

The Corporation of the City of Kenora

By-law Number 48 - 2015

A By-law to Provide for Indemnification

Whereas Subsection 279(1) of the *Municipal Act, 2001, as amended*, provides that a municipality may be or may act as an insurer with respect to the following matters:

- a) protection against risks that may involve pecuniary loss or liability on the part of the municipality or any local board of the municipality;
- b) the protection of its employees or former employees or those of any local board of the municipality against risks that may involve pecuniary loss or liability on the part of those employees;
- c) subject to section 14 of the *Municipal Conflict of Interest Act*, the protection of the members or former members of the council or of any local board of the municipality or any class of those members against risks that may involve pecuniary loss or liability on the part of the members;
- d) subject to section 14 of the *Municipal Conflict of Interest Act*, the payment of any damages or costs awarded against any of its employees, members, former employees or former members or expenses incurred by them as a result of any action or other proceeding arising out of acts or omissions done or made by them in their capacity as employees or members, including while acting in the performance of any statutory duty; and
- e) subject to section 14 of the *Municipal Conflict of Interest Act*, the payment of any sum required in connection with the settlement of an action or other proceeding referred to in paragraph 4 and for assuming the cost of defending the employees or members in the action or proceeding.

Whereas subsection 14(1) of the *Municipal Conflict of Interest Act* provides that councils may pass by-laws to enable the municipality to act as an insurer to protect a member of the council or of any local board thereof who has been found not to have contravened section 5, against any costs or expenses incurred by the member as a result of a proceeding brought under the *Municipal Conflict of Interest Act*, and for paying on behalf of or reimbursing the member for any such costs or expenses; and

Whereas it is advisable to protect Members of Council, City Employees and Members of Local Boards against certain pecuniary losses, liabilities, risks, costs and expenses that relate to their offices or arise because of their being, or having been, Members or Employees;

Now Therefore Council of the Corporation of the City of Kenora Enacts as Follows:

Definitions

1. In this By-law, unless a contrary intention appears,
 - a) "Act" means the *Municipal Act, 2001*, S.O. 2001 c. 25, as amended;
 - b) "By-law" means this By-law, as it may be amended from time to time;
 - c) "CAO" means the person within the Corporation's employ who holds the title of "Chief Administrative Officer", including his or her designates;
 - d) "Claimant" means a Member or Employee who claims coverage pursuant to this By-law;
 - e) "Corporation" means The Corporation of the City of Kenora;
 - f) "Corporation's Legal Counsel" means legal counsel employed or retained to represent the interests of the Corporation, including his or her designates;
 - g) "Council" means the elected municipal council for the Corporation;
 - h) "Employee" means a person who is a salaried officer, or any other person in the employ of the Corporation;
 - i) "Former Employee" means a person who was formerly an Employee of the Corporation;
 - j) "Local Board" means a board that has its members appointed by resolution of Council and which is included on the "Boards and Committees List" that is maintained by the City Clerk;
 - k) "Member" means a person who is or was a member of the Council of the Corporation or of a Local Board;
 - l) "Proceeding" means any civil, criminal or administrative action or proceeding initiated or claim made by a Third Party arising out of acts or omissions done or made (or alleged to be done or made) by a Claimant acting in his or her capacity as a Member or Employee or as a result of the Claimant having status as a Member or Employee;
 - m) "Third Party" means any person or authority including the Crown, other than the Member, the Employee, the Corporation or a Local Board.

Interpretation Rules

2. In this by-law,

- a) wherever this By-law refers to a person or thing with reference to gender or the gender neutral, the intention is to read the By-law with the gender applicable to the circumstances;
- b) references to items in the plural include the singular, as applicable;
- c) the words “include”, “including”, “included” or “includes” are not to be read as limiting the phrases or descriptions that precede or follow them; and
- d) headings are inserted for ease of reference only and are not to be used as interpretation aids.

Statutes

- 3. Unless otherwise defined, specific references to statutes in this By-law are printed in italic font and are meant to refer to the current statutes applicable within the Province of Ontario as at the time this By-law was enacted, as they are amended and revised from time to time.

Indemnity for Members

- 4. The Corporation shall, subject to the provisions of this By-law, indemnify a Member in the manner and to the extent provided herein in respect of any Proceeding brought against such Member by a Third Party arising out of acts or omissions done or made by such person in his or her capacity as a Member or by reason of being a Member, including, without limitation,
 - a) while acting in the performance of any statutory duty; and
 - b) while being or acting as an appointee, nominee, delegate, member, officer or in any other capacity on a Local Board, Committee, Corporation, Association or other body pursuant to the direction, request or other authority of the Corporation.
- 5. Subject to the provisions hereof, the Corporation shall indemnify a Member by:
 - a) assuming the cost of defending the Member in the Proceeding;
 - b) assuming the cost of representation where a person is compelled to give evidence in a Proceeding by reason of being or having been a Member;
 - c) paying any fines, monetary penalties, damages or costs imposed on or awarded against that person as a result of a Proceeding;
 - d) paying, either by direct payment or reimbursement, any expenses reasonably incurred by that person as a result of the Proceeding;

- e) paying any sum required in connection with the settlement of a Proceeding.
6. In the case of Proceedings under the *Municipal Conflict of Interest Act*, the following shall apply:
- a) the indemnity is limited to the costs and expenses reasonably incurred by the Member as a result of the Proceeding brought under that statute;
 - b) the Member is not entitled to any indemnity unless such Member is found not to have contravened Section 5 of that statute;
 - c) legal counsel approved by the Chief Administrative Officer shall be retained by the Member directly; and
 - d) no payment or liability shall be made or assumed by the Corporation unless and until the conditions in Clause 6(b) hereof have been met.

Indemnity for Employees

7. The Corporation shall, subject to the provisions of this By-law, indemnify an Employee in the manner and to the extent provided herein in respect of a Proceeding brought against such Employee by a Third Party arising out of acts or omissions done or made by such person as an Employee or by reason of he or she being or having been an Employee, including while acting in the performance of a statutory duty.
8. Subject to the provisions hereof, the Corporation shall indemnify an Employee by:
- a) assuming the cost of defending the Employee in the Proceeding;
 - b) assuming the cost of representation where a person is compelled to give evidence in a Proceeding by reason of being or having been an Employee;
 - c) paying any fines, monetary penalties, damages or costs imposed on or awarded against the Employee as a result of the Proceeding;
 - d) paying, either by direct payment or by reimbursement, any expenses reasonably incurred by such Employee as a result of the Proceeding;
 - e) paying any sum required in connection with the settlement of the Proceeding.

Exclusions

9. The obligations of the Corporation in this By-law shall not apply:

- a) where the Proceeding has arisen out of the dishonest, fraudulent or malicious act of the Claimant, or his or her wilful or reckless violation of any law, duty, contract or obligation;
 - b) where the Claimant has failed to comply with the provisions of this By-law, unless strict compliance has been waived by a Resolution of the Corporation;
 - c) to the extent by which the Corporation is prejudiced, where the claim is of a nature covered by an insurance policy or indemnity, whether placed or provided by the Corporation, the Claimant, a Local Board or otherwise, and there has been a policy violation or other act on the part of the Claimant prejudicing the right of indemnity under that policy or other right of indemnity; and
 - d) to any Claimant in respect of whom the Corporation has agreed to provide indemnity under a collective agreement or employment agreement and the rights of such persons and any union, association or other organization representing them shall be governed solely by such agreement and not by any of the provisions of this By-law, whether or not such agreement extends to any or all of the indemnities or other protections provided for in this By-law.
10. The liability of the Corporation under this By-law shall be reduced by the amount of indemnity paid pursuant to an insurance policy or indemnity as referred to in Clause 10(c) of this By-law and, at the reasonable request of the Corporation, the Claimant shall assign to the Corporation his or her rights pursuant to that insurance policy or indemnity and to any amount payable under it.
 11. Notwithstanding that the Corporation may have assumed the defence of a Proceeding or the cost thereof, it shall be deemed to have reserved its rights with respect to the applicability of any exclusion under this By-law.
 12. The Corporation may waive the reservation of rights referred to in Section 11, subject to such conditions as the Corporation deems appropriate in the circumstances.

Limit of Coverage

13. Subject to Section 37, the maximum amount for which the Corporation may be liable hereunder (inclusive of claims, costs, expenses and any other amount) shall not exceed \$100,000.00 in respect of any claim or combination of claims arising under the same circumstances, made against a Claimant.

If CAO is Claimant

14. If the Claimant is the current CAO, Council shall designate one of the Clerk or the Deputy Clerk to carry out the duties under this By-law assigned to the CAO, however, any decisions that the CAO would make under the By-Law are to be made by Council.

Notice to Corporation

15. A Claimant shall promptly give written notice to the CAO of any threatened or actual Proceeding. Where a Claimant is served with any process or notice with respect to a Proceeding, he or she shall immediately deliver a true copy of the document to the CAO.
16. A Claimant shall, concurrently with giving notice under section 15 of this By-law, provide the CAO with full particulars of any other insurance or indemnity providing coverage to the Member or Employee.
17. In the event that a Claimant fails to give such notice or deliver such document or provide such full written particulars to the CAO within 30 days of the receipt of such notice or such document by the Claimant, no indemnity will be provided to a Claimant pursuant to this By-law.

Determination of Coverage

18. The CAO shall determine whether or not a Claimant is covered under the provisions of this By-law.
19. Where the CAO determines that a Claimant is not entitled to coverage under this By-law, he or she shall prepare a report to the Council as to the circumstances involved. The Council may substitute its decision on coverage for the CAO's decision under section 18 of this By-law.
20. In the event that a Claimant commences a legal proceeding to enforce a claim for indemnity under this By-law, such legal proceeding must be commenced within 90 days of receipt of the final decision made by the CAO or Council, as the case may be, pursuant to Sections 18 and 19 of this By-law.

Legal Counsel

21. The Corporation's Legal Counsel may, in appropriate cases, provide representation to a Claimant at the cost of the Corporation and the Corporation may take general carriage of the Proceeding where the Corporation and the Claimant are both parties to the Proceeding, and it is in the interests of the Corporation to do so.
22. The Corporation may apply for party, intervener or other status in any Proceeding with which a Claimant is or may be involved if to do so is in the interest of the Corporation, and the Corporation's Legal Counsel may, in proper cases, also represent the Claimant, or take general carriage of the Proceeding, at the cost of the Corporation.
23. Despite any other provision of this By-law, any Legal Counsel retained by the Corporation's Insurer to defend a Proceeding shall also represent the Claimant with respect to that Proceeding unless the Corporation requires or consents to the retainer of different Legal Counsel.

24. Except as otherwise provided in this By-law, the Corporation shall have the right to select and retain Legal Counsel to represent the Claimant.
25. Notwithstanding section 24, a Claimant may request, in writing, approval of the CAO of Legal Counsel of the Claimant's own choice, and such a request shall include the name, and contact information of such Legal Counsel, together with a statement of his or her rates, fees and charges.
26. The CAO of the Corporation shall within 10 days from receiving the request, approve the request or deny the request and appoint Legal Counsel of the Corporation's choice and, in either case, advise the Claimant in writing.
27. If a Claimant's request to use Legal Counsel of his or her own choice is denied, and the Claimant still wishes to use that Legal Counsel, such costs shall be the responsibility of the Claimant.
28. If, after 10 days from receiving the request the CAO has not advised the Claimant in writing of the disposition of his or her request, the Claimant may retain his or her choice of Legal Counsel to act on his or her behalf until the Corporation retains other Legal Counsel.
29. If the Corporation retains other Legal Counsel to act on behalf of the Claimant in place of Legal Counsel originally retained by the Member in accordance with section 25, the Corporation shall, subject to the *Solicitors Act*, pay to the Claimant's Legal Counsel all of his or her reasonable legal fees and disbursements from the time that the Claimant retained such Legal Counsel until replaced by Legal Counsel retained by the Corporation.
30. Subject to the requirements of the Law Society of Upper Canada, all Claimant Legal Counsel in any Proceeding shall co-operate fully with, and provide all relevant information to, the Corporation's Legal Counsel.
31. Unless otherwise agreed to by the CAO, Legal Counsel retained by the Claimant shall render detailed accounts to the Claimant on a monthly basis for all services rendered in the immediately preceding month, and shall deliver such statements of account to both the Claimant and the CAO. Upon approval of such accounts by the Claimant and the CAO, the Corporation shall pay such accounts. Legal accounts may, at the request of the Corporation or the Claimant, be submitted for assessment in accordance with the *Solicitors Act* and the Corporation shall not be liable for payment of an account which has been assessed unless it has been given notice of and the full opportunity to participate in the assessment process.
32. If the Corporation retains other Legal Counsel to act on behalf of the Claimant in place of the counsel originally retained by the Claimant, the Corporation shall, subject to the *Solicitors Act*, pay to the Claimant's counsel all of his or her reasonable legal fees and disbursements from the time that the Claimant retained the counsel until replaced by Legal Counsel retained by the Corporation.

Costs

33. No costs, expenses or other liability shall be incurred or assumed on behalf of the Corporation under any circumstances without the prior written approval of the CAO.
34. Where the Corporation has provided indemnity to a Claimant pursuant to this By-law, and costs are awarded in favour of that Claimant in the Proceeding, the Claimant shall assign the amount of the costs award and the right to collect it to the Corporation.

Settlements

35. The Corporation, at its option, shall have the right at its own expense to investigate any claim and may negotiate the settlement of any claim, or any aspect of any claim, including any non-monetary terms of settlement, as it deems expedient but the Corporation shall not commit the Claimant to any settlement without the Claimant's consent, unless the failure to settle results or may result in any continuing liability, including but not limited to vicarious liability, to which the Corporation may be exposed, but which would have been released by such settlement. In that case, the Corporation has the right to settle the claim to the extent required to obtain a release of the Corporation from liability and to decline indemnity of the Claimant if the Claimant fails to join in the implementation of the settlement as may be required by the Corporation.
36. If the Claimant's consent is required and the Claimant refuses to consent to any settlement recommended by the Corporation, and the Claimant elects to contest the claim or continues to defend the Proceeding in connection with such claim, then, subject to the provisions of this By-law, the Corporation's limit of liability for the claim or for indemnity of the Claimant shall not exceed the amount for which the claim could have been settled, including costs, charges and expenses incurred with the Corporation's consent up to the date of the refusal of the Claimant to settle.
37. In the event that the Corporation elects to reject a settlement and elects to contest the claim or continue any Proceeding in connection with such claim and the rejected settlement was within the maximum limit of liability provided for in this By-law, the Corporation shall be liable for any amount awarded against the Claimant in excess of the maximum otherwise applicable.

Cooperation

38. A Claimant shall at all times co-operate fully with the Corporation and the Corporation's Legal Counsel and shall make available to the Corporation's Legal Counsel all information and documents relevant to the matter as are within the Claimant's knowledge, possession or control. A Claimant shall not do anything to compromise or prejudice the position of the Corporation in the Proceeding. A Claimant shall attend at all Proceedings, and all meetings related to the Proceedings, when required to do so by operation of law or when requested to do so by the Corporation's Legal Counsel or CAO.

Rights to Terminate or Amend

39. The Corporation shall be entitled to terminate or change its obligations under this By-law by repealing or amending the By-law provided that the repeal or amendment of this By-law shall not prejudice the rights of a Claimant in respect of any Proceeding that arose prior to the repeal or amendment.

By-Law Not to Be Retroactive Effect

40. This by-law only applies to claims for indemnity respecting Proceedings which are commenced or continued after the effective date of this by-law. It does not apply to Proceedings that were commenced, continued or concluded prior to its coming into effect.

Repeal of Bylaw

41. By-law Number 4 - 2005 is hereby repealed.

Effective Date

42. This By-law shall take come into force and take effect on the date of its final passing.

By-law read a First and Second Time this 21st day of April, 2015

By-law read a Third and Final Time this 21st day of April, 2015

The Corporation of the City of Kenora:-

David S. Canfield, Mayor

Heather Lajeunesse, Deputy Clerk