

Authority: Administration Committee Report No. 7, Clause No. 7,
as adopted by City of Toronto Council on November 23, 24 and 25, 1999
Enacted by Council: November 25, 1999

CITY OF TORONTO

BY-LAW No. 808-1999

Y2K Employee Indemnification.

WHEREAS the City is in the process of taking steps to ascertain and resolve the implications for the City of the year 2000 date change (the "Year 2000 Problem" as defined below); and

WHEREAS the City is taking all appropriate steps to ensure that there is business continuity through the year 2000 and beyond; and

WHEREAS there may nevertheless be claims by third parties against the City alleging acts or omissions against the City, some members of its Council or some of its employees, or all or any of them, arising out of the Year 2000 Problem; and

WHEREAS paragraph 207[50] of the Municipal Act, R.S.O. 1990, c. M.45, provides that the council of a municipality may pass by-laws for, among other things, paying any damages or costs awarded against any of the employees (including salaried officers and including former employees and salaried officers) 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 on or after June 20th, 1978 in their capacity as employees including while acting in the performance of any statutory duty or for paying any sum required in connection with the settlement of an action or other proceeding and for assuming the cost of defending the person in such an action or other proceeding; and

WHEREAS section 252 of the Municipal Act, R.S.O. 1990, c. M.45, as amended, provides that the council of a municipality may pass by-laws for, among other things, paying any damages or costs awarded against any members of council (including former members) or expenses incurred by them as a result of any action or other proceeding, except a proceeding brought under the Municipal Conflict of Interest Act, arising out of acts or omissions done or made by them on or after December 15th, 1978 in their capacity as members or officers of the municipality including while acting in the performance of any statutory duty or for paying any sum required in connection with the settlement of an action or other proceeding and for assuming the cost of defending the member in such an action or other proceeding; and

WHEREAS such by-law is considered advisable;

Now therefore, the Council of the City of Toronto HEREBY ENACTS as follows:

Definitions

1. In this by-law, the following definitions shall apply:
 - (a) **"Action"** means a civil action or claim commenced or threatened to be commenced after the passing of this by-law containing allegations that a person or persons have suffered damages, or seeking some other remedy, arising out of an alleged act or omission of one or more Employees of the City of Toronto and relating, directly or indirectly, to the Year 2000

Problem (as defined below). An Action includes the appeal of any final judgment in the Action where the Employee is a respondent in the appeal;

- (b) the **“Year 2000 Problem”** means the failure of computer software, hardware or devices containing embedded chips to accept, calculate, compare, sort, extract, sequence or process accurately date inputs or date values or the failure to accurately return, generate, process or display accurately date output or date values, as a result, directly or indirectly, of the transition up to, during and beyond the date January 1, 2000; and
- (c) **“Employee”** means, for the purpose of this by-law, an employee, former employee, salaried officer or former salaried officer of the City (including any of its predecessor municipalities) who, during his or her term of employment or office with the City, works or has worked for the City, directly or indirectly, or makes or has made a decision for or on behalf of the City while acting in his or her capacity as an employee or officer of the City or gives or has given advice of any kind to the City or any of its local boards on matters relating to the Year 2000 Problem and includes a Member or former Member of Council of the City (including any of its predecessor municipalities) who, during his or her term of office on Council, works or has worked for the City, directly or indirectly, or makes or has made a decision while acting in his or her capacity as a Member of Council or an officer of the City on matters relating to the Year 2000 Problem.

Condition Precedent

2. The provision of coverage under this by-law shall be subject to and conditional upon any rights, obligations and duties of any insurer of the City that may respond to an Action under an insurance policy issued to the City and is subject to any rights, obligations and duties of the City and its Employees in respect of such insurance. By virtue of the Municipal Act, this by-law does not apply to an act or omission of an Employee that occurred prior to June 20th, 1978, but, if the Employee (as defined above) is a Member or former Member of Council, it does not apply to an act or omission that occurred prior to December 15th, 1978.

Notice

3. Where an Employee becomes aware that an Action has been commenced or threatened against the Employee, the Employee shall forthwith provide the City with notice of the same.

Legal Defence, Damages and Costs

4. After receiving notice of an Action, the City shall as soon as is reasonably possible determine the factual background to the Action and shall determine whether the Employee will be afforded coverage under this by-law. The Employee will cooperate with the City to permit the City to determine the factual background to the Action and provide all necessary assistance that the City requests.

5. Provided that the City determines that the Employee's connection, if any, with the allegations related to the Action involves the Employee's attempted performance in good faith of his or her duties and subject to compliance by the Employee with the provisions of this by-law, in an Action, the City will:

- (a) represent the Employee in the name of, and on behalf of, the Employee through counsel employed by the City or through the payment of all legal costs of the Employee, from time to time and as they are incurred, in defending the Action through the use of outside counsel retained by the City;
- (b) pay all damages and legal costs, including interest, awarded against an Employee;
- (c) pay all sums required in connection with the settlement of the Action provided that the City approves of the terms of the settlement;

6. Subject only to paragraphs 13, 14 and 15 of this by-law, the City shall, in its sole discretion, determine whether to represent the Employee in the Action through the use of counsel employed by the City or through the use of outside counsel retained by the City

7. Where the City represents the Employee in the Action, whether through the use of counsel employed by the City or through the use of outside counsel, the City and the Employee shall cooperate and consult with one another. However, all decisions to be made in the defence of the Action (including decisions in respect of any counterclaim by the Employee or in the prosecution of a third party claim) shall be made by the City, in its sole discretion, after having taken into account the consultations with the Employee.

8. The City may, in its sole discretion, determine that an Employee is not entitled to coverage pursuant to this by-law because the City has determined that the Employee has not acted in good faith in the attempted performance of his or her duties or has not otherwise complied with the terms of this by-law. In such circumstances, that Employee shall be responsible for all costs in connection with his or her defence of the Action and the Employee shall be responsible for the payment of any damages or costs awarded against him or her in the Action. In addition, in such circumstances, the City reserves the right to claim indemnity from the Employee for any damages or costs which may be suffered by the City.

9. Where the City has paid for the legal costs associated with the defence by an Employee of an Action in the reasonable belief that the Employee had acted in good faith in the attempted performance of his or her duties and it is later determined by a court of competent jurisdiction or the City that the Employee did not act in good faith in the attempted performance of his or her duties, then in such circumstances that Employee shall be responsible for all costs in connection with his or her defence of the Action and the Employee shall be responsible for the payment of any damages or costs awarded against him or her in the Action. In addition, such an Employee shall be liable to repay to the City upon written demand all costs incurred by the City in the defence on behalf of the Employee of the Action. In addition, in such circumstances, the City reserves the right to claim indemnity from the Employee for any damages or costs which may be suffered by the City.

10. Where an Employee's employment has been terminated by the City and the City has alleged that it had just cause for termination, the City may, in its sole discretion and whether or not just cause has been determined by a court of law, decide that it will not provide coverage under this by-law or may cease to provide coverage previously afforded under this by-law. In such circumstances that Employee shall be responsible for all costs in connection with his or her defence of the Action and the Employee shall be responsible for the payment of any damages or costs awarded against him or her in the Action. Where coverage has already been provided and the City thereafter terminates the employee and alleges just cause, then the Employee shall be liable to repay to the City all legal costs incurred by the City in the defence on behalf of the Employee of the Action. In addition, in such circumstances, the City reserves the right to claim indemnity from the Employee for any damages which may be suffered by the City. Under no circumstances will an Employee's termination and the allegation by the City of just cause for the termination together with the decision by the City to refuse to afford coverage or to terminate coverage constitute a conflict for the purposes of paragraphs 13, 14 and 15 herein.

11. Where the City represents an Employee or pays for the legal costs the Employee incurs in defending an Action, such representation or payment shall take into account any association sponsored or prepaid legal assistance plan or available insurance personal to the Employee and shall be reduced or repaid to the City to the extent that any such costs are received by the Employee. In addition, if the Employee receives and collects upon an order of costs in the Action, those costs shall be paid to the City.

12. In order to receive the benefit of this by-law, the Employee must agree to execute any and all documents required by the City to enable the City to subrogate itself to the position of the Employee as concerns the Action.

Conflicts

13. Where the Employee has been afforded coverage under this by-law and where in connection with an Action there exists or arises a conflict between the City and an Employee, the Employee may, subject to the provisions of this by-law, retain their own legal counsel for their defence of the Action.

14. The City shall not be obliged to pay for the legal costs of an Employee's own counsel unless, in addition to the other provisions of this by-law being met, the City, through the City, has approved of the legal counsel retained by the Employee.

15. In connection with an Action, where there is a dispute between the City and an Employee as to whether or not a conflict exists as between them, that dispute shall be resolved by discussion between the City and the Employee or, failing the success of such discussions, by an arbitrator appointed pursuant to the Arbitrations Act 1991 (Ontario) who shall summarily determine the question as to whether or not a conflict exists. Such determination shall be final and shall not be appealable on any ground.

Investigation, Negotiation and Settlement

16. In any Action, whether the Employee is separately represented or not, the City may make such investigation, negotiation or settlement on behalf of the City and the Employee, or either one of them, as may be deemed appropriate by the City.

Counterclaims and Third Party Actions

17. An Employee may not commence either a counterclaim or a third party proceeding as part of an Action unless the commencement of such proceedings have been approved, in advance, by the City.

Appeals By The Employee

18. Where an Employee seeks to appeal a judgment in an Action, the City shall, in its sole discretion, determine whether to represent the Employee in the appeal and whether the costs of the appeal will be paid for by the City. Where the City determines that it will not represent the Employee on an appeal or pay the legal costs associated with such an appeal by an Employee, the Employee may nevertheless proceed with the appeal at his or her own expense. If this occurs and the Employee is successful in the appeal, the City may, in its sole discretion, determine whether it will reimburse the Employee for his or her costs of the appeal.

Assessment of Accounts

19. The City shall have the right to assess any account rendered by counsel acting for any Employee in the defence of an Action.

Without Prejudice

20. Nothing in this by-law shall prejudice the City in any claim, action or proceeding that the City has or might have against the Employee in connection with the Year 2000 Problem or otherwise.

ENACTED AND PASSED this 25th day of November, A.D. 1999.

CASE OOTES,
Deputy Mayor

NOVINA WONG,
City Clerk

(Corporate Seal)