

July 9, 2010

To: The Board of Governors of Exhibition Place

From: City Solicitor

Subject: City Insurance/Indemnification Policy for Board Members

Purpose:

To report as requested by the Board at its meeting of December 4, 2009 with respect to the application of the City of Toronto's insurance coverage and indemnification policy to the now abandoned civil action brought against the Board and individual members by Terence and Mark Osborne.

Financial Implications and Impact Statement:

There are no financial implications arising from this report.

Recommendations:

It is recommended that this report be received for information.

Background:

At its meeting of December 4, 2009, the Board requested that the City Solicitor report for the information of the Board as to the application of the City of Toronto's insurance and indemnification policy with respect to a civil action brought against the Board and individual Board members by Terence and Mark Osborne. This action was for damages arising from the injuries suffered by Mark Osborne in an electrical transformer explosion at Exhibition Place. As the Board is aware, that action was dismissed by the Court as abandoned. In this case, the civil action was also statute-barred under the *Occupational Health and Safety Act*.

However, it is my understanding that the Board request was for the purpose of receiving some general information respecting the extent of protection available to members of the Board under the City's insurance program and indemnification policy.

Comments:

Insurance Coverage

I have now had an opportunity to review this matter with the City's Insurance & Risk Management Section (IRM) and the City's insurance broker, Marsh Canada Limited.

IRM and Marsh have indicated for the information of the Board that the City maintains \$100,000,000 of broad insurance coverage covering the operations of the City and City board (including Exhibition Place) which includes specific protection for directors and officers. A general description of this coverage is attached for the information of the Board.

The City's insurance program also includes coverage for bodily injury, property damage, employers' liability and sudden & accidental pollution liability. This coverage includes legal defence (e.g. for General Liability); Financial loss due to wrongful acts including legal defence (i.e. Public Officials' Errors & Omissions); and Automobile Liability. A summary of the various general policies contained in the insurance program is attached for the information of the Board.

IRM has a rigorous process to address and respond to all claims and to guide individuals named in any claims or lawsuits arising out of their duties.

If grounds had existed for the pursuit of a separate civil action for bodily injury in the Osborne case (i.e. separate from the *Occupational Health and Safety Act* issue), the City's insurance coverage would have applied.

Indemnification Policy

The City's Indemnification policy for Council Members was extended by City Council in February 2009 to include the members of the agencies, boards, commissions, corporations and special purpose bodies included in the City's "Public Official Errors & Omissions Liability Insurance" coverage, including The Board of Governors of Exhibition Place.

A copy of the indemnification policy is attached to this report for the information of the Board.

In general, members of the Board should note that the City's indemnification policy is designed to apply only in instances where the City's insurance coverage would not apply. It would therefore not be relevant in the case of a civil action for bodily injury.

Conclusions:

Members of the Board are now protected by both the City's insurance coverage and the City's indemnification policy which has been extended by City Council to members of City agencies such as The Board of Governors of Exhibition Place.

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EE: ee Attach.

List of Attachments:

Attachment 1 – Summary of City's Insurance Coverage Attachment 2 – Indemnification Policy for Members of Council and Local Boards

ATTACHMENT 1 SUMMARY OF CITY'S INSURANCE COVERAGE



City of Toronto Public Officials Errors & Omissions Liability Insurance

June 1, 2010/11 Insurance Program Summary

The following insurance policy information is provided as a brief outline only. The actual policy terms and conditions on file with the City's Insurance and Risk Management Department will govern.

Background

As a Government entity, the City of Toronto purchases Public Officials' Errors & Omissions Liability Insurance and *not* Directors' & Officers' Insurance (which is primarily purchased by corporations and other entities to protect their board of directors and officers).

THIS IS A CLAIMS MADE POLICY. This policy covers only claims first made against an Insured and reported to insurers during the Policy Period or during the Extended Discovery Period (as defined in the policy).

What is the Purpose of the Coverage?

- Designed to protect the personal liabilities of the "persons insured" and the City of Toronto;
- Covers loss that "persons insured" or the City become legally obligated to pay as Damages for any Wrongful Act (as well as defence costs).

What is a "Wrongful Act"?

"Wrongful Act" means any actual or alleged error, omission, misstatement, misleading statement, act or omission or neglect or breach of duty with respect to any "persons insured" (while acting on behalf of the City / while in performance of City duties) including misfeasance and nonfeasance.

What Damages are Insured?

"Damages" means all damages but does not include fines or penalties imposed by law nor any judgements or awards arising from acts or omissions deemed uninsurable by law.

Who is Insured under the Policy?

"Persons Insured" means any past, present or future:

- Lawfully elected or appointed officials including council chair and council members;
- Officers, employees or volunteers;
- Members of commissions, boards, units, committees and special purpose bodies operated by and under the jurisdiction of the Named Insured;

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- Lawyers, architects, engineers, or accountants with respect to professional services on behalf of the Named Insured;
- Members of the police force acting in performance of their duties or statutory duty or as volunteers with respect to sports team/youth activities sanctioned by the public entity;
- Trustees of a Police Village;
- Professionals (including volunteers) forming part of the City's Design Review Panel including but not limited to architects, landscape architects, professional planners and professional engineers.

Program Structure

\$100,000,000 (annual aggregate) in coverage is in place subject to a \$5M retention for each and every claim except —

- CONFLICT OF INTEREST INSURANCE \$100,000 limit defense of legal proceedings under the Conflict of Interest Act; and
- DEFENCE EXPENSES \$25,000 limit alleging violation of any statute or regulation of the Province of Ontario or of Canada (including the Criminal Code of Canada or any criminal law of Canada).

Major Exclusions

The policy exclusions are most easily explained by splitting them into 3 categories:

- 1. Insured Elsewhere:
- 2. Uninsurable By Law;
- 3. Outside the Intent of the D&O Policy;

The following summary of exclusions is not exhaustive:

- 1. Exposures that are excluded from coverage under the E&O policy because they can be insured elsewhere include –
- Pension/Employee Benefit Plan Liability (insured by a Fiduciary Liability Insurance Policy City purchases \$15M coverage);
- Bodily Injury/Personal Injury/Property Damage/Discrimination/Medical Malpractice (insured by a General Liability/Specific Liability Program - City purchases \$100M General Liability);
- Misappropriation of funds (insured by Crime Insurance City purchases \$10M coverage)
- Pollution Liability (insured by a General Liability / Environmental Program City purchases \$100M General Liability with limited sudden and accidental pollution coverage);
- Terrorism (coverage must be purchased under a specific Terrorism policy)

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- Exposures that are excluded from coverage under the E&O policy because they are uninsurable by law include -
- Fraudulent / criminal acts (this exclusion shall not apply to any Insured who is neither the author of said act nor an accomplice);
- Illegal profits (e.g. one director induces a fellow board members to approve a self-dealing contract, awarding lucrative business to a company controlled by the director's spouse);
- Fines and penalties (i.e. it is contrary to public policy to provide insurance cover for criminal fines and penalties)
- 3. Exposures that are excluded from coverage under the E&O policy because they are outside the intent of a E&O policy include -
- Brought by or on behalf of one Insured against another Insured;
- Liability of others assumed by any Insured under any contract;
- Relief in any form other than Damages;
- Failure to maintain insurance;
- Arising out of strikes, lockouts, acts of terrorism, sabotage, riot or civil commotions;
- Salary and benefits due on termination of employment;
- Failure to collect money or to apply for grants;
- Loss of investment / investment income, profits, goodwill, income to be realized from a transaction:
- Related in any way to the design of, or the materials used in, any building or structure;
- Arising out of refund of taxes, assessments of fees or charges as a result of an improper or illegal levy, tax imposition, assessment or valuation of property;
- Asbestos, Data, Nuclear, Silica

E&O versus D&O Key Differences

The table below sets out some key differences between Directors' & Officers' Insurance and the City's Public Officials' Errors & Omissions Liability Insurance Policy.

Both forms of policy insure wrongful acts (generally defined as any actual or alleged error, omission, misstatement, misleading statement, act or omission or neglect or breach of duty of the Insured including misfeasance and nonfeasance) but ultimately the Public Officials' Errors & Omissions Liability format is better suited to the City's exposures as can be seen upon review of the differences below.

Categories of	City's Public Officials' Errors & Omissions (E&O)	Directors' & Officers' (D&O) Insurance		
Differences				
Cost	No additional cost to insure the directors and officers exposure of the City's agencies, boards, and commissions	Additional cost would apply based on underwriting information provided by each agency, board, and commission requesting coverage. The cost would be significant to arrange a stand alone D&O tower to match the current \$95M E&O limits.		

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Categories of Differences	City's Public Officials' Errors & Omissions (E&O)	Directors' & Officers' (D&O) Insurance
Limit	\$95,000,000 of Umbrella coverage applies in excess of the City's \$5,000,000 each claim retention	Significant D&O limits are generally carried only by larger corporations. D&O limits can <i>not</i> be scheduled under the City's Umbrella policy.
Persons insured	Any past, present or future: Lawfully elected or appointed officials including council chair and council members; Officers, employees or volunteers; Members of commissions, boards, units, committees and special purpose bodies operated by and under the jurisdiction of the Named Insured; Lawyers, architects, engineers, or accountants with respect to professional services on behalf of the Named Insured; Members of the police force acting in performance of their duties or statutory duty or as volunteers with respect to sports team/youth activities sanctioned by the public entity; Trustees of a Police Village; Professionals (including volunteers) forming part of the City's Design Review Panel including but not limited to architects, landscape architects, professional planners and professional engineers but only while acting on behalf of the Named Insured or while in performance of their duties.	Directors and officers (and employees named as co-defendants)
Entity coverage	Coverage for the City, its agencies, boards, and commissions	No entity coverage in base policy i.e. only coverage for directors and officers (certain coverage can be added for an additional premium)

Directors and Officers Liability - Brief Overview

Directors and officers have two basic duties imposed on them when performing their responsibilities, a breach of which can lead to liability: (1) Fiduciary Duty (duty of loyalty to the company); and (2) Duty of Care ("Every director and officer of a corporation in exercising his powers and discharging his duties shall, exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances." (OBCA, section 134(1), CBCA, section 122 (1)). This duty requires not only reasonable behavior with respect to matters submitted for approval, but also reasonable inquiry and monitoring of corporate affairs by the directors and officers.

In addition, there are estimated to be more than 100 provincial and federal statutes imposing other personal liabilities upon directors and officers.

D&O liability insurance policies are designed to protect directors and officers for the legal liability they may sustain when acting in their executive capacity. A policy will also reimburse or pay on behalf of the organization to the extent to which it indemnifies its directors and officers.

ATTACHMENT 2

INDEMNIFICATION POLICY FOR MEMBERS OF COUNCIL AND LOCAL BOARDS

- (1) Where a Member of Council or a local board ("Member") is charged with an offence under the *Criminal Code*, or under any other statutes(s), arising out of an act done in the performance of his/her official duties:
 - (a) The Member shall, in the first instance, be responsible for his/her own defence including the retaining of legal counsel or a paralegal.
 - (b) Where the Member is acquitted and is seeking reimbursement for legal expenses, the matter shall be referred to the Executive Committee and City Council for their consideration on advice from the City Solicitor.

Interpretation Notes:

- (i) The term "acquitted" shall be taken to be the same as a dismissal of the charge(s) and may, in appropriate circumstances, include the withdrawal of the relevant charge(s).
- (ii) Section (1) shall not be read so as to preclude the reimbursement of funds in circumstances where no charge has been laid and where independent legal advice is necessary, except for a proposed application alleging a Member has contravened the *Municipal Conflict of Interest Act*.
- Where a civil action or proceeding, which is not covered by the City's insurance policy, is brought against a Member, which in the opinion of City Council arises out of acts or omissions done or made by such Member in his/her capacity as a Member, the City may pay damages or costs awarded against such Member or legal expenses incurred by him/her as may be determined by City Council on advice from the City Solicitor, as provided for by section 218 of the *City of Toronto Act*, 2006, as amended. Whenever a civil action or other proceedings is brought against a Member, the Member is to advise the Insurance and Risk Management Section of the Corporate Finance Division immediately with respect to such action proceeding.
- (3) Upon the approval of the Executive Committee and Council, Members may be reimbursed for legal expenses in matters covered by sections (1) and (2) above to a maximum of \$25,000, where the reimbursement of funds is warranted upon consideration of all the circumstances. In the event that the initial reimbursement is exhausted before the matter is concluded, any further financing shall be referred to the Executive Committee for its consideration and recommendation to Council.

- (4) Section (3) does not apply to an application alleging a Member has contravened the *Municipal Conflict of Interest Act*.
- (5) Where a request for reimbursement of legal expenses has been made under this policy, the City Solicitor shall provide a report and a recommendation to the Executive Committee and to City Council for their consideration. In appropriate circumstances, or when requested by the Councillor involved, the City Solicitor shall consult with the Integrity Commissioner and/or external counsel in the preparation of the report.
- Where a Member is eligible for the reimbursement of legal expenses, the City Solicitor's report shall include an assessment of the reasonableness of the lawyer's account, having regard to the factors ordinarily considered by a court, including, but not limited to, the experience, skill and competence of the lawyer, the complexity of the issues, the importance of the matter and the time expended by the lawyer.

City of Toronto 2010-11 Insurance Policy Summary This is a summary only; the actual policies must be consulted for full details and determination of coverage.

COVERAGE	POLICY PERIOD	POLICY NO.	INSURER(S)	MAJOR LIMITS	MAJOR RETENTIONS	PURPOSE
Comprehensive General Liability	June 1, 2010 to June 1, 2011	CGL523851-GL	ACE INA Insurance	\$4,000,000 Per Occurrence	\$4,000,000 deductible excess of \$1,000,000 Self Insured Retention Per Occurrence	Insures liability resulting from bodily injury or property damage to third parties.
Public Officials E & O	June 1, 2010 to June 1, 2011	CGL523851-EO	ACE INA Insurance	\$4,000,000 Each Claim	\$4,000,000 deductible each claim excess of \$1,000,000 Self Insured Retention	Insures third party financial loss due to wrongful acts by elected officials, members of boards, commissions, lawyers/architects/engineers.
Automobile	June 1, 2010 to June 1, 2011	CAC301537	ACE INA Insurance	\$5,000,000 Per Occurrence	S5,000,000 deductible Per Accident	Insures bodily injury and property damage to third parties arising out of the use of a City owned/leased auto.
Garage Automobile	June 1, 2010 to June 1, 2011	GAP424657	ACE INA Insurance	\$5,000,000 Per Occurrence	\$5,000,000 deductible Per Accident	Insures property damage to third parties at City garage locations (excluding the Toronto Parking Authority lots).
Umbrella Liability	June 1, 2010 to June 1, 2011	XBC523851	ACE INA Insurance	\$5,000,000 excess of Primary Underlying \$10,000,000 aggregate except: \$5,000,000 Products / Completed Operations	\$3,000,000 SIR	Provides liability limits in excess of the City's General Liability, Public Officials' E&O, Automobile and Aviation Liability Policies (and Home Day Care Providers' General Liability Policy).
1st Excess Liability	June 1, 2010 to June 1, 2011	EXT34146	Various through Elliott Special Risks Scottish & York Insurance Co., Temple	\$13,000,000 aggregate	Nil	As above.

This is a summary only; the actual policies must be consulted for full details and determination of coverage Page 1 of 3

COVERAGE	POLICY PERIOD	POLICY NO.	INSURER(S)	MAJOR LIMITS	MAJOR RETENTIONS	PURPOSE
			Insurance Company, Lloyd's of London, XL Reinsurance America Inc., Co- operators			
2 nd Excess Liability	June 1, 2010 to June 1, 2011	9136425	GCAN Insurance Company	\$5,000,000 aggregate	Nil	As above.
3 rd Excess Liability	June 1, 2010 to June 1, 2011	34218788	Chartis Insurance Company of Canada	\$20,000,000 aggregate	Nil	As above.
4 th Excess Liability	June 1, 2010 to June 1, 2011	CPC0075757	St.Paul Fire and Marine Insurance Co	\$20,000,000 aggregate	Nil	As above.
5 th Excess Liability	June 1, 2010 to June 1, 2011	509/PA006810	QBE - 50% ACE - 50%	\$32,000,000 aggregate	Nil	As above.
Property	June 1, 2010 to June 1, 2011	SU526	Factory Mutual Insurance Company	\$1,750,000,000 Blanket Limit except Ashbridges Bay \$1,697,815,400, Humber Treatment Plant \$724,540,466, R.C. Harris Filtration Plant \$70,500,600,600, Highland Creek Treatment Plant \$582,766,600, R.L. Clark Filtration Plant \$582,465,000, F.J. Horgan Filtration \$545,428,000 (\$500,000,000 aggregate wrt to Earthquake and Flood)	\$5,000,000 annual aggregate deductible (excluding Earthquake, wind, Flood) \$250,000 per occurrence once annual aggregate is eroded Earthquake – \$25,000 combined all coverages, per Location subject to a minimum deductible of \$5,000,000 per Occurrence	Insures accidental physical damage from all risks (except specific exclusions) to the City's property – excludes infrastructure e.g. roads, pipes etc.

This is a summary only; the actual policies must be consulted for full details and determination of coverage Page 2 of 3

COVERAGE	POLICY PERIOD	POLICY NO.	INSURER(S)	MAJOR LIMITS	MAJOR RETENTIONS	PURPOSE
Boiler & Machinery	June 1, 2010 to June 1, 2011	EBI019156229	RSA	\$100,000,000 Limit Per Accident	\$200,000 Per Accident except \$2,000,000 flood, sewer back-up, or water escape	Insures accidental breakdown on all pressure vessels, electrical and mechanical equipment
Crime	June 1, 2010 to June 1, 2011	01-880-55-24	Chartis Insurance Company of Canada	\$10,000,000 any one loss	\$5,000,000 deductible	Insures loss to the City due to theft of money, securities, or other property by employees and of money or securities by third parties.

This is a summary only; the actual policies must be consulted for full details and determination of coverage Page 3 of 3