

# Corporation of the Town of Newmarket

## By-law 2019-09

A By-law to provide for the indemnification and defence of employees, Members of Council and Integrity Commissioners against loss or liability in certain circumstances arising out of acts or omissions done while acting on behalf of the corporation.

Whereas Section 279 of the *Municipal Act, 2001* (the “Act”) provides that a municipality may act as an insurer with respect to the protection of its employees or members of council, subject to section 14 of the *Municipal Conflict of Interest Act*, against risks that may involve pecuniary loss or liability on the part of those employees or members of council including the payment of any damages or costs awarded 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 for assuming the cost of defending the employees or members in the action or proceeding;

And whereas Section 223.3 of the *Municipal Act, 2001* provides that a municipality shall indemnify the Integrity Commissioner or any person acting under the instructions of that officer for costs reasonably incurred by either of them in connection with the defence of a proceeding if the proceeding relates to an act done in good faith in the performance or intended performance of a duty or authority under this Part or a by-law passed under it or an alleged neglect or default in the performance in good faith of the duty or authority.

And whereas it is deemed advisable to enact an indemnification by-law for this purpose.

Therefore be it enacted by the Council of the Corporation of the Town of Newmarket as follows:

### 1. Definitions:

In this By-law:

“Action or Proceeding” includes all civil actions, provincial offences, administrative proceedings, complaints to a professional association and third party proceedings except a proceeding brought under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c.M.50, as amended, the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended, the *Criminal Code*, R.S.C. 1985, c.C.46, as amended, or municipal parking and traffic by-laws;

“Chief Administrative Officer” means the Chief Administrative Officer of the Town of Newmarket or his/her designate;

“Committee” shall mean a committee comprised of the Chief Administrative Officer (CAO); the Director, Legal Services; and the Town Clerk, with input from the respective Commissioner(s) and the Director, Human Resources as necessary, to be known as the Indemnification Review Committee;

“Corporation” means the Corporation of the Town of Newmarket;

“Council” means the Council of the Town of Newmarket;

“Covered Action or Proceeding” means an Action or Proceeding commenced after the passing of this By-law and arising out of alleged acts or omissions done or made by the Employee, Member or Integrity Commissioner acting in their capacity as an Employee, Member, officer of the Town or Integrity Commissioner, including while acting in the performance of a statutory duty imposed by any general or special act (duties arising out of an appointment to a Statutory Board or Committee) and having been determined by the Committee as entitled to indemnification;

“Department Head” means the Manager, Director, or Commissioner directly responsible for overseeing the work of the Employee. The Mayor is the “Department Head” for Members of Council;

“Director, Human Resources” means the Director, Human Resources of the Town of Newmarket or his/her designate;

“Director, Legal Services” means the Director, Legal Services of the Town of Newmarket or his/her designate;

“Employee” means any person in the employ of the Corporation or salaried officer and any former employee and salaried officer.

“Integrity Commissioner” means any person appointed by the Town of Newmarket to perform the functions assigned by Section 223.3 of the *Municipal Act*, 2001, S.O. 2001, c. 25 as amended, or by the Code of Conduct for Council, Local Boards, and Adjudicative Boards, as amended from time to time, or any person acting under the instructions of the Integrity Commissioner.

“Member” means a Member of the Council of the Town of Newmarket and any former Member of Council;

“Statutory Board or Statutory Committee” means any board or committee of Council as provided by acts under the Province of Ontario or whose members are appointed by By-law;

“Town” means the Corporation of the Town of Newmarket; and

“Town Clerk” means the Town Clerk of the Town of Newmarket or his/her designate.

## **2. Former Employees, Officers and Members**

This By-law also applies to any person who was an Employee, Member or Integrity Commissioner at the time the cause of Action or other Proceeding arose but who, prior to judgment or other settlement of the Action or Proceeding, has ceased to be an Employee, member or Integrity Commissioner.

## **3. Indemnification of Employees:**

- 3.1 Subject to the provisions of this By-law, the Town shall in respect of any Covered Action or Proceeding against an Employee, Member or Integrity Commissioner or in which the Employee, Member Integrity Commissioner is a party and in which their conduct is called into question, indemnify an Employee, Member or Integrity Commissioner and his or her heirs and

legal representatives in the manner and to the extent provided for in this By-law.

- 3.2 Where an Employee, Member or Integrity Commissioner becomes aware that an Action or Proceeding has been threatened against them, for which they may seek indemnification, the Employee, Member or Integrity Commissioner shall provide immediate and confidential written notice of the Action or Proceeding to their Department Head.
- 3.3 Where an Employee, Member or Integrity Commissioner is served with any document which commences an Action or Proceeding for which they seek indemnification, the Employee, Member or Integrity Commissioner shall provide the document or a copy thereof and a written request for indemnification, immediately and confidentially to the Committee, through the Town Clerk. A copy of the confidential documents submitted to the Committee shall also be provided to the Employee's or Member's Department Head.
- 3.4 Where the Employee, Member or Integrity Commissioner seeking indemnification is a member of the Committee, they shall be replaced by their designate.
- 3.5 The Committee shall in its own discretion determine whether an Employee, Member or Integrity Commissioner is entitled to indemnification pursuant to this By-law. The Committee may provide indemnity where it is determined that:
- a) the Employee, Member or Integrity Commissioner acted honestly and in good faith with a view to the best interests of the Town and with no improper, immoral or objectionable purpose; or
  - b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the Employee, Member or Integrity Commissioner had reasonable grounds for believing that his/her conduct was lawful; or
  - c) the interests of the Town and Employee, Member or Integrity Commissioner are not adverse to each other; or
  - d) the actions of the Employee were not of a nature as to provide grounds for immediate dismissal; or
  - e) indemnification is not prohibited by statute or court order.
- 3.6 The Committee shall provide a written response to a request made under Subsection 3.3, within 10 business days of receipt of the request. Notwithstanding Subsection 7.1, the decision of the Committee shall be final.

#### **4. Manner and Extent of Indemnification:**

Where an Employee, Member or Integrity Commissioner is entitled to indemnification under this By-law, in a Covered Action or Proceeding, the Town shall:

- a) pay the costs of defending such Employee, Member or Integrity Commissioner; and/or,
- b) pay any damages or costs, including any monetary penalty or award against such Employee, Member or Integrity Commissioner; and/or,

- c) pay, either by direct payment or reimbursement, any expenses reasonably incurred by the Employee, Member or Integrity Commissioner; and/or,
- d) pay any sum required in connection with the settlement of a Covered Action or Proceeding, provided that as a condition precedent the Town approves the terms of the settlement.

to the extent that such costs, damages, expenses, monetary penalty, other award or other sums related to the Covered Action or Proceeding are not assumed, paid or reimbursed under any provision of the Town's insurance program for the benefit and protection of such person against any liability incurred by him or her.

## **5. Town's Right to Select a Lawyer:**

- 5.1 Subject to Section 12, the Town shall have the right to select and retain the lawyer to represent an Employee, Member or Integrity Commissioner and the Committee shall advise the Employee, Member or Integrity Commissioner of the lawyer selected to represent him/her.
- 5.2 The Town shall not be obliged to pay for the legal costs of an Employee's or Member's or Integrity Commissioner's lawyer unless, in addition to the other provisions of this By-law being met, the Town, through the Committee, has approved of the lawyer retained by the Employee, Member or Integrity Commissioner.
- 5.3 Where an Employee, Member or Integrity Commissioner seeks approval of a lawyer under Subsection 5.2, the Employee, Member or Integrity Commissioner shall advise the Committee through the written request in Subsection 3.3, and shall provide sufficient information to support the Committee's decision which may include the hourly rate charged by the lawyer, as well as, the experience of such lawyer in dealing with similar claims.

## **6. Excluded Actions and Proceedings**

- 6.1 This By-law does not apply to an Action or Proceeding:
  - a) which relates to a grievance filed under the provisions of a collective agreement or a disciplinary action to an Employee, Member or Integrity Commissioner taken by the Town as an employer, except insofar as the Employee, Member or Integrity Commissioner is exercising management or management support functions;
  - b) under the *Municipal Elections Act*, if the Member has been found to have committed bribery or a corrupt practice or to have otherwise contravened any of the provisions of the *Act*;
  - c) under the *Municipal Conflict of Interest Act*, if a Member has been found to have contravened Section 5 of the *Act*, other than through inadvertence or by reason of a bona fide error in judgment;
  - d) which relates to defamation.
- 6.2 Where the Committee has determined that an Employee, Member or Integrity Commissioner is not entitled to indemnification, the Employee, Member or Integrity Commissioner shall be responsible for all costs,

damages, penalties and legal fees in connection with representation in the Action or Proceeding.

- 6.3 Where an Employee, Member or Integrity Commissioner is charged with and subsequently acquitted of an offense under the *Criminal Code*, R.S.C. 1985, c.C.46, as amended; the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended; or municipal parking or traffic by-laws, because of any act done or any failure to act or allegations of same in the attempted performance or performance in good faith of his/her duties, the Employee, Member or Integrity Commissioner shall be indemnified by the Town for the necessary and reasonable legal costs incurred in the defense of such charges or allegations. The Employee, Member or Integrity Commissioner may be entitled to receive payment from the Town for a retainer and/or for interim payment of legal costs incurred in the defense of such charges or allegations, to a maximum of \$5,000.00, to obtain legal representation during the investigation, at the discretion of the Committee.
- 6.4 Despite Subsection 6.3 of this By-law, where an Employee is a firefighter and is charged with an offence under the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended, whether or not the Employee is subsequently acquitted of the offence, the Employee shall be indemnified by the Town for the necessary and reasonable legal costs incurred in the defense of such charge or charges, provided that:
- a) the charge or charges arose while the Employee, in the attempted performance or performance in good faith of his or her duties, was travelling to the site of a call; and
  - b) the Committee is of the opinion, in their sole discretion, that providing indemnity to the Employee would be in the best interests of the Town.
- 6.5 Where an Employee, Member or Integrity Commissioner is the subject of an investigation in a matter which may result in charges being laid against the Employee, Member or Integrity Commissioner under the *Criminal Code*, provincial statute or regulation, or municipal by-law, because of any act done or any failure to act or allegations of same in the attempted performance or performance of his/her duties, the Employee, Member or Integrity Commissioner may be entitled to receive payment from the Town for a retainer and/or interim payment of legal costs, not to exceed \$5,000.00, to obtain legal representation during the investigation, at the discretion of the Committee.
- 6.6 As a condition precedent to the Town making any payment in respect of the costs of defense or representation of any Employee, Member or Integrity Commissioner pursuant to Subsections 6.3 and 6.5 of this By-law, the Employee, Member or Integrity Commissioner must agree in writing to repay the Town on demand in the event that the Employee, Member or Integrity Commissioner is convicted of an offence, except under Subsection 6.4, all sums paid by the Town in respect of the costs of defense or representation as to such charges, including the retainer referred to in Subsections 6.3 and 6.5, and must execute an indemnity or other documentation required by the Town to secure such repayment to the Town.
- 7. Limits to Indemnification:**
- 7.1 The Committee shall have the discretion at any time during or after the Action or Proceeding to review its decision to not provide indemnity and may provide indemnity where additional facts become available,

that demonstrate that the Employee, Member or Integrity Commissioner is entitled to indemnification pursuant to this By-law.

7.2 The Committee shall have the discretion at any time during or after the Covered Action or Proceeding to review its decision to provide indemnity, and may terminate or rescind indemnity where facts are available to the Town, that demonstrate that the Employee, Member or Integrity Commissioner was not entitled to indemnification pursuant to this By-law, including where an Employee, Member or Integrity Commissioner acted in bad faith or outside the scope of their authority. Prior to the Committee making a decision to terminate or rescind indemnity, the Employee, Member or Integrity Commissioner shall be provided with the opportunity to make submissions to the Committee in support of the Employee's, Member's or Integrity Commissioner's indemnification. Notwithstanding Subsection 7.1, the decision of the Committee shall be final and not subject to review or appeal.

7.3 The Committee, acting reasonably, may request or impose one or both of the following:

(a) Periodic Budgets for anticipated legal costs, which may be revised and/or,

(b) Status Updates in respect of the progress of the proceedings.

7.4 The Town shall have the right to reasonably limit the amount which it shall pay an Employee, Member or Integrity Commissioner for legal costs, and may require that any account for legal costs for which reimbursement is sought, be assessed by Court Assessment Officer prior to payment by the Town. The Committee shall be provided with copies of the statements of account on a monthly basis, which shall outline all fees and disbursements, and shall be provided with information relating to these accounts, as may be requested from time to time.

**8. Third Party Actions and Counterclaims:**

An Employee, Member or Integrity Commissioner may not commence a third party action or Counterclaim unless such Action or Counterclaim is part of the proper defense by the Employee, Member or Integrity Commissioner of a Covered Action or Proceeding under this By-law, and only if such Action or Counterclaim has been approved by the Committee.

**9. Duty to Cooperate**

9.1 An Employee, Member or Integrity Commissioner involved in any Action or Proceeding who seeks indemnification shall co-operate fully with the Town.

9.2 Any Employee, Member or Integrity Commissioner involved in a Covered Action or Proceeding shall cooperate fully with any lawyer retained by the Town to defend such Covered Action or Proceeding and shall make available to such lawyer all information and documentation relevant to 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.

**10. Failure to Comply With By-law**

If an Employee, Member or Integrity Commissioner fails or refuses to comply with the provisions of this By-law, the Committee shall have sole discretion to determine whether the Town shall be liable to assume or pay any of the costs, damages, expenses or sums mentioned in Sections 4 or

5, of this By-law. Prior to the Committee making a decision to terminate or rescind indemnity, the Employee, Member or Integrity Commissioner shall be provided with the opportunity to make submissions to the Committee in support of the Employee's or Member's or Integrity Commissioner's indemnification.

**11. Appeal**

Where a person seeks to appeal a judgment or decision in a Covered Action or Proceeding, the Employee, Member or Integrity Commissioner shall first consult with the Committee, and the Committee shall have sole discretion to determine indemnification eligibility for the appeal. If an Employee, Member or Integrity Commissioner pursues an appeal without first seeking indemnification approval from the Committee and is successful in that appeal, the Committee shall have sole discretion to determine whether the Employee, Member or Integrity Commissioner shall be indemnified for his or her legal costs.

**12. Conflict**

The Town maintains various policies of insurance for both the Town and its Employees, Members or Integrity Commissioners. The provisions of this By-law are intended to supplement the protection provided by such policies of insurance. In the event of conflict between this By-law and the terms of any such policy of insurance in place from time to time, the terms of such policy or policies of insurance shall prevail.

**13. Reimbursement**

Where the Employee, Member or Integrity Commissioner is to be indemnified by the Town, the amount of the indemnity shall be reduced by the amount of any costs or damages recovered by the Employee, Member or Integrity Commissioner and where the indemnity has been paid, any costs or damages recovered by the Employee, Member or Integrity Commissioner shall be paid or assigned to the Town up to the amount of the indemnity.

**14. Severability**

If any sections, section or part of a section of this By-law are found by any Court to be illegal or beyond the power of Council to enact, such sections or section or part of a section shall be deemed to be severable and all other sections or parts of sections of this By-law shall be deemed to separate and independent and shall continue in full force and effect.

**15. That By-law 2011-54 be hereby repealed and replaced with this by-law.**

Enacted this 11<sup>th</sup> day of February, 2019.

John Taylor, Mayor

Kiran Saini, Acting Town Clerk