

TORONTO MUNICIPAL CODE
CHAPTER 39, DEFENCE AND INDEMNIFICATION

Chapter 39

DEFENCE AND INDEMNIFICATION

ARTICLE I

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[HISTORY: Adopted by the Council of the City of Toronto as indicated in article histories. Amendments noted where applicable.]

General References

Arbitration Act, 1991 - See S.O. 1991, c. 17.

Municipal Act, - See R.S.O. 1990, c. M. 45.

ARTICLE I

Y2K Employee Indemnification

[Adopted 1999-11-25 by By-law No. 808-1999¹]

§ 39-1. Definitions.

As used in this article, the following terms shall have the meanings indicated:

ACTION - A civil action or claim commenced or threatened to be commenced after the passing of this article 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 judgement in the action where the employee is a respondent in the appeal.

¹ Editor's Note: This by-law was passed under the authority of clause 50 of section 207 and section 252 of the *Municipal Act*, R.S.O. 1990, c. M.45.

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EMPLOYEE - 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.

YEAR 2000 PROBLEM - 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.

§ 39-2. Condition precedent.

The provision of coverage under this article 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 article does not apply to an act or omission of an employee that occurred prior to June 20, 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 15, 1978.

§ 39-3. Employee to notify city of action or threatened action.

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.

§ 39-4. Legal defence; damages and costs.

- A. 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 article. The employee will co-operate with the City to permit the City to determine the factual background to the action and provide all necessary assistance that the City requests.
- B. 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 article, in an action, the City will:
 - (1) 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

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employee, from time to time and as they are incurred, in defending the action through the use of outside counsel retained by the City.

- (2) Pay all damages and legal costs, including interest, awarded against an employee.
 - (3) Pay all sums required in connection with the settlement of the action, provided that the City approves of the terms of the settlement.
- C. Subject only to § 39-5, 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. **[Amended 2000-10-05 by By-law No. 869-2000]**
- D. 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 co-operate 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.
- E. The City may, in its sole discretion, determine that an employee is not entitled to coverage pursuant to this article 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 article. 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.
- F. 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.
- G. 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 article or may cease to provide coverage previously afforded under this article. 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

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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 § 39-5. **[Amended 2000-10-05 by By-law No. 869-2000]**

- H. 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.
- I. In order to receive the benefit of this article, 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.

§ 39-5. Conflicts.

- A. Where the employee has been afforded coverage under this article 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 article, retain his or her own legal counsel for his or her defence of the action.
- B. 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 article being met, the City, through the City, has approved of the legal counsel retained by the employee.
- C. 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 *Arbitration 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.

§ 39-6. Investigation, negotiation and settlement.

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.

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§ 39-7. Counterclaims and third-party actions.

An employee may not commence either a counterclaim or a third-party proceeding as part of an action unless the commencement of such proceedings has been approved, in advance, by the City.

§ 39-8. Appeals by the employee.

Where an employee seeks to appeal a judgement 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.

§ 39-9. Assessment of accounts.

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

§ 39-10. Without prejudice.

Nothing in this article 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.