

Corporation Of The City Of Kingston

Ontario

By-Law Number 2006-210

Protection Against Liability

Passed: September 19, 2006

(Office Consolidation)

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A By-Law Respecting The Protection Of Municipal Employees And Officers And Members Of Council Of The Corporation Of The City Of Kingston Against Liability Incurred While Acting On Behalf Of The City

Passed: September 19, 2006

Whereas Section 279 of the *Municipal Act*, 2001 authorizes Council to pass By-laws for paying any damages or costs awarded against the Members of Council, including the Mayor, or expenses incurred by them or for assuming the defence costs incurred as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as members of Council of the City of Kingston, including the Mayor;

And Whereas Section 279 of the *Municipal Act* 2001, authorizes Council to pass By-laws for paying any damages or costs awarded against Officers and Employees or expenses incurred by them or for assuming the defence costs incurred as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as Officers or Employees;

And Whereas section 14 of the *Municipal Conflict of Interest Act* provides that a municipality may indemnify members of a municipal council for costs or expenses incurred to defend a proceeding brought under the *Municipal Conflict of Interest Act* provided that the Councillor is found not guilty of the allegation brought under section 5 of the Act;

Now Therefore, The Council of the City of Kingston enacts as follows:

1. In this By-law, the following terms shall have the following meanings:

- a) "Action" shall mean a civil, criminal or administrative action or proceeding commenced or threatened to be commenced seeking damages or some other remedy related to an alleged act or omission of an Employee or Councillor acting in the course of their employment or office with the City. Action is deemed to include any counterclaim or third party claim, but shall not include a legal proceeding related to a grievance filed under the provisions of a collective agreement, or to disciplinary action taken by the City as an employer, except insofar as the Employee or Officer, including the Mayor, is exercising a bona fide management function;
- b) "City" shall mean the Corporation of the City of Kingston;
- c) "Committee" shall mean a committee comprised of all of the Commissioners of the City and the Chief Administrative Officer, to be known as the "Indemnification Committee";
- d) "Council" shall mean the duly elected Council of the City of Kingston;

- e) "Councillor" shall mean an elected representative of the City of Kingston Council or a former elected representative of the City of Kingston Council who, during their term of office with the City, did or failed to do an act which is alleged to be related to the Action commenced against the Councillor, including the Mayor;
 - f) "Damages" shall mean all sums to be paid to satisfy any order of a court of competent jurisdiction, monetary penalties, fines and interest thereon.
 - g) "Employee" shall mean an employee, former employee, salaried officer or former salaried officer, including the Mayor, who, during the term of their employment with the City, did or failed to do an act alleged to be related to the Action commenced against the Employee.
2. The City may contract for insurance to protect Employees and Councillors against risks that may involve liability on the part of such Employees or Councillors arising out of acts or omissions done in their capacity as Employees or Councillors while acting in the performance of their job duties or in the performance of any statutory duty on behalf of the City.
 3. The provision of indemnification authorized under this by-law shall be subject to and conditional upon any rights, obligations and duties of any insurer of the City that may respond to an Action under an insurance policy issued to the City and is subject to any rights, duties and obligations of the City and its Employees in respect of such insurance.
 4. Where an Employee or Councillor becomes aware that an Action has been commenced, or is threatened, against them the Employee or Councillor shall forthwith provide the City with notice of same.
 5. The Employee or Councillor shall cooperate with the City to permit the City to determine the factual background of the Action and shall provide all necessary assistance that the City requires, including attending all proceedings upon request.
 6. Council of the City of Kingston hereby establishes a Committee and delegates to the Committee the authority to determine whether or not an Employee or Councillor is entitled to receive an indemnity and the nature and scope of any indemnity provided pursuant to this By-law.
 7. The Committee shall be comprised of all Commissioners of City Administrative Groups and the Chief Administrative Officer of the City. The Committee shall:
 - a) Call its meetings at the pleasure of the Chair;
 - b) Conduct business only where a quorum of three members or more are present;
 - c) Establish its own rules of procedure;
 - d) Seek advice from the City Solicitor in exercising its delegated authority pursuant to this By-law; and

8. The Committee shall consider the following factors in assessing whether to provide indemnification pursuant to this by-law:
 - a) The alleged actions or omissions of the Employee or Councillor and all facts related to the alleged act or omission;
 - b) Whether the alleged actions or omissions related to the performance of the Employee or Councillor's duties or statutory obligations;
 - c) Whether the alleged actions or omission of the Employee or Councillor were performed honestly and in good faith in an attempt to fulfill his or her duties/obligations and were consistent with all applicable City policies;
 - d) Where the Action relates to a criminal or administrative action or proceeding, whether the Employee or Councillor had reasonable grounds to believe that his or her actions or omissions were lawful; and
 - e) Whether the Employee or Councillor has complied with his or her obligations pursuant to this By-law.
9. The Committee shall, in its sole discretion, determine whether an Employee or Councillor is entitled to indemnification pursuant to this by-law. The City may provide indemnification where the Employee or Councillor:
 - a) acted in good faith in the attempted performance of his or her duties or obligations;
 - b) acted in the best interests of the City;
 - c) acted within the scope of his or her employment or obligations and within all applicable City policies;
 - d) acted with due regard for the legality of his or her actions or omissions; and
 - e) otherwise complied with this by-law.
10. The decision to provide or to deny an indemnity and the scope and nature of any indemnity provided is final and shall not be subject to reconsideration, judicial review or appeal.
11. Where an Employee or Councillor is entitled to indemnification pursuant to this By-law, the City shall:
 - a) Represent the Employee or Councillor in the name of, and on behalf of, the Employee or Councillor through legal counsel employed by the City or through the payment of reasonable legal costs incurred by the Employee or Councillor to defend the Action through the use of outside legal counsel;
 - b) Pay all Damages and reasonable legal costs, including interest, awarded against the Employee or Councillor; and
 - c) Pay all Damages required in connection with the settlement of the Action, provided that the City approves the terms of the settlement.

12. The Committee shall, in its sole discretion, determine whether to represent the Employee or Councillor in the Action through the use of counsel employed by the City or through the use of outside counsel retained by the City.
13. The City and the Employee or Councillor shall cooperate and consult with one another in all matters relevant to the defence of the Action. Notwithstanding the foregoing, all decisions to be made in the defence of the Action shall be made by the City, in its sole discretion, after having taken into consideration the consultation with the Employee or Councillor.
14. Where an Employee or Councillor is not entitled to indemnification, the Employee or Councillor shall be responsible for all costs in connection with his or her defence of the Action, and the Employee or Councillor shall be responsible for the payment of any Damages or costs awarded against him or her in the Action.
15. The Committee shall have the discretion at any time during the Action or after the Action to review its decision to provide an indemnity and may terminate or rescind the indemnity where facts are available to the City that demonstrate that the Employee or Councillor was not entitled to an indemnity pursuant to this By-law. Prior to terminating or rescinding an indemnity, the Employee or Councillor shall be afforded the opportunity to present arguments to the Committee relevant to the decision to terminate or rescind the indemnity, but the decision is otherwise not subject to review or appeal.
16. Where the City has paid for the legal costs, or any portion thereof, to defend an Employee or Councillor in an Action and the indemnification is subsequently terminated or rescinded, the Employee or Councillor shall be responsible for all costs in connection with his or her defence of the Action and the Employee or Councillor shall be responsible for the payment of any Damages or costs awarded against him or her in the Action. The Employee or Councillor shall also be liable to repay to the City, upon written demand, all costs incurred by the City in the defence of the Action on behalf of the Employee or Councillor.
17. Where the City provides indemnification to an Employee or Councillor, any association sponsored or prepaid legal assistance plan or available insurance personal to the Employee or Councillor shall be taken into account and the cost paid by the City shall be reduced accordingly.
18. Any award of costs paid to an Employee or Councillor in the Action shall be paid to the City and by accepting an indemnity pursuant to this by-law, the Employee or Councillor shall be deemed to agree to this paragraph as a condition of the City providing the indemnity.
19. In order to receive the benefit of the indemnity provided in this by-law, the Employee or Councillor must agree to execute any and all documents required by the City to enable the City to subrogate itself to the position of the Employee or Councillor as it concerns the Action.

20. Where an Employee or Councillor has been afforded an indemnity under this by-law and where in connection with an Action there exists a conflict between the City and the Employee or Councillor, the Employee or Councillor may, subject to the provisions of this by-law, retain his or her own legal counsel for the defence of the Action.
21. The City shall not be obliged to pay for the legal costs of an Employee or Councillor's own legal counsel unless, in addition to the other provisions of this By-law being met, the City has pre-approved the legal counsel retained and approved a monetary limit for the defence of the Action, which monetary limit shall not be exceeded without the express consent of the Committee.
22. Where there is a dispute between the City and an Employee or Councillor as to whether a conflict exists as between them in relation to an Action, the decision of the Committee shall be final and shall not be subject to any right of judicial review or appeal.
23. Neither the termination of an Employee for just cause nor the decision to refuse indemnity or to terminate or rescind an indemnity shall constitute a conflict of interest.
24. In any Action, regardless of whether the Employee or Councillor are separately represented by legal counsel, the City may make such investigation, negotiation or settlement on behalf of the City and the Employee or Councillor as may be deemed appropriate by the City.
25. An Employee or Councillor may not commence either a counterclaim or a third party claim as part of an Action unless the commencement of such proceeding has been approved, in advance, by the Committee.
26. Where an Employee or Councillor seeks to appeal a judgment in an Action, the Committee shall, in its sole discretion, determine whether to represent the Employee or Councillor in the appeal and whether the cost of the appeal will be paid by the City. Where the Employee or Councillor is not entitled to indemnification for an appeal, the Employee or Councillor may nevertheless proceed with the appeal at his or her own expense. If the Employee or Councillor proceeds with the appeal and they are successful on the appeal, the Committee may, in its sole discretion, determine whether it will reimburse the Employee or Councillor for his or her costs of the appeal.
27. The City shall have the right to assess any account rendered by counsel acting for any Employee or Councillor in the defence of an Action.
28. Nothing in this by-law shall prejudice any right the City may have as against any Employee or Councillor in connection with any Action.
29. The provisions of this by-law shall in no way limit the City's rights respecting discipline, removal and dismissal.

30. Council may provide indemnification to Councillors charged with breaching section 5 of the *Municipal Conflict of Interest Act* for costs or expenses incurred by the Councillor to defend the charge where the Councillor is found not guilty of the charge.
31. Notwithstanding any provision of this By-law, Council shall not be prevented from exercising its discretion to extend an indemnity in appropriate circumstances to persons who may be provided with an indemnity pursuant to the *Municipal Act*, but are not otherwise provided for in this By-law. Where Council provides an indemnification, all provisions of this By-law shall apply to such person as if they were an Employee or Councillor within the meaning of this By-law.
32. This by-law shall be effective as of the date it is passed by Council and shall apply to all Actions instituted thereafter, regardless of the date of the alleged act or omission upon which said Action is based.

This By-Law was given third reading and passed: September 19, 2006