

MANAGEMENT REPORT TO THE GREATER TORONTO TRANSPORTATION AUTHORITY

Board Meeting Date: July 27, 2007
Item Class: Chair's Item
 Decision
 In Camera
 Information
 Resolution / By Law

RECOMMENDATION (S):

Whereas the *Greater Toronto Transportation Authority Act, 2006* incorporates certain provisions of the *Ontario Business Corporations Act* which permit the Corporation to indemnify its directors and officers.

BE IT RESOLVED THAT:

The Corporation execute and deliver to each of its officers and directors, including any directors or officers appointed after the date hereof, an Indemnity substantially in the form annexed to this resolution. Any one of the signing officers of the Corporation is hereby authorized and directed to execute the indemnity on behalf of the Corporation and deliver it to each director and officer together with such amendment as they in their absolute discretion may consider to be necessary or advisable.

RATIONALE:

It is appropriate for the Corporation to indemnify its directors and officers in respect of any losses or expenses they may sustain or incur for which they would not otherwise be responsible. While provisions of the *Ontario Business Corporations Act* ("OBCA") incorporated by reference in the *Greater Toronto Transportation Authority Act, 2006* (the "GTТА ACT") permit an indemnity, it does not automatically arise absent an express commitment from the Corporation.

ANALYSIS:

1. Although there is some duplication, an indemnity provides coverage to the GTTA directors and officers pending the placement of insurance coverage. In addition, an indemnity may not be subject to the same deductibles and limitations included in the final insurance policy. On the other hand, insurance coverage will be available to directors and officers in the event future financial difficulties prevent the Corporation from making payments under the indemnity. As well, pending the proclamation of proposed amendments to the OBCA (expected for August, 2007) which will enable the Corporation to advance litigation costs to directors and officers, insurance coverage provides up front funding for related out of pocket expenses.

2. Under sections of the OBCA incorporated under the GTTA Act, directors are expressly permitted to authorize indemnity and insurance arrangements.

RESOURCE IMPLICATIONS:

Minimal beyond the cost of insurance described under Financial Impact.

Financial Impact:

To be determined upon receipt and review of insurance quotations.

Legal Implications:

As stated above.

Pro's: A combination of an indemnity and insurance coverage provides directors and officers with the fullest possible coverage. Appointees to these positions will be free to authorize and implement good faith corporate decisions without fear of personal loss.

Con's: Unless insurance coverage can be obtained at a reasonable cost the expense may not be justified after amendments to the OBCA are proclaimed. In practical terms the financial exposure to directors and officers arising out of the Corporation's failure to honour its indemnity is likely quite limited. As well, to obtain coverage at a reasonable cost corporations typically agree that the insurer may look to the corporation to reimburse it for any insurance proceeds paid out. As a result, in the case of a solvent corporation, the insurer is primarily a short term credit facility.

INDEMNITY

TO: •

RECITALS:

- A. You have accepted the appointment as **[director or name office]** and (the "Appointment") of the Greater Toronto Transportation Authority ("the Corporation") as of the date hereof.
- B. In consideration of your acceptance, the Corporation has agreed to indemnify you on the basis described below.

NOW THEREFORE the Corporation hereby agrees, subject to the terms hereof, to indemnify and hold harmless you and your heirs and legal personal representatives against and from any and all losses, costs, damages, expenses and liabilities of whatsoever kind, including amounts paid to investigate an action or threatened action or proceeding, to settle an action or to satisfy a judgment, and including all legal and other professional fees and other expenses (a "Claim" or, collectively, the "Claims") which you may sustain or incur or become subject to by reason of the Appointment in respect of claims or demands of any kind made by persons or entities. You shall be entitled to this indemnity without adjustment for any deductible amounts or policy limits contained in any insurance policy which may be maintained by the Corporation. This indemnity does not apply with respect to Claims:

- (a) arising from any circumstances for which coverage is provided under any insurance policy to the extent that you are indemnified or covered under such policy and are in receipt of related insurance proceeds;
- (b) arising from any circumstances in which you did not act honestly and in good faith with a view to the best interests of the Province and or the Corporation;
- (c) brought about or contributed to by your dishonesty, or willful misconduct if a judgment or other final adjudication adverse to you establishes that there was dishonesty or willful misconduct on your part which was material to the cause of action as adjudicated;

- (d) where you don't advise the Corporation of the particulars of the Claim within ninety (90) days of the date you first became aware of the Claim; or
- (e) brought against you by the Corporation.

In order to be entitled to indemnification hereunder in respect of any notice of a Claim that you receive, you must:

- (i) immediately and without delay deliver to the Corporation (through the Corporation's general Counsel) a notice setting forth in reasonable detail the particulars of the Claim(s);
- (ii) upon written request of the Corporation, furnish to the Corporation copies of any document, or provide to the Corporation any information that relates to the Claim(s) that is in your possession or under your control; and
- (iii) take all reasonable steps necessary to secure and preserve your rights in respect of the Claim(s).

The Corporation shall have the right to participate in or assume control of the negotiation, settlement or defence of the Claim(s) and in no event shall you negotiate, settle, compromise or pay the Claim(s) without the prior written consent of the Corporation. If the Corporation elects to participate in or assume control of the negotiation, settlement or defence of the Claim(s), you shall co-operate fully with the Corporation in connection with the same, and you shall agree to be represented by legal counsel chosen by the Corporation, unless, in the opinion of such legal counsel, there would arise a conflict of interest preventing such legal counsel from representing you. Where it is such legal counsel's opinion that a conflict of interest prevents that legal counsel representing you, you will be entitled, after consultation with the Corporation and acting reasonably, to obtain legal counsel of your choice, and the fees and expenses of your counsel incurred in your representation shall be costs to which this indemnity extends.

The expenses incurred by you in investigating, defending or appealing any Claim(s) shall, at your written request and to the extent permitted by applicable law, be advanced to you by the Corporation prior to resolution of the Claim as may be appropriate to

enable you properly to investigate, defend or appeal such Claim(s), with the understanding that if it is ultimately determined that you are not entitled to be indemnified hereunder, you shall immediately repay any amount(s) so paid.

You shall promptly reimburse the Corporation to the full extent of any duplication between insurance proceeds received by you relating to a Claim and related advances or other payments made to you by the Corporation.

For greater clarity, this indemnity shall only apply to Claim(s) that are referable to the period during which you hold, or held, the Appointment.

IN WITNESS HEREOF, the undersigned has duly executed this indemnity, this

_____ day of _____, 2007.

The Greater Toronto Transportation Authority

Per: _____