization Forms

I, **(name)**, of the **(city/town/township)**, of **(name of city)**
in the **(province/territory)** of **(name of province/territory)** hereby authorize the
Attorney General of Canada, or such other person as may be designated by the
Attorney General, or a delegate thereof, to defend me in,

**(describe the nature of the action and the name of the court, tribunal, inquiry or
other)**

and to take such actions and conduct such proceedings as the Attorney General may
consider necessary to defend such action on my behalf and to protect the interests of
the Crown.

I have been provided with a copy of the Treasury Board *Policy on Legal Assistance and
Indemnification*. I have read and understood the policy. If at any time during or after the
proceedings it becomes apparent that I did not act in accordance with the eligibility
criteria outlined in the policy, the approval authority may terminate legal assistance in
accordance with the collective agreement.

Should any judgment or decision result in an award of costs to me, I hereby authorize
and direct the payment of any such amounts directly to the Crown in accordance with
the collective agreement.

DATED at **(location)**, this **(date)** day of **(month)**, A.D., **(year)**.

To be added to the above if there are multiple defendants

I have been informed, and I understand, that I have the right to terminate this retainer at
any time and to retain and instruct private counsel. I have further been informed, and I
understand, that should a conflict arise between my interests and those of the Crown (or
any of the co-defendant(s) named above) at any time during this litigation, it will be
necessary for me to retain private counsel. I am aware, in that event, that I may apply
for approval to retain private counsel at public expense in accordance with the
collective agreement.