

## Committee of the Whole (2) Report

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**DATE:** Tuesday, April 21, 2020

**WARD(S):** ALL

**TITLE: INDEMNIFICATION BY-LAW AMENDMENTS (REFERRED)**

**FROM:**

Wendy Law, Deputy City Manager, Administrative Services and City Solicitor

**ACTION:** DECISION

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**Purpose**

Referred report from the Council meeting of March 11, 2020, Report No.11, Item No. 14, which was referred to Committee of the Whole meeting of April 7, 2020. This report is now referred to the Committee of the Whole meeting of April 21, 2020, as the April 7, 2020 Committee of the Whole meeting was cancelled due to the COVID-19 pandemic crisis.

This report provides an overview of staff's suggested revisions to the City's Indemnification By-law to implement the policy options discussed by the Integrity Commissioner in her reports to Committee of the Whole and to provide some overall updates and changes.

**Report Highlights**

- If Council chooses to adopt the policy recommendations contained in the Integrity Commissioner's reports, the City's Indemnification By-law will need to be revised.
- The revised Indemnification By-law would provide indemnification for legal fees incurred by Members of Council and Local Boards ("Members") related to Code of Conduct complaints.
- Indemnification of legal fees for Members will be funded from corporate contingency in 2020, and will be budgeted as in the corporate budget for 2021 and going forward.
- Staff are proposing additional amendments to the Indemnification By-law, and the Code Complaint Protocol to give effect to the changes and to address existing gaps.

## **Recommendations**

Council, at its meeting of March 11, 2020, (Committee of the Whole, Report No. 11, Item 14) adopted the following recommendation:

Recommendation of the Council meeting of March 11, 2020:

- 1) That communication C25 from Regional Councillor Ferri, dated March 8, 2020, be received.

Recommendation of the Committee of the Whole meeting of March 9, 2020:

- 1) That consideration of this matter be deferred to the April 7, 2020 Committee of the Whole (1) meeting.

## **Report and Recommendations of the Deputy City Manager, Administrative Services and City Solicitor, dated March 9, 2020:**

1. That a new Indemnification By-law, substantially in the form as Attachment #3 to this report be enacted.
2. That the Code of Ethical Conduct for Members of Council and Local Boards and related Complaint Protocol included as attachments #1 and #2 to this report be confirmed by by-law.
3. That any amounts incurred/to be incurred in 2020 to indemnify Members of Council and Local Board for Legal Proceedings that are not funded by the City's insurer be funded from the corporate contingency in 2020, and that such expenses be budgeted in the corporate budget for 2021 budget and going forward.

**Report dated March 9, 2020**

## **Background**

At its meeting on January 28, 2020, Council received staff's communication on "2019 Indemnification By-law Amendments" and asked that a further report be brought back to Council from staff and the Integrity Commissioner on the issues identified therein. Both staff and the Integrity Commissioner prepared further reports, which were before Council on February 11, 2020. Staff now seek approval from Council to repeal the current Indemnification By-law 91-2011, as amended, and replace it with a new consolidated Indemnification By-law addressing the matters set out herein.

## **Previous Reports/Authority**

[By-law 91-2011](#)

[By-law 013-2019](#)

[Council Report - Addendum Item 1 - February 11, 2020 - Suzanne Craig, Integrity Commissioner & Lobbyist Registrar](#)

[Communication - January 27, 2020 - 2019 Indemnification Bylaw](#)

[Communication - February 10, 2020 - Reimbursement of Legal Expenses for Council](#)

## **Analysis and Options**

The *Municipal Act*, and section 14 of the *Municipal Conflict of Interest Act* (“MCIA”) set out the circumstances in which a municipality may indemnify its employees and members of Council and Local Boards. In particular, sections 279 and 283 of the *Municipal Act* allow a municipality to indemnify current and former employees, and members of Council and Local Boards, for expenses, such as legal fees (including damages awards and costs awards) incurred as a result acts or omissions done in the individual’s capacity as employee or member.

Section 14 of the MCIA confirms that a municipality may indemnify a member of Council or Local Board for legal fees incurred in respect of a legal proceeding under the MCIA, so long as the member has not contravened section 5, 5.1 or 5.2 of the MCIA.

In light of the regulatory framework as well as the Integrity Commissioner’s comments in respect of the Code of Conduct regime, and to address certain gaps in the existing By-law, staff are recommending certain amendments be made to the Indemnification By-law. Below is an overview of the proposed changes:

1. Enact one new Indemnification By-law that incorporates indemnification provisions of By-law 91-2011, as amended, with necessary amendments, together with the new provisions as provided in this report. This way, all matters of indemnification are dealt with in one document.
2. As set out as an option for Council to consider by the Integrity Commissioner in her report to Committee of the Whole dated March 9, 2020, if Council agrees to proceed with the option, add indemnification for actual and reasonable legal fees incurred by a Member of Council and Local Board related to a Code of Conduct complaint filed with the Integrity Commissioner for an investigation under section

223.4 or 223.4.1 of the *Municipal Act, 2001*, as amended (a “Code Complaint”), where the Integrity Commissioner has found that:

- i. there has been no Code contravention; or
  - ii. a Code contravention has occurred by reason of inadvertence, or
  - iii. a Code contravention has occurred by reason of a bona fide error in judgment; or
  - iv. the referral of the matter is frivolous, vexatious or not made in good faith and the Integrity Commissioner dismisses the complaint without an investigation, or that there are no grounds or insufficient grounds for an investigation; or
  - v. where it becomes apparent in the course of an investigation that there are insufficient grounds to continue the investigation, the Integrity Commissioner terminates the investigation and dismisses the complaint.
3. Clarify that unless the City Solicitor determines there is a conflict in representation and the City cannot represent a person who is eligible for indemnification (“Eligible Person”), the City (or the City, through its insurer) will assume carriage of the defence on behalf of the Eligible Person. Further clarify that Eligible Persons are required to aid the City in the defence of the Legal Proceeding. While this is already the practice at the City, as is in many other municipalities, and assuming carriage of a defence is generally required by the insurer, amendments to the By-law can provide further clarity in this respect.
4. Where an individual is required to retain their own counsel, such as in the case of a Code Complaint filed with the Integrity Commissioner, the individual can submit a request for indemnification to the City Solicitor, and such request may also include a request that actual and reasonable legal fees incurred be reimbursed/paid in advance of a final disposition being made. The existing sections of the Indemnification By-law relating to the process surrounding indemnification will continue to apply, including the current requirements for approval of legal counsel and budget, and the assessment of reasonableness of fees as submitted etc.
5. Where an individual’s legal fees are paid in advance of a final disposition of a Legal Proceeding, and if it is subsequently determined that the individual is not entitled to indemnification in accordance with the By-law, the individual shall repay the Corporation within 90 days of such determination. Where an individual requests more than 90 days to reimburse the City, the City Solicitor shall bring a report to Council for direction.

6. If an Eligible Person receives a payment through a costs award or settlement in respect of a Legal Proceeding for which the City has indemnified the Eligible Person, such amounts must be paid to the City upon receipt by the Eligible Person.

The requirement for an individual to reimburse the City for indemnification expenses paid where the conduct in question is: (i) not related to the individual's capacity as an employee/Member, or (ii) was not done or made in good faith, or (iii) was not based on the reasonable belief that such acts or omissions were lawful and in the best interests of the corporation, are necessary pursuant to the *Municipal Act* and related case law. Likewise, the requirement for an Eligible Person to pay the City amounts received through costs awards or settlements are also necessary pursuant to the *Municipal Act* and related case law.

7. Any advance payment by the Corporation of reasonable legal fees incurred by an Eligible Person in a Legal Proceeding under the By-law shall be capped at \$25,000. For advance reimbursement requests of any amounts exceeding \$25,000 prior to the final disposition of the Legal Proceeding, the City Solicitor shall bring a report to Council for direction.

This is one of the options for Council's consideration that the Integrity Commissioner provided in her report to Council dated February 10, 2020. Rather than only applying the reimbursement cap of \$25,000 to Code Complaints before the Integrity Commissioner, it is recommended that this rule be generally applied for all cases of advance payment so that there is consistency in approach. Any request for advance payment of legal fees reasonably incurred by the Eligible Person in a legal proceeding shall be subject to a \$25,000 cap, unless Council determines otherwise. (For clarity, this does not apply where the City assumes the defence of the Eligible Person itself or through its insurer.)

8. Clarify that proceedings related to the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., as amended do not qualify for indemnification. This is consistent with the language of the *Municipal Act, 2001* and related case law.
9. Under the proposed By-law, the administration of the Indemnification By-law will be managed through the City Solicitor's office. This will streamline the process around indemnification and is similar to how other municipalities have structured their Indemnification By-laws. The By-law will also clarify that any issues of uncertainty relating to indemnification will be brought back to Council for determination.

10. Extend indemnification coverage of the By-law to members of the City's local boards, which would include the Vaughan Public Library Board. The prior Indemnification By-law provided indemnification for current/former members of Council as well as salaried officers employees. Members of the City's local boards were not included. The City has insurance liability coverage for members of local boards which covers members in the event they are named in a lawsuit as a result of their duties as it pertains to the board. Staff are therefore recommending that members of local boards be indemnified under the new Indemnification Bylaw.
11. Other administrative amendments are being included in the new By-law to increase readability and clarity. For instance, various definitions (such as "City Solicitor" and "Employee") would benefit from being streamlined. Similarly, it would make the By-law clearer if section 4.0 "Persons Served with Process" were amended to simply say that an Eligible Person served with a document which initiates a Legal Proceeding shall forthwith deliver same to the City Solicitor. In the context of Code Complaints, Members will not be required to provide a copy of the Complaint to the City Solicitor, but instead will be permitted by the Integrity Commissioner to disclose the existence and general nature of the inquiry to the City Solicitor in support of their request for indemnification.
12. The effective date of the By-law will be the date that it is enacted by Council (i.e. an anticipated enactment date of March 11, 2020). It is recommended that:
  - a. For ongoing matters where the City has assumed the defence of a Legal Proceeding on behalf of current or former employees, the City will continue to defend the Legal Proceeding on the Eligible Person's behalf.
  - b. For all matters where indemnification is authorized under Bylaw 91-2011, as amended, those indemnification approvals will continue to apply under the new By-law.
  - c. For Code Complaints filed with the Integrity Commissioner prior to the enactment of the new bylaw where a final disposition has not been rendered, the provision of the new bylaw will apply to any indemnification requests.

These transitional provisions are recommended to allow for minimal interruption of the indemnification entitlements of Eligible Persons. For Code Complaints, although there was a period of gap of indemnification for non-MCIA Code complaints between June 2019 and the present, if that gap had not existed, indemnification would apply only

after the final disposition.<sup>1</sup> As such, it is staff's position that the new By-law would apply to any Code Complaints where a final disposition has not been rendered by the Integrity Commissioner, even if the Code Complaint was filed prior to the date of the enactment of the new Bylaw, as the right to indemnification would not have crystallized until the disposition is made.

In addition to the recommended amendments to the Indemnification By-law above, staff have also identified beneficial amendments to the Code of the Ethical Conduct for Members of Council and Local Boards and the related Complaint Protocol to ensure consistency in approach.

In particular, in consultation with the Integrity Commissioner, staff recommend adding new paragraphs 5 and 6 to Rule No. 6 of the Code of the Ethical Conduct for Members of Council and Local Boards which confirm, respectively, that: (i) Members are required to comply with sections 5, 5.1, and 5.2 the MCIA, and (ii) declarations of pecuniary interests known to Members shall be recorded in the meeting minutes in accordance with section 6 of the MCIA. While Members are bound by these obligations regardless of whether they appear in the Code of the Ethical Conduct for Members of Council and Local Boards, including such provisions will help bring clarity to Members and to the public. No other changes are made to the Code, which can be found as attachment #1.

Further, in consultation with the Integrity Commissioner, staff recommend adding new section 7(iv) of the Complaint Protocol which confirms that the Integrity Commissioner has the ability to terminate an investigation where it becomes apparent in the course of an investigation that the complaint is frivolous, vexatious or not made in good faith, or that there are no grounds or insufficient grounds for an investigation. While the Integrity Commissioner has inherent jurisdiction to terminate an investigation, adding an explicit provision to this effect (which is similar to prior sections included in the Complaint

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<sup>1</sup> Former section 19 of the Complaint Protocol stated: (1) A Member of Council who is subject of an Integrity Commissioner complaint under Part A (Informal Complaint Procedure) or Part B (Formal Complaint Procedure) under this Protocol may charge against the Member's office budget the actual legal expense incurred for consultation with a lawyer of up to \$500.00.

(2) A Member of Council who is the subject of an Integrity Commissioner complaint investigation \* under this Protocol may be reimbursed for actual and reasonable expenses incurred for consultation with a lawyer of up to \$5000.00, where it is determined that there has been no contravention of the Code of Ethical Conduct by the Member, such amounts to be charged against the Council Corporate Budget following approval by the Integrity Commissioner.

\* An Integrity Commissioner complaint investigation begins when the Integrity Commissioner opens a case file and gives notice of the same to the Member of Council subject of the formal complaint

Protocol) will provide additional clarity for Members as well as the public. No other changes are made to the Complaint Protocol, which can be found as attachment #2.

## **Financial Impact**

Although a provision providing indemnification of Mayor and Members of Council related to Code Complaints and MCIA proceedings had been in place in the past, there was no corresponding budget specifically allocated for indemnification.

The actual financial impact is difficult to forecast due to the varying number of matters that may arise each year and their complexity. As such, in consultation with Financial Planning and Development Finance, it is recommended that amounts incurred in 2020 to indemnify Members for legal proceedings not covered by the City's insurer, such as Code Complaints, will be funded from the corporate contingency in 2020. Such expenses will be budgeted in the corporate budget for 2021 and going forward.

## **Broader Regional Impacts/Considerations**

N/A

## **Conclusion**

Based on Council's prior direction for staff to review the Indemnification By-law and the options provided for Council to consider received from the Integrity Commissioner, staff are proposing a new Indemnification By-law. The new Indemnification By-law will provide indemnification for legal fees incurred by Members related to Code Complaints filed with the Integrity Commissioner, together with other updates. Corresponding minor changes are also proposed for the Code of Conduct and Code Complaint Protocol.

**For more information**, please contact: Wendy Law, 8700

## **Attachments**

1. Code of Ethical Conduct for Members of Council and Local Boards
2. Complaint Protocol
3. Proposed Indemnification By-law

## **Prepared by**

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