

THE CORPORATION OF THE TOWN OF FORT FRANCES

By-Law XX/22

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

WHEREAS subsection 279(1) of the *Municipal Act, 2001*, as amended, states 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 XIII 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

AND 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 of the *Municipal Conflict of Interest Act* against any costs or expenses incurred by the member as a result of a proceeding brought under that legislation, and for paying on behalf of or reimbursing the member for any such costs or expenses in that regard;

AND WHEREAS s. 448(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, states that no proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority;

AND WHEREAS s. 448(2) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, states that s. 448(1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent.

AND WHEREAS paragraph 278(1)(b) of the *Municipal Act, 2001* defines “employee” and authorizes a municipal council to pass by-laws designating certain persons or classes of persons as employees for the purposes of insurance; and

AND WHEREAS it is advisable to protect Members of Council and Employees of the Corporation that are acting in good faith and within the scope of their duties against 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 the Council of The Corporation of the Town of Fort Frances hereby **ENACTS AS FOLLOWS:**

1. DEFINITIONS

In this By-law, unless a contrary intention appears,

- 1.1 “Act” means the *Municipal Act, 2001*, SO 2001, c 25, as amended;
- 1.2 “By-law” means this By-law, and as it may be amended from time to time;
- 1.3 “CAO” means the person within the Corporation’s employ who holds the title of “Chief Administrative Officer”, including his or her designate;
- 1.4 “Claimant” means a Member or Employee who claims coverage pursuant to this By-law;
- 1.5 “Corporation” means The Corporation of the Town of Fort Frances;
- 1.6 “Corporation’s Legal Counsel” means legal counsel employed or retained to represent the interests of the Corporation, including his or her designates;
- 1.7 “Council” means the elected Municipal Council for the Corporation;
- 1.8 “Employee” means any salaried officer, or any other person in the employ of the Corporation or of a Local Board and includes, as applicable:
 - (a) a member of the police force of the Corporation;
 - (b) persons that provide their services on behalf of the Corporation without remuneration, exclusive of reimbursement of expenses or honoraria, if Council of the Corporation has passed a by-law designating such persons or classes of person as employees for the purposes of this By-law;
 - (c) any person or class of person designated as an employee of the Minister for the purposes of sections 279, 280 and 282 of the Act who is in the employ of the Corporation; or
 - (d) a Former Employee.
- 1.9 “Former Employee” means a person who was formerly an Employee of the Corporation;
- 1.10 “Former Member” means a person who was formerly a Member of Council of the Corporation;
- 1.11 “Local Board” means a local board as defined in subsection 278(1) of the *Municipal Act, 2001*;
- 1.12 “Member” means a person who is a Member of the Council of the Corporation and includes a Former Member;
- 1.13 “Proceeding” means a proceeding before a court or statutorily created judicial tribunal commenced by a Third Party in which a remedy is sought against the Claimant.; and
- 1.14 “Third Party” means any person or authority including the Crown., but does not include the Corporation, or a Local Board.

2. INTERPRETATION RULES

In this By-law,

- 2.1 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;
- 2.2 references to items in the plural include the singular, as applicable;
- 2.3 the words “include”, “including”, “included” or “includes” are not to be read as limiting the phrases or descriptions that precede or follow them; and
- 2.4 headings are inserted for ease of reference only and are not to be used as interpretation aids.

3. STATUTES

- 3.1 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.

4. INDEMNITY FOR MEMBERS

- 4.1 The Corporation may, subject to the provisions of this By-law, indemnify a Member that was acting in good faith and within the scope of his or her duties at all material times 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 Member in his or her capacity as a Member or by reason of being a Member, including, without limitation:
 - 4.1.1 while acting in the performance of any statutory duty; and
 - 4.1.2 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.
- 4.2 Subject to the provisions of this By-law, the Corporation may indemnify a Member by:
 - 4.2.1 assuming the cost of defending the Member in the Proceeding;
 - 4.2.2 where permitted by law, paying any fines, monetary penalties, damages or costs imposed on or awarded against that Member as a result of the Proceeding;
 - 4.2.3 paying, either by direct payment or reimbursement, any expenses reasonably incurred by that Member as a result of the Proceeding;
 - 4.2.4 paying any sum required in connection with the settlement of the Proceeding.
- 4.3 In the case of a Proceeding under the *Municipal Conflict of Interest Act*, the following shall apply:
 - 4.3.1 any indemnity the municipality decides to pay will only be by way of reimbursement for costs or expenses actually paid by the Member and subject to the following conditions;
 - 4.3.2 the indemnity is limited to the costs and expenses reasonably

incurred by the Member as a result of the Proceeding brought under that statute;

4.3.3 the Member is not entitled to any indemnity unless such Member is found not to have contravened that statute;

4.3.4 legal counsel, approved by the CAO in advance of the costs being incurred shall be retained by the Member directly; and

4.3.5 no payment or liability shall be made or assumed by the Corporation unless and until the conditions in clause 4.3.3 hereof have been met.

5. INDEMNITY FOR EMPLOYEES

5.1 The Corporation may, subject to the provisions of this By-law, indemnify an Employee that was acting in good faith and within the scope of his or her duties at all material times 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.

5.2 Subject to the provisions of this By-law, the Corporation may indemnify an Employee by:

5.2.1 assuming the cost of defending the Employee in the Proceeding;

5.2.2 paying any fines, monetary penalties, damages or costs imposed on or awarded against that Employee as a result of the Proceeding;

5.2.3 paying, either by direct payment or by reimbursement, any expenses reasonably incurred by such Employee as a result of the Proceeding;

5.2.4 paying any sum required in connection with the settlement of the Proceeding.

6. INDEMNITY - OTHER

6.1 In addition to the persons covered in sections 4 and 5 of this By-law, the Corporation may:

a) on a case-by-case basis; and

b) in the Corporation's sole and absolute discretion;

provide indemnity to any person that the Corporation is authorized under sections 278 to 280 of the *Municipal Act, 2001* to provide indemnity to and do so in accordance with the provisions of this by-law or as otherwise stipulated by the Corporation.

6.2 With respect to a proceeding that is brought against a Member or Employee by a person who is not a Third Party, the Corporation may:

a) on a case-by-case basis; and

b) in the Corporation's sole and absolute discretion;

provide indemnity to such Member or Employee in accordance with the provisions of this by-law or as otherwise stipulated by the Corporation.

7. EXCLUSIONS

7.1 The obligations of the Corporation in this By-law shall not apply in the

following circumstances:

- 7.1.1 where the proceeding has arisen out of the illegal, dishonest, fraudulent or malicious act of the Claimant, or his or her willful or reckless violation of any law, duty, contract, policy or obligation;
 - 7.1.2 where the Claimant is acting or proceeding in a manner that is contrary to a decision, policy or position of the Corporation;
 - 7.1.3 where the Claimant has failed to comply with the provisions of this By-law, unless strict compliance has been waived by a Resolution of Council;
 - 7.1.4 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
 - 7.1.5 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.
- 7.2 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 section 7.1.4 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.
- 7.3 Notwithstanding that the Corporation may have assumed the defence of any 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.
- 7.4 The Corporation may waive the reservation of rights referred to in section 7.3, subject to such conditions as the Corporation deems appropriate in the circumstances.
- 7.5 The provisions of this By-law are intended to supplement the protection provided by policies of insurance. For purposes of clarity, there is no entitlement to any coverage under this By-law when the Claimant has or had insurance coverage pursuant to an insurance policy, whether placed or provided by the Corporation, the Claimant, a Local Board or otherwise, with respect to the proceeding and coverage under any policies of insurance that the Claimant may have in respect of such proceeding must first be exhausted before any right to indemnity under this By-law may be triggered.

8. LIMIT OF COVERAGE

- 8.1 Subject to section 14.1, the maximum amount for which the Corporation may be liable hereunder (inclusive of claims, costs, expenses and any other amount) shall not exceed \$250,000.00 in respect of any claim or combination of claims arising under the same circumstances, made against a Claimant.

9. IF CAO IS CLAIMANT

- 9.1 If the Claimant is the current CAO, Council shall designate the Clerk to carry out the duties under this By-law assigned to the CAO; however, any

decisions that the CAO would make under this By-Law are to be made by Council.

10. NOTICE TO CORPORATION

- 10.1 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.
- 10.2 A Claimant shall, concurrently with giving notice under section 10.1 of this By-Law, provide the CAO with full written particulars of any other insurance or indemnity providing coverage available to the Claimant.
- 10.3 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.

11. DETERMINATION OF COVERAGE

- 11.1 Subject to sections 7.1.3 and 9:
 - (a) Where the Claimant is an Employee the CAO shall determine, in his or her sole and absolute discretion, whether or not the Claimant is covered under the provisions of this By-law.
 - (b) Where the Claimant is a Member, the CAO shall provide a written report and recommendation to Council regarding whether or not the Claimant is covered under the provisions of this by-law and Council shall determine, by majority vote at a duly constituted meeting, whether to authorize indemnity.
- 11.2 As a condition precedent to the Corporation making any payment in respect of the costs of or representation of any Employee or Member pursuant to this By-law, the Employee or Member must agree in writing to comply with the provisions of this by-law and such other terms and conditions as are determined to be appropriate by the Corporation's Legal Counsel, and shall agree to repay the Corporation on demand, in the event that the Employee or Member is convicted of an offence in respect of the Proceeding, all sums paid by the Corporation in respect of the costs of defence or representation as to such charges and must execute an indemnity agreement or other documentation requested by the Corporation to secure such repayment to the Corporation. No retainer shall be made on behalf of a Claimant and/or no money shall be paid by the Corporation with respect to any Proceeding until an indemnity agreement and/or other documentation has been executed. The CAO is hereby authorized to execute such indemnity agreements on behalf of the Corporation upon recommendation of the Corporation's legal counsel.
- 11.3 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 11.1 and 11.2 of this By-law.

12. LEGAL COUNSEL

- 12.1 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 any 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.

- 12.2 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 any such proceeding, at the cost of the Corporation.
- 12.3 Despite any other provision of this By-law, any Legal Counsel retained by the Corporation's Insurer to defend any proceeding shall also represent the Claimant with respect to that proceeding unless the Corporation requires or consents to the retainer of different Legal Counsel.
- 12.4. Except as otherwise provided in this By-law, the Corporation shall have the right to select and retain Legal Counsel to represent the Claimant in any proceeding.
- 12.5 Notwithstanding section 12.4, a Claimant who the Corporation has determined is entitled to coverage under this By-law may request, in writing, approval of the CAO of Legal Counsel of the Claimant's own choice to represent him or her in a Proceeding, 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, charges and experience.
- 12.6 The CAO of the Corporation shall, within 10 working days from receiving the request under section 12.5, in his or her sole and absolute discretion, 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.
- 12.7 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.
- 12.8 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.
- 12.9 If the Corporation retains other Legal Counsel to act on behalf of the Claimant in place of Legal Counsel originally retained by the Claimant in accordance with the provisions of this By-law, 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.
- 12.10 Subject to the requirements of the Law Society of Ontario, all Claimant Legal Counsel in any proceeding shall cooperate fully with, and provide all relevant information to, the Corporation's Legal Counsel.
- 12.11 Unless otherwise agreed to by the CAO, Legal Counsel retained by or for 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.

13. COSTS

- 13.1 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, or by by-law or resolution of Council, as the case may

be.

- 13.2 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.

14. RELIANCE ON INSURANCE

- 14.1 Notwithstanding any other provision of this By-Law to the contrary, in the event a Proceeding is covered by the Corporation's insurance policy, any lawyer retained by the Corporation's insurers from time to time shall represent a Claimant with respect to the Proceeding and the Corporation shall have no obligation to indemnify such Claimant for the retention of any other counsel, unless the Corporation agrees otherwise in writing.

15. SETTLEMENTS

- 15.1 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.
- 15.2 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.
- 15.3 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.

16. COOPERATION

- 16.1 A Claimant shall at all times cooperate 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 any 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.

17. RIGHTS TO TERMINATE OR AMEND

- 17.1 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 a Proceeding that was commenced prior to the repeal or amendment.

18. BY-LAW NOT TO BE OF RETROACTIVE EFFECT

18.1 This By-law only applies to claims for indemnity respecting proceedings which are commenced 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.

19. APPEALS

19.1 Where an individual seeks to appeal a judgment in a covered proceeding, the Corporation shall have the sole and absolute discretion to determine whether an appeal should be pursued, and whether the cost of the appeal will be covered by this By-law. If a Claimant pursues an appeal without representation by the Corporation and is successful in that appeal, the Corporation may, in its sole and absolute discretion, indemnify the Claimant for his or her legal fees or a part thereof.

20. SHORT TITLE

20.1 This By-law shall be known as the “Indemnification By-law”.

21. EFFECTIVE DATE

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

Enacted and Passed this ____ day of May, 2022.

J. Caul, Mayor

G. Lecuyer, Clerk