

**NATIONAL
POLICE
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NATIONALE**

MEMBERS' RIGHTS AND RESPONSIBILITIES

QUICK REFERENCE HANDBOOK

PART VII

Duty-Related Civil Suits, Inquests, or Commissions of Inquiry: Legal Assistance and Indemnification

The mission of the National Police Federation is
to provide strong, professional, fair and progressive representation
to promote and enhance the rights of RCMP members.

The National Police Federation encourages all members to be aware of their rights and responsibilities, particularly when defending a duty-related civil suit.

The information in this handbook does not constitute legal advice. Members who are or may become involved in a duty-related civil suit, inquest, or commission of inquiry are advised to immediately consult an NPF representative.

While every effort has been made to ensure accuracy, in the event of any discrepancies or errors, the relevant provisions of the *RCMP Act*, applicable federal statutes, the *RCMP Regulations, 2014*, *Commissioner's Standing Orders*, and RCMP policies govern.

EXAMPLES OF DUTY-RELATED CIVIL SUITS

Examples of civil action claims brought against police services and/or individual police officers have included (see Ceysens, P., *Legal Aspects of Policing*, ch. 3, Police Civil Liability (Saltspring Island: EarlsCourt Legal Press, Inc.):

- excessive use of force / assault;
- unlawful detention and/or arrest;
- unlawful searches and/or seizures;
- malicious prosecution;
- driving without due care and attention to public safety;
- failure to prevent crime (*Doe v Metropolitan Toronto Board of Commissioners of Police*, (1998) 160 DLR (4th) 697);
- negligent investigation (*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41); and
- infringement or denial of *Charter* rights (*Vancouver (City) v Ward*, 2010 SCC 27).

A plaintiff may file a civil action against a member **even if** the member's conduct:

- complied with the *RCMP Act*, CSOs and RCMP policies;
- did not violate the *Code of Conduct*;
- did not attract a serious incident investigation;
- did not attract criminal charges;
- did not attract a Coroner's inquest; and/or
- was justified under a provision of the *Criminal Code*.

ON-DUTY MEMBERS' LEGAL EXPORSURE RECOGNIZED BY GOVERNMENT

The Government of Canada recognizes that an RCMP member may be required to testify in commissions of inquiry or inquests, and may be subject to legal claims or civil actions for their acts or omissions, despite the fact that the member acted **in good faith, did not act against the interests of the Crown;** and acted **within the scope of their duties or in the course of their employment** (TB Policy, s. 3).

MEMBERS ENTITLED TO FAIR TREATMENT AND FAIR PROTECTION

The Government of Canada recognizes that **providing legal assistance and indemnification to RCMP members is essential** (TB Policy, s. 3.1 and 5.1):

- **to treat members fairly and to protect them from personal financial losses or expenses** incurred if they were acting within the scope of their duties or in the course of their employment, and not against the Crown's interests;
- **to protect the Crown's interest** and its potential or actual liability arising from the acts or omissions of a member;
- **to ensure continued and effective management of the RCMP, and service** to Canadians; and
- **to serve the greater public interest by obtaining members' full collaboration in testifying** in parliamentary proceedings, commissions of inquiry, inquests, or other similar proceedings.

DEFINITIONS

Legal Assistance

Legal assistance includes the costs of (TB Policy, s. 4):

- the legal services of a lawyer from the Department of Justice Canada (DOJ), or a Crown agent, or, in certain situations, a privately-retained lawyer;
- paralegal services;
- necessary travel and incidental costs; and
- the use of essential expert witnesses.

Indemnification

Indemnification means the **payment of, or the reimbursement of** amounts paid by a member as a result of (TB Policy, s. 4):

- a monetary judgment or a cost award made against a member; or
- a monetary settlement that has been pre-approved by the appropriate RCMP approval authority, on the recommendation of the DOJ.

THREE ROUTES TO ELIGIBILITY FOR LEGAL ASSISTANCE OR INDEMNIFICATION

Assuming the member follows the required steps for making a request, there are **three routes to eligibility** (TB Policy, s. 6.1.3):

1. The member **meets the three basic eligibility criteria** set out in s. 6.1.5, in that the member:
 - acted in good faith;
 - did not act against interests of the Crown; **and**
 - acted within the scope of duties or course of employment.

2. There are **exceptional circumstances** such that the member **does not meet one or more of the three basic eligibility criteria, but** (TB Policy, s. 6.1.8):
 - the **Commissioner consulted with the Advisory Committee** on Legal Assistance and Indemnification; **and**
 - the **Commissioner considers that it would be in the public interest** to approve the member's request.

3. **For parliamentary proceedings, commissions of inquiry, inquests, or other similar proceedings in connection with which the member is requested or compelled to appear** (TB Policy, s. 6.1.9):
 - it is **in the public interest** to have the member appear; **and**
 - the matter **concerns events where the member was acting within the scope of duties, or in the course of employment.**

**A NEW REQUEST FOR LEGAL ASSISTANCE MUST BE SUBMITTED
FOR EACH STAGE OF PROCEEDINGS
OR
FOR ANY SIGNIFICANT CHANGE IN CIRCUMSTANCES**

NOTE: For each stage of a judicial process (for example, an initial consultation with counsel, negotiations for a settlement, a trial, or an appeal), or for any significant change in the circumstances related to the case, the member must submit a new request for legal assistance, which will be assessed in accordance with the considerations set out in the TB Policy.

MEMBERS' RESPONSIBILITIES WHEN MAKING A REQUEST FOR LEGAL ASSISTANCE OR INDEMNIFICATION

When to Make the Request

A member should **promptly** make a request to the Commissioner **when the member is** (TB Policy, s. 6.1.6):

- **threatened with a suit or sued;**
- **faced with serious personal liability** before any court, tribunal, or other judicial body; or
- **when they learn that they are required to testify in a duty-related proceeding and may incur expenses.**

How to Make the Request

In all situations, to be considered for legal assistance or indemnification, **a member / former member must** (TB Policy, Appendix B):

- **inform the appropriate official** (normally the member's supervisor) of the matter **at the earliest reasonable opportunity** after the member becomes aware of a potential or actual legal action;
- **be willing to authorize**, as early as possible, **the DOJ to represent** the member;
- **submit a request to the Commissioner**, which should include:
 - **how the member meets the applicable criteria;**
 - **whether the request is for legal assistance, indemnification, or both;**
 - **if requesting to be represented by private counsel, the reasons** for such request, and the **name and proposed fee schedule** of the preferred counsel;
 - **whether the request will require the Minister of Public Safety's approval** (request for legal assistance by private counsel **exceeds \$50,000**);
 - **whether the request will require Treasury Board's approval** (member's eligibility is based on **exceptional circumstances and** request for legal assistance by private counsel, or request for indemnification, **exceeds \$50,000**);
- **refrain from retaining private counsel until the request is approved unless** waiting for approval is practically unreasonable (see Possibility of Retroactive Approval, below).

If a member instructs counsel to begin work without the requisite prior approval, the member may be personally responsible for payment of the resulting legal fees, costs and judgment;

- **make a factual report to RCMP management of the incident** that led to the request; **and**

- **upon the RCMP's request, authorize the Attorney General, or such other person as may be designated by the Attorney General, to defend the member.**

Failure to meet the above requirements may result in a denial of legal assistance and/or indemnification, and in personal liability for the payment of legal fees, costs, and any judgment awarded against the member.

POSSIBILITY OF RETROACTIVE APPROVAL OF LEGAL ASSISTANCE

The approval authority (Commissioner / Minister / Treasury Board) may approve legal assistance retroactively where (TB Policy, s. 6.1.10):

- it was **practically unreasonable for the member to obtain approval in advance**;
- the **legal services were immediately necessary** to protect the member's interests; **and**
- the member **makes the request for legal assistance as soon as possible thereafter**.

WHEN AN APPROVAL MUST BE FOR PRIVATELY-RETAINED COUNSEL

Authorization for privately-retained legal assistance **must** be provided to a member in cases where (TB Policy, s. 6.1.16, 8.2):

- there is some conflict of interest between the Crown and the member;
- the approval authority (Commissioner / Minister / Treasury Board) consults with the DOJ with respect to the proposed private counsel, their proposed fee schedule, and the appropriateness of engaging such private counsel; **and**
- it is determined that the private counsel is appropriate.

Authorization for private counsel **must** be provided to the member in writing and include:

- the name of the selected private counsel;
- the limits of the Crown's financial commitment, in terms of both the approved fee schedule and the total expenditures; and
- the requirement that the DOJ will review the privately-retained lawyer's accounts to ensure the fees are within the established limits.

RIGHT TO SOLICITOR-CLIENT PRIVILEGE IF ASSISTED BY DOJ LAWYER

If a member will be receiving the legal assistance from a DOJ lawyer, that lawyer is required to treat all communications with the member in confidence. As such, **the Crown cannot use any information that the member discloses to the DOJ lawyer in any** (TB Policy, s. 8.2):

- *Code of Conduct* proceeding; or
- civil action against the member.

THE DECISION-MAKING PROCESS

Right to an Initial Presumption of Eligibility

When first assessing a member's request for legal assistance or indemnification, the Commissioner **must initially presume, unless or until there is information to the contrary, that the member has met the three basic eligibility criteria** (TB Policy, s. 6.1.4 and 6.1.5):

- the member **acted in good faith**;
- the member **did not act against the interests of the Crown**; and
- the member **acted within the scope of their duties or course of employment**.

Right to a Timely Response

The Commissioner is responsible for ensuring that members receive timely responses to their requests (TB Policy, s. 6.1.2).

RECONSIDERATION OF DENIALS

If, after a request was denied on the basis that the member did not meet the three basic eligibility criteria, **a court or tribunal concludes its proceedings and new evidence or information demonstrates that the basic eligibility criteria were, indeed, met**, the approval authority is responsible for consulting with the Advisory Committee and reconsidering the member's request (TB Policy, s. 6.1.13).

NOTE: The dismissal of a civil suit against a member does not automatically entitle the member to reimbursement of legal expenses that were previously denied.

TERMINATION AND RECOVERY OF LEGAL ASSISTANCE

Termination of Legal Assistance

Legal assistance may be terminated if, **at any time during or after the proceedings, it becomes clear** that the member either (TB Policy, s. 6.1.12):

- did not meet the three basic eligibility criteria set out in s. 6.1.5; or
- did not continue to qualify under the exceptional circumstances described in s. 6.1.8.

Reasons to Recover from a Member Amounts Previously Paid for Legal Assistance

Where a member did receive legal assistance based on the three eligibility criteria, recovery action will be considered and initiated if it is subsequently (TB Policy, s. 6.1.12):

- established that the member acted dishonestly; or
- determined that the member did not act within the scope of their duties or course of their employment.

Recovery action will be for an amount equal to the amount of legal assistance paid to the member. This amount will constitute a debt owing to the Crown.

INFORMATION RELATED TO A MEMBER'S REQUEST FOR LEGAL ASSISTANCE OR INDEMNIFICATION CANNOT BE RELEASED TO THE CRCC

The events giving rise to a civil suit, a commission of inquiry, or an inquest, could also form the basis for a public complaint to the Civilian Review and Complaints Commission for the RCMP (CRCC).

If the CRCC investigates a complaint that is related to a civil suit against a member, or a commission of inquiry or an inquest in which the member is requested or compelled to testify, despite the CRCC's broad rights of access to RCMP information, **any information relating to a member's request for legal assistance or indemnification must not be provided to the CRCC** (*RCMP Act*, s. 45.42(1)).

ABBREVIATIONS AND REFERENCES

<i>Charter</i>	<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act, 1982 (UK), 1982</i> , c 11. (online: https://laws-lois.justice.gc.ca/eng/Const/page-15.html)
<i>Code of Conduct</i>	<i>Code of Conduct of the Royal Canadian Mounted Police</i> , Schedule to the <i>Royal Canadian Mounted Police Regulations, 2014</i> . (online: https://laws-lois.justice.gc.ca/eng/regulations/SOR-2014-281/page-6.html#h-30)
CRCC	Civilian Review and Complaints Commission for the RCMP (website: https://www.crcc-ccetp.gc.ca/)
<i>Criminal Code</i>	<i>Criminal Code</i> , RSC, 1985, c C-46 (online: https://laws-lois.justice.gc.ca/eng/acts/c-46/)
CSOs	<i>Commissioner's Standing Orders</i>
DOJ	Department of Justice
NPF	National Police Federation
<i>RCMP Act</i>	<i>Royal Canadian Mounted Police Act</i> , RSC 1985, c R-10, as amended on November 28, 2014, by the <i>Enhancing Royal Canadian Mounted Police Accountability Act</i> , SC 2013, c 18. (online: https://laws-lois.justice.gc.ca/eng/acts/R-10/index.html)
TB Policy	Treasury Board Policy on Legal Assistance and Indemnification (online: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=13937)

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