



POLICY MANUAL

POLICY NUMBER: CORPORATE-026

SUBJECT: INDEMNIFICATION POLICY

**POLICY STATEMENT:
(Purpose/Objective)**

In certain circumstances, members of Council and Employees of the Municipality should be indemnified for their reasonable costs in legal proceedings which may have been brought against them during their term on Council or during their employment with the City. As a general principle, when members of Council or Employees of the City are facing civil, criminal, or quasi-criminal legal proceedings, they should receive assistance from the City in defending against liability they have incurred while acting under legitimate instructions either from Council or from senior management of the City, or while they have otherwise been attempting to perform their duties in good faith, honestly, and without malice. The remainder of this Policy/By-law further delineates the manner in which it is intended that the foregoing principle shall be applied.

Members of Council and Employees should be entitled to access funds to pay for professional services to allow them to obtain advice in relation to Defamation faced due to their role during their term on Council or the role as an Employee, which advice staff is unable to provide.

Additionally, where Defamation has occurred, and litigation is required, indemnification of legal fees for members of Council or an Employee may be possible upon application to Council.

RELATED POLICY PROCEDURES/GUIDELINES:

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(b) Statement of Principle

In certain circumstances, members of Council and Employees of the Municipality should be indemnified for their reasonable costs in legal proceedings which may have been brought against them during their term on Council or during their employment with the City. As a general principle, when members of Council or Employees of the City are facing civil, criminal, or quasi-criminal legal proceedings, they should receive assistance from the City in defending against liability they have incurred while acting under legitimate instructions either from Council or from senior management of the City, or while they have otherwise been attempting to perform their duties in good faith, honestly, and without

malice. The remainder of this By-law further delineates the manner in which it is intended that the foregoing principle shall be applied.

Members of Council and Employees should be entitled to access funds to pay for professional services to allow them to obtain advice in relation to Defamation faced due to their role during their term on Council, which advise staff is unable to provide.

Additionally, where Defamation has occurred, and litigation is required, indemnification of process costs for members of Council or an Employee may be possible upon application to Council.

(c) Definitions

In this By-law,

“City Solicitor” shall mean the City Solicitor or her or his designate.

“Defamation” means a statement or communication, verbally or in writing, that refers to a member of Council or Employee, that is communicated publically, and the words used tend to lower the reputation of the person who is the subject of the words in the eyes of a reasonable person, and Defame or Defamatory shall have corresponding meanings.

“Employee” means an individual receiving salary or wages who is in a full or part-time employment relationship with the Corporation of the City of Brantford. Without limiting the generality of the foregoing, an employee does not include a body corporate, independent or dependent contractors, or employees of local Boards of the City. An Employee of the City performing services for a local Board or affiliated company of the City as part of his or her duties as an Employee of the City is treated as an Employee for all purposes of this By-law.

“Facing Civil Proceedings” means sued or threatened with a proceeding, and includes the situation where an Employee who is a member of a self-governing profession is facing professional disciplinary proceedings.

“Facing Quasi-Criminal or Criminal Proceedings” means charged with or likely to be charged with an offence.

“Former Employee” means an individual who was formerly an Employee of the Corporation of the City of Brantford, but is not an Employee at the time in question.

“Good Faith” means the state of mind consisting of honesty in belief or purposes, faithfulness to ones duty or obligations, observance of reasonable commercial standards of fair dealing, and absence of intent to defraud or to seek

unconscionable advantage without limiting the generality of the foregoing, good faith will not be demonstrated if that state of mind was reached as a result of wilful blindness or reckless disregard of the circumstances.

“Malice” means the state of mind consisting of intent without justification or excuse to commit a wrongful act, or the reckless disregard of the law, policies or of a person’s legal rights.

“Outcome Costs” means fines or damages, including court costs, which are ultimately found to be payable after there has been a settlement or other determination of a proceeding. In civil matters, these will include compensatory damages and in criminal or quasi criminal matters, they will include any fines which have been imposed.

“Process Costs” means the costs to conduct the defence of a proceeding which has been brought against an individual or the costs to commence an action against an individual who has Defamed a member of Council or Employee covered by this policy. In civil matters, these will include reasonable solicitor and client defence costs but will not include any costs in connection with counterclaims, crossclaims, or third party proceedings unless the City Solicitor concludes that the same are integral to the defence of the proceedings and the Employee or Member of Council agrees that the City’s costs shall be the first claim on any amounts recovered through such counterclaims, crossclaims, or third party proceedings. For criminal and quasi-criminal matters, these will include reasonable solicitor and client defence costs. In all proceedings, process costs may include fees for expert witnesses and other reports, if necessary for the case and approved by the City Solicitor.

SECTION 2 PROCESS COSTS

(a) General

Indemnification for Process Costs shall be provided in criminal, quasi-criminal, and civil matters in cases where:

- (i) Members of Council are facing civil, criminal, or quasi-criminal legal proceedings and there is no question that they have been acting under legitimate instructions from Council expressed by majority vote at a duly constituted meeting or have otherwise been attempting to perform their duties in good faith, honestly, and without malice;
- (ii) Employees are facing civil, criminal, or quasi-criminal legal proceedings and there is no question that they have been acting under legitimate instructions from senior management or legitimate instructions from Council expressed by a majority vote at a duly constituted meeting, or

have otherwise been attempting to perform their duties in good faith, honestly, and without malice;

- (iii) The prerequisites in (i) and (ii) are in question, but the City has nevertheless made a determination to assume process costs on an interim basis on the agreement of the affected individual to repay same in the event that the final outcome of the proceeding reveals (either through obiter dicta or otherwise) that the prerequisites in (i) and (ii) were not met; and,
- (iv) Where (i), (ii) and (iii) above are not applicable but the City would, in any event, be vicariously liable for the acts of the member of Council or Employee. In such cases, the potential liability of the City may justify the expenditure of public funds to ensure that the defence is properly carried out, however the foregoing shall not prevent the City from subsequently advancing a claim against the member of Council or Employee in an appropriate case for the costs of the assistance so provided.
- (v) Where a member of Council or Employee has received approval of Council for indemnification further to a successful application as set out in Section 9(b).

(b) Exclusions

Despite section 2(a), there shall be no indemnification provided by the City to Employees or members of Council for process costs if any one or more of the following circumstances are applicable:

- (i) Where adverse parties in civil proceedings would each be entitled to funding for defence costs under this By-law, it being the policy of the City that it shall not finance both sides of litigious disputes and that neither party should receive indemnification in such circumstances;
- (ii) In prosecutions commenced by the City against a member of Council or Employee for the enforcement of its own By-laws or other statutes enforced by the City;
- (iii) In any criminal or quasi-criminal proceeding against a member of Council or Employee prosecuted by the City or in which the City was the complainant;
- (iv) In civil actions commenced by the City against Employees or members of Council;
- (v) In appellate proceedings, unless leave has been obtained

from the City. Such leave may be granted by Council in respect of proceedings involving members of Council or the Chief Administrative Officer, and by the Chief Administrative Officer in respect of proceedings involving other City employees. The City Solicitor shall provide advice and recommendations to Council and the Chief Administrative Officer in connection with the foregoing.

(vi) In third party claims or crossclaims brought against Employees or Members of Council where such third party claims or crossclaims are for relief over against such Employees or Members of Council in a proceeding commenced by the City;

(vii) Where the Employee or member of Council was acting on the instructions of Council or senior management of the City, but those instructions themselves were illegal and such illegality was:

1. known by the Employee or member of Council; or,
2. something that a reasonable person would have suspected under the circumstances, and the Employee or member of Council failed to make reasonable inquiries to either confirm or deny such reasonable suspicions or to take appropriate action upon the receipt of such confirmation or denial.

(viii) Where the Employee or member of Council was disobeying the instructions of Council or senior management of the City;

(ix) Where, in committing some alleged wrong, the Employee or member of Council was clearly acting on his or her own behalf and not that of the City;

(x) Where the Employee or member of Council was performing his or her duties in otherwise than in good faith, dishonestly, or with malice;

(xi) In respect of proceedings against former Employees and former Members of Council, unless there is agreement to the contrary between the City and the affected Employee or Member of Council;

(xii) Any criminal matters, however coverage will be provided for regulatory offences which are strict or absolute liability offences. Despite the foregoing, coverage for other criminal matters may be provided if approved by Council in respect of criminal charges against members of Council or the Chief Administrative Officer and if approved by the Chief Administrative Officer in respect of criminal

charges against other Employees. The City Solicitor shall provide advice and recommendations to Council and the Chief Administrative Officer in connection with the foregoing;

(xiii) In respect of legal proceedings against members arising out of any municipal election, including election expense audits and recounts;

(xiv) In defamation cases, where the words complained of consisted of the personal views of the speaker or writer of such words, and were not in Good Faith, or were said with Malice and were not expressed or published on behalf of the municipality in accordance with explicit instructions from Council or senior management of the City.

(c) **Set-Off**

Where a Member of Council or Employee has received indemnification by the City for Process Costs, and is ultimately successful in the litigation, either through settlement of the proceeding or through adjudication, the Member of Council or Employee shall pay to the City the monies they have received in an amount attributed to costs, or an award of costs,

SECTION 3
OUTCOME COSTS

(a) General

Indemnification for outcome costs shall be provided in criminal, quasi-criminal, and civil matters in cases where:

- (i) Process costs have been actually paid pursuant to this By-law; or, if expressly approved by Council on a case by case basis, where Process costs were not paid but would have been payable pursuant to this By-law; and,
- (ii) There has been a settlement or adjudication in the proceeding and a monetary amount is payable by the affected Employee or member of Council.

(b) Exclusions

Despite section 3(a), there shall be no indemnification provided by the City to Employees or members of Council for outcome costs if any one or more of the following circumstances are applicable:

(i) In civil proceedings, for punitive or aggravated damages which have been awarded unless the City has agreed to assume these costs. Such agreements to assume costs may be made by Council in respect of damages awarded against members of Council or the Chief Administrative Officer and by the Chief Administrative Officer in respect of damages awarded against other Employees. The City Solicitor shall provide advice and recommendations to Council and the Chief Administrative Officer in connection with the foregoing.

(ii) Unless otherwise approved by Council pursuant to section 3(a)(i) of this By-law, in all circumstances where indemnification of process costs was not provided under this By-law. This would include situations where interim funding was provided pursuant to section 2(a)(iii) but the final outcome has resulted in the requirement that the affected individual repay the amounts so advanced.

(iii) Any criminal matters, however coverage will be provided for regulatory offences which are strict or absolute liability offences. Despite the foregoing, coverage for other criminal matters may be provided if approved by Council in respect of criminal charges against members of Council or the Chief Administrative Officer and if approved by the Chief Administrative Officer in respect of criminal charges against other Employees. The City Solicitor shall provide advice and recommendations to Council and the Chief Administrative Officer in connection with the foregoing.

(iv) There shall be no indemnification for losses due to periods of incarceration, loss of driving privileges, and other non-monetary penalties or results;

(v) There shall generally be no indemnification where the Court determines in the course of its deliberations, either by way of obiter dicta or otherwise, that:

(1) An Employee or member of Council was acting on the instructions of Council or senior management of the City, but those instructions themselves were illegal and such illegality was:

(i) known by the Employee or member of Council; or,

(ii) something that a reasonable person would

have suspected under the circumstances, and the Employee or member of Council failed to make reasonable inquiries to either confirm or deny such reasonable suspicions or to take appropriate action upon the receipt of such confirmation or denial.

(2) The Employee or member of Council was disobeying the instructions of Council or senior management of the City;

(3) Where, in committing some wrong, the Employee or member of Council was clearly acting on his or her own behalf and not that of the City;

(4) The Employee or member of Council was performing his or her duties in otherwise than in good faith, dishonestly, or with malice; and,

(vi) In respect of proceedings against former Employees and former Members of Council, unless there is agreement to the contrary between the City and the affected Employee or Member of Council.

(vii) Where the mental state of the Employee or member of Council did not bring him or her into any one or more of the foregoing exclusions, but only because of wilful blindness or reckless disregard of circumstances on the part of such Employee or member of Council.

SECTION 4

MUNICIPAL CONFLICT OF INTEREST ACT

- (a) Members of Council shall be indemnified to the extent permitted in the Municipal Conflict of Interest Act in respect of proceedings brought against them under that legislation. Subsection (b) sets for the allowable level of indemnification under that legislation as of the date of this By-law.
- (b) Members of Council against whom proceedings have been brought under the Municipal Conflict of Interest Act and have been found by a Court not to have contravened that Act, may receive reimbursement for their reasonable costs and expenses incurred in defending those proceedings.

SECTION 5 EFFECT OF INSURANCE COVERAGE

(a) Where insurance coverage is available in respect of any claim advanced against an Employee or member of Council, the provisions of such insurance coverage shall apply and not the provisions of this By-law. The foregoing shall not apply to prevent the recovery of a policy deductible where this By-law would permit such recovery.

(b) In arranging insurance coverage for the City, the Insurance and Risk Management staff may include coverage for any matters covered by this By-law (including without limitation Conflict of Interest Insurance for Members of Council) and thereby cause the provisions of section 5(a) to become applicable to such matters.

SECTION 6 CONTROL AND COOPERATION

Every individual for whom indemnification is to be provided must, as a condition precedent to and as a continuing requirement for the provision of such indemnification:

(a) Give his or her full cooperation to the City Solicitor in the assessment, defence, investigation, negotiation, or settlement of the proceeding. In particular, where full indemnification is to be provided in respect of any proceeding against an Employee or Member of Council, the City Solicitor shall appoint such competent Counsel as he or she determines is most appropriate for the defence of the case. Where the City Solicitor has assumed such control, control of the proceeding and all decisions in relation to the defence of the action shall be made by the City and not the affected member of Council or Employee;

(b) Not have or engage in any contact, discussions or negotiations with any adverse person or party without the prior written consent of the City Solicitor. Any attempted settlement of any proceeding, including a plea bargain or other arrangement, shall not bind the City to the payment of the resulting outcome costs unless the settlement has been approved by Council in respect of legal proceedings against members of Council, and by the Chief Administrative Officer in respect of legal proceedings against Employees. The City Solicitor shall provide advice and recommendations to Council and the Chief Administrative Officer in connection with the foregoing. This subsection shall not apply to Members of Council or Employees who have been approved to receive indemnification of Process Costs in an action they have commenced;

(c) Promptly disclose all contacts, discussions, or negotiations with any adverse person or party to the City Solicitor. This subsection shall not apply to Members of Council or Employees who have been approved to receive indemnification of Process Costs in an action they have commenced ;

(d) Fully and completely disclose all matters in relation to the proceeding to the City Solicitor;

(e) Fully and completely comply with every requirement of this By-law;

(f) Execute a document prepared by the City Solicitor, following the receipt of independent legal advice for which the City may make a reasonable payment, in which he or she acknowledges that any indemnification to be provided shall be provided in accordance with this By-law and any other special conditions that may have been imposed and in which he or she specifically acknowledges that the receipt of any indemnification under this By-law shall not be construed as any condonation on the part of the City of any actions on the part of the member of Council or Employee, or otherwise act as a bar to the censure, discipline, or termination of that person.

SECTION 7

RECOVERY OF LEGAL ASSISTANCE

Where it is subsequently determined that legal assistance has been provided to a Employee or member of Council for events that were not part of that person's duties, or for events for which this policy does not apply, an attempt shall be made to obtain recovery from the individual.

SECTION 8

ASSESSMENT OF COSTS

As a precondition to providing any indemnification for legal expenses, the City Solicitor may require any Bill of Costs or legal account rendered to have been assessed pursuant to the Solicitors Act and any applicable rules of Court.

SECTION 9

REQUEST FOR COVERAGE

(a) Application

Employees or members of Council who are facing criminal, quasi-criminal or civil proceedings, and who wish to be considered for the receipt of indemnification

from the City, shall make application in writing for such coverage to the City Solicitor. Such application shall include a full and complete report of the incident or incidents giving rise to such request.

(b) Application for Indemnity for Councillors/Employees Who Commence Defamation Proceedings

Employees or Councillors who have been defamed and who wish to be considered for the receipt of indemnification from the City for Process Costs for an action in defamation that they commence shall make an application, in writing, for such coverage to the City Solicitor. Such application shall include:

- (i) a full and complete report of the incident or incidents giving rise to such request;
- (ii) an explanation of what other methods have been attempted to repair the reputation of the Councillor/Employee, or an explanation of why other methods have not been engaged;
- (iii) an explanation of the harm suffered as a result of the defamation, including any financial or personal impacts of the defamation.

Incomplete applications will not be considered.

Upon receipt and analysis of a complete application, the City Solicitor shall bring a report to Council with recommendations as to whether the request should be accepted. The decision as to whether indemnification is granted is to be made by Council.

(c) Notification of Result of Determination

The affected Employee or member of Council shall be advised whether or not indemnification will be provided to him or her for process costs or outcome costs. The City will not normally pay any costs incurred before a request for indemnification has been advanced and approval has been given. No entitlement to any appeal or review of any such determination is granted by this By-law.

**SECTION 10
INDEMNIFICATION FOR PROFESSIONAL SERVICES**

Members of Council shall be entitled to receive \$5,000.00 annually during their term of Council, that they may use to obtain the necessary professional opinions required, whether legal, financial or otherwise, to determine how best to respond to Defamatory statements made against them related to their work as Councillors.

Employees may be indemnified for up to \$5,000.00 annually to obtain the necessary professional opinions required, whether legal, financial or otherwise,

to determine how best to respond to Defamatory statements made against them related to their work.

To be so indemnified, Employees shall make an application to the City Solicitor outlining:

- a. the Defamatory statements;
- b. where they were published or stated;
- c. if stated, to whom the Defamatory statements were made; and
- d. the nature of the harm caused to the Employee's reputation.

Incomplete applications will not be considered.

Applications for indemnification for professional services shall be considered by the City Solicitor and Director of Human Resources for Employees up to the level of Director and by the City Solicitor and CAO for Directors or more senior Employees. Where the application is approved, payment will be made upon receipt of an invoice demonstrating professional opinions were obtained up to the maximum indemnification available.

SECTION 11 NO ENTITLEMENTS

This By-law is intended to furnish a procedure through which decisions may be made about the indemnification of Employees and Members of Council. This By-law is not intended to, nor shall it, create, grant, or confer actionable rights for indemnification or any other relief in favour of any member of Council or Employee which can be obtained as of right, it being the policy of the City that the complicated nature of the issues underlying this By-law implies a case by case approach. By submitted an application for indemnification

SECTION 12 BUDGETARY

Costs and expenses of indemnification given pursuant to this By-law shall be paid, accounted for and budgeted in the same manner and by the same internal departments as insurance expenses.

Date of Enactment:
February 13, 2006

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