

REPORT TITLE: **Replacing the Regional By-law to Indemnify Employees and Members of Council**

FROM: Kathryn Lockyer, Interim Commissioner of Corporate Services
 Patrick O'Connor, Regional Solicitor

RECOMMENDATION

That By-law 38-2005, as amended by By-law 24-2014 (the “By-law”) be repealed and replaced with a newly enacted by-law to provide:

- a) Clarification of the ability of Regional Council to provide indemnification or reimbursement of legal costs incurred by members of Regional Council and Regional employees in proceedings under or pursuant to the criminal law, including the *Criminal Code of Canada* (the “*Criminal Code*”) where deemed appropriate by Regional Council in its discretion; and**
- b) Protection for members of Regional Council and Regional employees from liability to the Region and the prevention of proceedings by the Region against members of Regional Council and Regional employees in certain instances described in the report of the Interim Commissioner of Corporate Services and the Regional Solicitor titled “Replacing the Regional By-law to Indemnify Employees and Members of Council”;**

And further, that the required by-law be presented to Regional Council for enactment;

And further, that staff be directed to revise the Region’s external insurance program to remove coverage for legal costs incurred in *Criminal Code* proceedings with indemnifying coverage being extended instead in the discretion of Regional Council, to be exercised on a case by case basis.

REPORT HIGHLIGHTS

- Regional by-laws and insurance policies do not provide Regional Council members and employees with protection from legal claims brought against them by the Region, in cases where the Region incurs liability or losses as a result of good faith acts or omissions done or made by Council members or employees in the good faith performance of their duties.
- Staff recommends that the By-law be amended to provide such protection.
- The current By-law’s general intention is to preclude coverage for legal costs incurred in *Criminal Code* proceedings. However, the Region’s purchased insurance policy provides such coverage even if the individual is ultimately convicted of the criminal offence.

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- Staff recommends that the Region's purchased insurance coverage be amended to remove coverage for legal costs in relation to criminal proceedings, that Regional Council decide whether such coverage provided directly by the Region is appropriate on a case by case basis, and that Regional Council direct the Regional Solicitor to assess and advise on the propriety and extent of any claims for such indemnification or reimbursement on a case by case basis where a request for such coverage is made.

DISCUSSION

1. Background

By-law 38-2005, as amended, (the "By-law") establishes the Region's policies in regards to the extent to which members of Regional Council and employees of the Region will be protected from liability where their actions or omissions have resulted in liability or losses to the Region of Peel or third parties. The current By-law reflects the general principle that members of Council and employees acting honestly and in good faith in the performance of their duties will be protected from liability. The exception to this general principle is in the case of certain criminal proceedings, where the By-law does not afford protection to members of Regional Council or employees but reserves the discretion to Regional Council to provide such protection where deemed appropriate. Legal staff have recently undertaken a review of the By-law, the Region's purchased insurance policies, and the by-laws of other municipalities. As a result of such review, repeal and replacement of the By-law are recommended, as outlined further in this report.

a) Legal Claims by the Region Against Regional Council Members and Employees

Regional Council members and employees are responsible to act in the best interests of the Region and its residents. They are responsible and accountable for making good faith decisions in the performance of their duties.

However, even when acting in good faith and with proper intentions, members of Council and employees may make errors which result in losses and liability for the Region. One example may be where an employee makes an error in financial reporting to another level of government, and the Region is issued a financial penalty as a result. While errors are to be avoided to the greatest practicable extent, they are also to be expected and, depending on the severity and circumstances, may, in the case of employees, result in discipline up to and including termination of their employment.

Though the By-law protects members of Council and employees acting honestly and in the good faith performance of their duties from claims commenced by third parties, it does not address claims that may be made against them by the Region. Commencement by the Region of a legal claim against Regional Council members or Regional employees for losses or liability resulting from errors in the performance of their duties is a possibility. The current By-law and the Region's purchased insurance do not provide coverage for Regional Council members and employees in respect of such claims.

b) Criminal Code Proceedings Against Regional Council Members and Employees

Regional Council members and employees who are engaged in the good faith performance of their duties may face investigations and legal proceedings under the criminal law. For clarity, criminal law proceedings (investigations and prosecutions) often involve suspected

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or alleged breaches of the *Criminal Code* but include any matter where the Federal criminal law jurisdiction is engaged. For instance, many drug related offences arise under the *Controlled Substances Act (Canada)*.

Criminal law proceedings are serious matters which may, depending on the circumstances, engage media and public attention. At the same time, there may be situations where *Criminal Code* proceedings may be contemplated or commenced against a Regional Council member or employee even though there are reasonable grounds to believe that the individual is not culpable. One example may be where an employee is accused of criminal wrongdoing by a cognitively impaired resident.

The current By-law specifically excludes legal representation, indemnification and reimbursement for legal costs in relation to proceedings under the *Criminal Code* and the *Controlled Substances Act*, while specifically allowing Regional Council the discretion to extend coverage in circumstances that it deems appropriate. The proposals in this report would extend that exclusion to all criminal law proceedings.

At the same time, the Region's purchased insurance provides coverage for "legal costs" incurred by Regional Council members or employees defending their legal rights in relation to "being investigated" or "being prosecuted" for "an alleged criminal offence."¹ This coverage would be provided whether or not the individual is ultimately convicted of the offence, and there is no ability for the insurer or the Region to recover sums paid out under such coverage.

Legal representation, indemnification and reimbursement for legal costs in relation to Provincial Offences prosecutions are included under the current by-law (always presupposing good faith intended performance of duty and a reasonable belief in the lawfulness of their acts or omissions on the part of the member or employee seeking indemnification). An exception is made for *Highway Traffic Act* and parking offences, which are not covered. Provincial Offences matters are not considered to be criminal law matters. This would continue to be the case under the proposals set out in this report.

2. Findings

a) Legal Claims by the Region Against Regional Council Members and Employees

A review of a number of by-laws of other municipalities demonstrates that they have not specifically addressed protection for members of Council or employees from legal claims that may be commenced against them by their employer municipality and such protection is not available from insurers. It is recommended that the By-law be amended to provide for such protection in circumstances where there has been good faith performance or attempted performance of duties by the member of Council or employee which nevertheless are performed erroneously or negligently in a manner which causes damage to the Region. This would represent a natural extension of the principle that members of Council or employees performing their duties in good faith should be protected from liability, and is innovative in that it directly addresses a possibility, albeit an unlikely one, which other by-laws have not addressed.

¹ Legal Expense Insurance Policy Number LC00608, section I, paragraphs 1 and 2.

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b) Approaches Taken in Peel's Local Municipalities to *Criminal Code* Proceedings Against Local Municipal Council Members and Employees

City of Brampton By-law 134-95 (the "City of Brampton By-law"), provides reimbursement for reasonable legal expenses incurred by employees or Council members in relation to legal proceedings under the *Criminal Code* resulting from acts or omissions in their capacity as employees or Council members, with the condition that such individuals shall be responsible for such costs and for reimbursing the City for same if the individual is convicted of an offence under the *Criminal Code*.² The City Solicitor is given authority to assess a claim for reimbursement and its extent.³

City of Mississauga By-law 0076-2014 (the "City of Mississauga By-law"), provides indemnification for reasonable legal expenses incurred by employees or Council members in relation to legal proceedings under the *Criminal Code* resulting from good faith acts or omissions based on the reasonable belief that same were lawful and in the best interests of the City, which were done in their capacity as employees or members of Council, but only if the individual has been found not to have contravened the *Criminal Code*.⁴ The City Solicitor is given authority to, assess a claim for indemnification and its extent.⁵

Town of Caledon By-law 2007-128 (the "Town of Caledon By-law"), is similar to the current Regional By-law in its denial of coverage for legal costs incurred by Town Council members and employees in *Criminal Code* proceedings.⁶ However, the Town of Caledon By-law also specifically allows the Town Council the discretion to extend coverage in circumstances that it deems appropriate.⁷

3. Proposed Direction

a) Regional Legal Claims Against Regional Council Members and Employees

Staff recommends the following amendments by means of a repeal and replacement of the By-law in order to ensure protection for Regional Council members and to employees who are acting in the good faith performance of their duties, while still allowing the Region the discretion to commence legal claims against Regional Council members and employees who do not so conduct themselves in certain instances:

A new Section 2 be enacted as follows:

2. The Region shall not commence an action or proceeding against a covered individual arising out of acts or omissions done or made by the covered individual in the attempted performance of their duties as a member of Council of the Region or as an employee, where the covered individual acted honestly and in good faith with a view to the best interests of the Region and had reasonable grounds for believing that their conduct was lawful.

² City of Brampton By-law 134-95, sections 1, 2, 3 and 4.

³ City of Brampton By-law 134-95, sections 6, 7 and 8.

⁴ City of Mississauga By-Law 0076-2014, sections 1, 2, 5, 9 and 16.

⁵ City of Mississauga By-Law 0076-2014, sections 6, 10, 11, 12 and 16.

⁶ Town of Caledon By-Law 2007-128, section 16.

⁷ Town of Caledon By-Law 2007-128, section 33.

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The amendment would go on to provide that the By-law would not apply (i.e. would not provide indemnifying coverage) in cases where the Region proceeds or could proceed to commence an action or proceeding against the member of Council or employee. These cases would include those where the member of Council or employee was not acting in good faith or had no reasonable grounds for believing that his or her conduct was lawful.

In effect then, the Region could not commence an action against a member of Council or employee who acted (or omitted) in honest good faith with objectively reasonable belief that their action or omission was lawful, even if the act or omission caused damage to the Region. The Region could commence an action if these elements were absent (e.g. the member or employee acted dishonestly) in which case there would of course be no obligation on the Region to indemnify the member or employee.

b) Criminal Law Proceedings Against Regional Council Members and Employees

To preserve the By-law's general intention to exclude coverage for legal costs incurred in criminal law proceedings but also to allow for indemnification or reimbursement of such costs where they would be appropriate in specific circumstances, staff recommends that the Region's purchased insurance coverage be amended to remove coverage for legal costs in relation to criminal proceedings.⁸

New provisions would be enacted to clarify how Council could consider a request for coverage regarding criminal law proceedings against a member or employee. Such a request would result in a report by the Regional Solicitor. Council would then have the discretion to decide to extend coverage, or not to do so.

RISK CONSIDERATIONS

Key Risk	Risk Response Strategy	Accountable	Risk Type
Failure to commence legal proceedings in circumstances permitted by the By-law.	Enterprise Risk and Audit Services and Legal Services will review cases where Region liabilities and losses arise from the actions or omissions of Regional Council members or employees. Any decision whether or not to pursue an action or proceeding available to the Region under the By-law will be reported to Council.	Regional Solicitor Director, Enterprise Risk and Audit Services	Reputational Risk Compliance/Regulatory Risk Social Risk
Indemnification or reimbursement of legal costs in criminal proceedings may be	Regional Council will request the Regional Solicitor to review and report on claims for indemnification or	Regional Solicitor	Reputational Risk

⁸ Legal Expense Insurance Policy Number LC00608, General Conditions, paragraph 4.

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Key Risk	Risk Response Strategy	Accountable	Risk Type
provided where they are not appropriate in the circumstances.	reimbursement with Regional Council retaining its discretion to deal with such claims as appropriate		Compliance/ Regulatory Risk Social Risk

APPENDICES

Appendix I – Draft By-law

For further information regarding this report, please contact Patricia Caza, Director, Legal Services and Deputy Regional Solicitor, Ext. 4742, patricia.caza@peelregion.ca.

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Reviewed and/or approved in workflow by:

Department Commissioner and Division Director.

Final approval is by the Chief Administrative Officer.



N. Polsinelli, Interim Chief Administrative Officer