

**Meeting date:** January 21, 2019  
**Department:** Legal & Legislative Services  
**Prepared by:** Fred W. Tranquilli, Director of Legal & Legislative Services/Clerk  
**Reviewed by:** Greg McClinchey, Chief Administrative Officer  
**SUBJECT:** **Indemnification By-law**

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**RECOMMENDATION: THAT: Council adopt the Indemnification By-law as drafted.**

## **BACKGROUND**

An Indemnification By-law has become a common municipal by-law to have in place as a result of changes in legislation assigning personal responsibility to certain employees and appointees.

Section 279 of the *Municipal Act, 2001* authorizes municipalities to pass by-laws to pay for damages or costs awarded against members of council, officers or employees of the municipality or those of local Boards, for expenses incurred for the defense costs as a result of any action or other proceeding arising out of acts or omissions done or made by them within the capacity of their role with the municipality.

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 that *Act*, provided that the member of council is not found guilty of the allegation brought under Section 5.

Within Middlesex County, other communities either have or are in the process of adopting Indemnification By-laws. Staff have been working with other local municipalities to bring forward a common Indemnification By-law for consideration by their respective councils. The product of that joint effort is the by-law which is attached.

## **ANALYSIS**

The purpose of an indemnification by-law is to protect individuals who work for the municipal corporation against financial loss or damage if they are sued in connection with their work on behalf of the municipality or a municipal board. The intent is not to pay legal expenses of individuals who are acting outside of their authority.

Indemnification can play a key role in attracting qualified individuals to serve as officers and members of council as it provides a level of assurance that members or appointees will not be personally liable for any costs incurred while carrying out their duties.

## **FINANCIAL & LEGAL IMPLICATIONS**

There are no direct financial implications of adopting an Indemnification By-law. In the event that the draft by-law is approved by council and there is legal action brought against individual members of council or staff as a result of them fulfilling their duties the draft by-law proposed would only apply to actions performed in 'good faith', and that the individual would have reason to believe their action and conduct was lawful.

The draft by-law would not apply to an action or proceeding where the legal proceeding relates to a grievance under a collective agreement or to disciplinary action taken by the municipality as an employer. Nor would the by-law apply to an action or proceeding under the *Highway Traffic Act* or the *Criminal Code* unless such proceedings arose as a result of the individual's good faith pursuit or performance of their assigned duties. The by-law, as drafted, would not apply to any expenses incurred by members of council or local boards in obtaining legal advice regarding pecuniary interests.

All members of council, local boards, and staff, continue to have a responsibility to ensure that their actions are performed in good faith and in keeping with the law.

Staff, council members and volunteers, are responsible for understanding their duties and the various laws under which they operate. Mitigation against litigation can be accomplished by being aware of the rules under which the municipality operates to ensure compliance and lessen the likelihood of legal challenge.

## **ATTACHMENTS**

- Draft By-Law

# THE CORPORATION OF THE MUNICIPALITY OF STRATHROY-CARADOC

## BY-LAW NO. 06-19

### BEING A BY-LAW FOR INDEMNIFICATION

BEING A BY-LAW TO PROVIDE INDEMNIFICATION FOR CURRENT AND FORMER MEMBERS OF COUNCIL, LOCAL BOARDS, COMMITTEES AND EMPLOYEES WITH RESPECT TO CERTAIN ACTIONS OR PROCEEDINGS ARISING FROM THEIR DUTIES

**WHEREAS** Section 279 of the *Municipal Act*, S.O. 2001, as amended, (the Act) provides that, despite the *Insurance Act*, a municipality may be or act as an insurer and may exchange with other municipalities in Ontario, reciprocal contracts of indemnity or inter - insurance in accordance with Part XII of the Insurance Act with respect to the following matters:

1. Protection against risks that may involve pecuniary loss or liability on the part of the municipality or any local board of the municipality.
2. 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.
3. 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.
4. 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.
5. 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;

**AND WHEREAS** exposure to liability under Acts dealing with areas such as environmental impairment or fisheries protection have prompted some municipalities to enact indemnification by-laws to address any gaps in their insurance coverage;

**AND WHEREAS** Provincial downloading in the second half of the last decade has brought new areas of exposure including the imposition of harsh penalties on elected representatives and senior managers for the actions of front-line staff, which has increased the risks still further;

**AND WHEREAS** Council would like to address the indemnification needs of Council members, Board appointees and employees in a comprehensive manner;

**AND WHEREAS** Council wishes to put in place appropriate protections against personal liability to ensure that competent staff, competent volunteers and competent Council members continue to be attracted to serve the Municipality of Strathroy-Caradoc;

**NOW THEREFORE** the Council of The Corporation of the Municipality of Strathroy-Caradoc **HEREBY ENACTS AS FOLLOWS:**

## **1. Scope**

The Municipality of Strathroy-Caradoc Indemnification By-law shall apply to all current and former members of Council, current and former members of Council Boards and Committees, and all current and former employees, subject to the limitations outlined in this by-law.

## **2. Definitions:**

For the purposes of this by-law:

"*Action or proceeding*" means an action or proceeding referred to in Section 5 a).

"*Council*" means the Council of the Corporation of the Municipality of Strathroy-Caradoc.

"*Employee*" means any salaried officer, or any other person in the employ of the Municipality of Strathroy-Caradoc or of a local board and includes persons that provide their services on behalf of the Municipality without remuneration, exclusive

of reimbursement of expenses provided that such persons are appointees of the Municipality or volunteers acting under the direction of a person in the employ of the Municipality.

"*Former employee*" means a person who was formerly an employee of the Municipality or local board.

"*Former member*" means a person who was formerly a member of a council of the Municipality or local board.

"*Individual*" means a person who was a member of council or was an employee, as the case may be, at the time the cause of action or proceeding arose or at the time that the act or omission occurred that gave rise to the action or proceeding, notwithstanding that prior to judgment or other settlement of the proceeding, the person may have become a former member or former employee.

"*Local board*" means a local board as defined in the Municipal Act, S.O. 2001;

"*Municipality*" means The Corporation of the Municipality of Strathroy-Caradoc.

### **3. Excluded Actions and Proceedings**

- a. This By-law does not apply to:
  - i. an action or proceeding where the legal proceeding relates to a grievance filed under the provisions of a collective agreement or to disciplinary action taken by the Municipality as an employer;
  - ii. an action or proceeding brought under the *Highway Traffic Act*, R.S.O. 1990, as amended and the *Criminal Code*, R.S.C. 1985 as amended unless such proceedings arose as a result of the individual's good faith pursuit or performance of the individual's assigned duties;
  - iii. any expenses incurred by members of council or a local board in obtaining legal advice to determine whether the member has a pecuniary interest in a matter which is the subject of a determination or consideration by council or a local board as defined herein.

### **4. Indemnification**

- a. Good faith — lawful conduct  
The Municipality shall indemnify an individual in the manner and to the extent provided by Section 4 c) in respect of any civil, criminal or administrative action or proceeding, including appeals, brought by a third party for acts or omissions arising out of the scope of the individual's authority or within the course of the individual's employment or office if:

- i. the individual acted honestly and in good faith with a view to the best interests of the Municipality; and
- ii. in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that his or her conduct was lawful.

b. Municipal Solicitor — to determine

In the event that any determination is required as to whether an individual meets the requirements of this Section, the Municipality's Solicitor shall obtain the advice and assistance of a qualified and independent solicitor, including advice on any terms and conditions that the Municipality's Solicitor may apply to the indemnification of an individual.

c. Manner and extent of indemnification

The Municipality shall indemnify an individual who meets the requirements of Section 4 a) & b) by:

- i. assuming the cost of defending such individual in an action or proceeding;
- ii. paying any damages or costs, including a monetary penalty, awarded against such individual as a result of an action or proceeding;
- iii. paying, either by direct payment or by reimbursement, any expenses reasonably incurred by such individual as a result of an action or proceeding; and
- iv. paying any sum required in connection with the settlement of an action or proceeding;

to the extent that such costs, damages, expenses or sums are not assumed, paid or reimbursed whether under any provision of the Municipality's insurance program or otherwise for the benefit and protection of such individual against any liability incurred by such individual.

## **5. Action — Proceedings**

a. Persons served with process

Where an individual is served with any process issued out of or authorized by any court, administrative tribunal or other administrative, investigative or quasi-judicial body, other than a subpoena, in connection with any action or proceeding the individual shall forthwith deliver the process or a copy thereof to the CAO/Clerk, who in turn shall deliver a copy thereof to the Municipality's Insurance Broker and to the Municipality's Solicitor.

- b. Lawyers retained by the Municipality's insurers  
Notwithstanding any other provision of this By-law to the contrary, any lawyer retained by the Municipality's insurers from time to time to defend the Municipality in any action or proceeding shall represent an individual with respect to that action or proceeding unless the Municipality instructs such individual otherwise.
- c. Municipality's right to select lawyer  
Subject to Section 9 and to paragraph c) (ii) of this section, the Municipality shall have the right to select and retain the lawyer to represent an individual and the Municipality's Solicitor shall:
  - i. advise such individual of the lawyer selected to represent the employee; and
  - ii. advise the Council of the final disposition of the matter.

## **6. Conduct of Defense**

Where possible, the Municipality's Solicitor shall conduct the defense of such actions or proceedings. In exceptional circumstances the use of the Municipality's Solicitor may not be possible and subject to Section 5 b) and Section 10 outside legal counsel may be retained having regard to:

- i. whether the Municipality's Solicitor has the required expertise;
- ii. whether the Municipality's Solicitor can provide the commitment of time and resources that is required;
- iii. whether the Municipality's Solicitor is or may be in a conflict of interest situation by virtue of conducting the defense of the individual.

## **7. Settlement — Council Approval**

Council shall have the right to approve the settlement of any action or proceeding.

## **8. Approval of other Lawyer**

Subject to the provisions of this section, an individual may request approval to be represented by the lawyer of the individual's choice by writing to the Municipality's Solicitor.

## **9. Municipal Solicitor — Review Request — 10 days**

The Municipality's Solicitor shall within 10 days from receiving the request, either approve the request or deny the request and nominate a lawyer of the Municipality's choice and, in either case, advise the individual in writing of such

decision.

#### **10. Municipal Solicitor — Fail to Respond**

If, after 10 days from receiving the request, the Municipality's Solicitor has not advised the individual in writing of the disposition of his or her request, the individual may retain his or her choice of lawyer to act on his or her behalf until the Municipality retains another lawyer to represent the individual, and shall forthwith so advise the Municipality's Solicitor in writing of any such retainer.

#### **11. Municipality — Legal Fees**

If the Municipality retains another lawyer to act on behalf of an individual in place of the lawyer originally retained by him or her in accordance with Section 10, the Municipality shall, subject to the Solicitors Act, pay to the individual's lawyer all of the reasonable legal fees and disbursements for services rendered and work done in connection with the action or proceeding from the time that the individual retained the lawyer in accordance with Section 10, until replaced by the lawyer retained by the Municipality.

#### **12. Duty to Co-operate**

An individual involved in any action or proceeding shall co-operate fully with the Municipality and any lawyer retained by the Municipality to defend such action or proceeding, shall make available to such lawyer all information and documentation relevant to the matter as are within his or her knowledge, possession or control, and shall attend at all proceedings when requested to do so by such lawyer.

#### **13. Failure to Comply — Conflict**

a. Failure to Comply with By-law

If an individual fails or refuses to comply with the provisions of this By-law, the Municipality shall not be liable to assume or pay any of the costs, damages, expenses or sums arising from the action or proceeding and shall not be subject to the requirements of Section 4 c) of this By-law.

b. Conflict — Insurance Policies

The Municipality maintains many different policies of insurance for both the Municipality and members of Council, officers and employees. The provisions of this Chapter are intended to supplement the protection provided by such policies of insurance. In the event of conflict between this

Chapter and the terms of such policy of insurance in place from time to time, the terms of such policy or policies of insurance shall prevail.

#### **14. Appeal - Enactment**

Where an individual seeks to appeal a judgment in a covered action or proceeding, the Municipality shall have the sole discretion to determine whether an appeal should be pursued, and whether the cost of the appeal will be covered by this By-law. If an individual pursues an appeal without representation by the Municipality and is successful in that appeal, the Municipality shall have the sole discretion to determine whether the individual shall be indemnified for his or her legal fees.

#### **15. Force and Effect**

That this by-law shall come into force and effect on the date of passage hereof.

**READ** a **FIRST** and **SECOND** time this 21st day of January, 2019.

**READ** a **THIRD** time and **FINALLY PASSED** this 21st day of January, 2019.

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Mayor, Joanne Vanderheyden

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Clerk, Fred W. Tranquilli