

Report re Legal update and amendment to City Solicitor Bylaw 48M2000

RECOMMENDATION(S):

That Council:

1. Give three readings to the proposed Bylaw 8M2021 in Attachment 1 to amend Bylaw 48M2000, the City Solicitor and General Counsel Bylaw.
2. Confirm and approve the expenditure of funds for legal fees and disbursements that were incurred, authorized or approved by the City Solicitor and General Counsel between March 14, 2016 and February 9, 2021 inclusive, for services provided to Members of Council by external legal counsel, which the City Solicitor & General Counsel determined were required to be made to fulfill The City's duties to defend and indemnify, which total an approximate amount of \$175,000.00.
3. Keep this Report and attachments confidential pursuant to section 27(1)(a) (FOIPP) until such time as Council rises and reports on this matter.

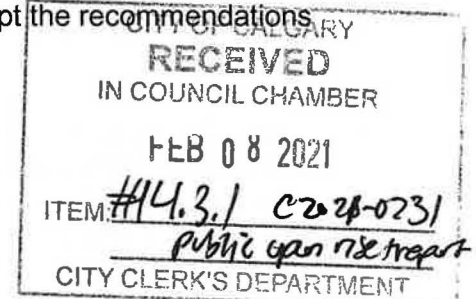
HIGHLIGHTS

- This report relates to situations in which legal proceedings are filed against Members of Council and external legal fees are incurred by The City in defending the proceedings.
- The Alberta Court of Queen's Bench recently identified what it perceives to be a technical gap in the authority of the City Solicitor and General Counsel to pay external legal fees to defend Members of Council.
- The Law Department disagrees with the existence of a technical gap in authority.
- The Court's decision is not yet final, and the Law Department will be filing further submissions.
- The Court's decision does not affect the substantive benefit and protection to which Council Members are entitled under the Council Indemnification Policy or Section 535 *Municipal Government Act*.
- Since Court proceedings take time and there is always the possibility of appeals, the City Solicitor and General Counsel recommends that Council adopt the recommendations contained in this report at this meeting.

DISCUSSION

Background

Since 1977, an indemnification policy (Council Policy CC010, Indemnification of Members of Council – "the Indemnification Policy" - Attachment 2) has been in place to provide protection for Council Members in the defence of claims in certain circumstances. Section 535 of the Municipal Government Act ("MGA") also protects Council Members against personal liability for any loss or damage caused by anything said or done or omitted to be done in good faith in the performance of their functions, duties or powers as a Councillor, and acknowledges that protection may fall under the MGA or any other enactment.



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The intent of this protection is to enable Council Members to perform their duties in good faith, without fear of personal legal liability or the legal cost of defending legal proceedings. The Indemnification Policy and the MGA impose a positive duty on The City to defend a Council Member (either through The City's in-house or external legal counsel) and provide indemnity to the Councillor if liability is imposed. These duties are limited in scope by the wording of the policy, MGA or any other enactment. The duty to defend entails the active defence of a matter and necessarily requires the expenditure of resources.

The determination of whether a legal proceeding is within the scope of protection involves a technical and often complex legal analysis. Given the legal expertise of the City Solicitor and General Counsel, it has been a decades long corporate expectation and requirement that the City Solicitor and General Counsel make such decisions for the corporation. If the City Solicitor and General Counsel does not make this determination, it would be necessary to retain external legal counsel at considerable expense to the corporation to advise on these matters.

Prior to March 2016, City Council had the decision making authority to pay external legal costs in the defence of legal proceedings against Council Members. In March 2016, Council amended the Indemnification Policy by resolution ("the 2016 Policy Amendments") and eliminated its authority and formally recognized the City Solicitor and General Counsel's authority to pay. The City Solicitor Bylaw (Attachment 3) was the accepted underlying authority for the City Solicitor and General Counsel to exercise this function, and the amendment to the policy was intended to formalize process and ensure clarity for Council Members.

The purpose for changing the process was to remove any possible concern with political motivation behind decision making and introduce a well-established process administered by a technical expert. This also achieved a practical efficiency. Given the possible duty of The City to indemnify Council Members against an unfavourable outcome, the revised process also created consistency in the way that lawsuits against Council Members and members of Administration are handled, all of which is in the best interests of The City.

Following a formal legal challenge to the validity of the 2016 Policy Amendments, the Alberta Court of Queen's Bench recently rendered a technical decision concluding the way in which the procedure was formalized (by resolution rather than bylaw) was ultra vires (Attachment 4). The decision does not affect the rights, benefits and protection Council Members are entitled to through the Indemnification Policy or otherwise. Rather, it affects only who determines The City's duty to defend legal proceedings against Council Members.

The decision of the Court is not yet final, and The City will be making further submissions to the Court. The decision will be effective February 16, 2021, barring further direction from the Court, which will result in a perceived technical process gap unless it is filled.

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The Law Department disagrees with the existence of a technical gap. The Court's decision is not yet final, and the Law Department will be filing further submissions on this matter. However, since Court proceedings take time and appeals are always a possibility, it is important that a clear process be in place to assess The City's duty to defend Council Members and fulfill that duty.

The MGA confers authority that creates multiple ways through which action can be taken by either Council or Administration to address the impact of the Court decision, but given the tenor of the court decision and to most clearly put any future dispute at an end, the most obvious and clear course of action is to bring the matter to Council for decision.

This is the first opportunity since the Court's decision to bring this matter forward to Council and the Court's decision is scheduled to come into effect February 16, 2021, barring further direction from the Court. Given the potential disruptions caused by the lack of a process, and the importance of perfecting historic expenditures, this report and recommendations are brought forward on an urgent basis.

Recommendation - Bylaw

The amendment to the City Solicitor Bylaw is to address the perceived technical gap identified by the Court of the City Solicitor and General Counsel's authority. By giving three readings to proposed Bylaw 8M2021 today, Council will enable the continuation of the process created by the March 2016 Policy Amendments and meet Council's expectation prior to the Court's decision.

Although this outcome could be achieved in ways other than through a bylaw amendment, for the reasons stated above, a bylaw amendment is proposed. The additional benefit of a bylaw amendment is to provide clarity and certainty to Members of Council and members of the public.

The proposed wording will not change the protection Council Members are already entitled under the Indemnification Policy and MGA

Recommendation – Affirm and Confirm Expenditures

The Court's decision creates a perceived technical process gap around who makes a decision on The City's duty to defend Members of Council and fulfill that duty (including the expenditure of resources). It is necessary that decisions of the City Solicitor and General Counsel to make expenditures for legal expenses to fulfill The City's duty to defend legal proceedings against Council Members made between March 14, 2016 (date of the 2016 Policy Amendments) and February 9, 2021 are confirmed and approved. All decisions to expend funds on external legal fees and disbursements in this timeframe were made in accordance with Council's March 2016 direction, and this resolution of Council will correct the perceived technical defect resulting from the Court's decision.

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As stated above, there are multiple ways to achieve the outcome of the resolution and perfect the expenditures, and some of which do not require Council direction. However, for the reasons stated above, this matter is before Council for decision.

The City Solicitor and General Counsel has a rigorous, thorough and extensive process to determine if legal proceedings trigger The City's duty to defend. Using this process, the City Solicitor and General Counsel has concluded that each matter for which legal fees and disbursements are included in the global amount, triggers The City's duty to defend. In the Law Department's opinion, with the perceived technical gap identified, Council's failure to approve the historic expenditures will breach The City's duty to defend, exposing The City to additional liability and cost.

By approving and confirming the historic expenditures, Council will perfect the process direction it gave in the 2016 Policy Amendments and fulfill The City's duty to defend.

STAKEHOLDER ENGAGEMENT AND COMMUNICATION (EXTERNAL)

- ☐ Public Engagement was undertaken
- ☒ Public Communication or Engagement was not required
- ☐ Public/Stakeholders were informed
- ☐ Stakeholder dialogue/relations were undertaken

The perceived gap in authority with the decision making process creates an urgent need to address this matter at Council. The decision of the court necessitating these actions was rendered on 2021 January 15. Administration is bringing this matter to Council's attention on an urgent basis.

The MGA does not require bylaws of general application or bylaws establishing designated officers to be advertised, go through a Standing Policy Committee, or be subject to a public hearing. No public consultation or engagement is legally required.

The City's Procedure Bylaw allows items to be added to Council's agenda as matters of urgent business. The urgency of this matter is addressed below under the heading Risks.

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IMPLICATIONS

Without these amendments to clarify the powers of the City Solicitor and General Counsel, there is a perceived technical gap created by the recent court decision that affects decision making on the defence of actions and claims against Members of Council.

Elected officials face increased susceptibility to lawsuits due to the public nature of their duties, and it is important that protection is in place to enable Council Members to perform their duties in good faith, without fear of personal legal liability or the legal cost of defending legal proceedings. It is essential that a clear, consistent, robust and cost-effective process be in place to ensure The City's duties are appropriately assessed and fulfilled, and Council Members are afforded the protections to which they are entitled.

Amendments to the Bylaw do not affect the benefits and protections that Council Members are entitled through the Indemnification Policy and otherwise.

Without approval and confirmation of historic expenditures, there will be a perceived gap in the approval authority for the payment of fees of external legal counsel to defend Members of Council since the 2016 Policy Amendments. To ensure that The City's duty to defend is fulfilled, it is necessary to approve these expenditures or risk exposure to liability for further cost and expense.

There are many ways to achieve the effect of the proposed recommendations without bringing the matter before Council, but for the reasons stated above, the recommendations have been brought to Council for decision.

RISK

Without these Bylaw amendments there will be a perceived process gap in decision making around the defence of lawsuits against Council Members.

This could have a negative impact on The City's ability to respond to and defend ongoing and future legal proceedings against Members of Council and fulfill The City's duties to defend and indemnify.

The City owes a duty to defend and indemnify Members of Council in claims and actions against them in certain circumstances. A breach of these duties could give rise to legal claims and damages against The City and adversely impact corporate reputation. It is in the City's best interests to fulfill these duties where and when it arises.

**Law and Legislative Services Report to
Combined Meeting of Council
2021 February 9**

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ATTACHMENT(S)

1. Proposed Bylaw 8M2021
2. Council Policy CC010, Indemnification of Members of Council
3. Bylaw 48M2000
4. Reasons for Judgement Terrigno v. Calgary (City), 2021 ABQB 41

Department Circulation

General Manager	Department	Approve/Consult/Inform