

III. General

Section 14 – Board Liability

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14.01 Board Member Indemnification

Subsection 8(2) of *The Public Employees Pension Plan Act* establishes the Board as the trustee of the Public Employees Pension Fund (the Fund). As trustees of the Fund, the Board collectively, or its members individually, may from time to time find themselves subject to legal actions brought forward by a beneficiary or beneficiaries of the trust or other interested parties regarding actions taken by the Board with respect to the investment or disposition of funds in the trust or the incursion of expenses related to the trust.

A trustee is permitted to be indemnified out of the property of the trust for a liability incurred in the course of administering the trust, provided that the trustee has acted honestly and prudently. In addition, section 43 of *The Trustee Act, 2009* provides the following:

- 43** (1) In this section, ‘trustee’ includes a former trustee.
- (2) A trustee:
- (a) is accountable only for money and securities actually received by the trustee even though the trustee signed a receipt for the sake of conformity; and
 - (b) is answerable and accountable only for the trustee’s own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for those of any banker, broker or other person with whom the trust money or securities mentioned in clause (a) are deposited.
- (3) A trustee may reimburse himself or herself for, or pay or discharge out of the trust money, all expenses reasonably incurred in or about the execution of the trustee’s trust or powers.

- (4) A trustee may:
- (a) be indemnified out of trust money with respect to:
 - (i) liabilities and expenses, including an amount paid to settle an action or satisfy a judgment, arising out of any matter or thing done honestly and in good faith relating to the exercise or attempted exercise of the powers and duties of the trustee; and
 - (ii) legal fees and costs relating to a claim for which this subsection provides an entitlement to an indemnity; and
 - (b) receive out of the trust money an advance of money for the purpose of meeting an expense for which the trustee may be reimbursed or indemnified pursuant to this section.
- (5) A trustee shall repay the money advanced to the trustee pursuant to clause (4)(b) if the trustee is found not to be entitled to be reimbursed or indemnified with respect to the expense for which the advance was made.

A trustee who has not acted honestly and prudently will not be eligible for indemnification by the trust. The purpose of clause **43(4)(b)** of *The Trustee Act, 2009* is to recognize that the process of responding to a legal claim and establishing the trustee's honesty and prudence in their conduct as trustee can involve expenses causing significant financial hardship to the individual trustee.

In order to avoid conflicts of interest that arise by the very nature of the circumstances in which this policy would apply, the Board has adopted criteria which, if met, will entitle the Board and its members to access funds from the Fund for the purpose of undertaking a reasonable response to a claim without having to seek approval from the Board.

The guiding principle behind the policy is that in all cases that the Board member must have acted honestly and in good faith, and the onus lies with the Board member to provide such information as may be required to make that determination.

Accessing Moneys from the Trust in Advance of a Determination of Liability – One Board Member Named in Claim

Section **43** of *The Trustee Act, 2009* allows for a Board member to access funds in the trust to pay legal expenses in advance of the determination of whether the Board member (or members) in question has acted honestly and prudently. The Board's procedure for where a Board member requires access to funds in the trust for that purpose is as follows:

1. Where a Board member has been served with a Statement of Claim which in the Board member's opinion will require that he or she seek legal

representation, the Board member will request in writing, via the Executive Secretary, that the Ministry of Justice or such other legal counsel as may be providing legal services to the Board assist the Board member in responding to the claim.

2. Should the Board's legal counsel decline the Board member's request for assistance in responding to the claim, on grounds other than that the Board member has, in the opinion of counsel, acted dishonestly or in bad faith, the Board member may retain legal counsel of his or her own choosing. The Board member and legal counsel shall make an initial determination as to whether it may or will be necessary and appropriate, based on an initial assessment on the nature, merits and scope of the claim, to access funds in the trust on an advance basis in order to provide an adequate response to the claim.
3. Where the Board member, in conjunction with legal counsel, determines that an advance will be necessary, the Board member shall provide to the Executive Secretary of the Board, the following documentation:
 - a certified true copy of the Statement of Claim;
 - a written legal opinion from the member's legal counsel as to the applicability of section 43 of *The Trustee Act, 2009* to the circumstances of the claim;
 - an estimate of what the total fees and expenses will be to provide an adequate response to the Statement of Claim; and
 - if applicable, any outstanding invoice(s) received from the legal counsel as of the date of the Board member's application to access moneys in the trust.
4. The Executive Secretary will review the submission from the Board member and undertake such investigation as the Executive Secretary feels is necessary in order to determine whether the Board member is entitled to an advance of funds pursuant to this policy.
5. The Executive Secretary may seek the advice of the Ministry of Justice or such other legal counsel as may be providing legal services to the Board in the course of determining whether the Board member is entitled to an advance of funds pursuant to this policy.
6. Where the Executive Secretary is satisfied that the Board member is entitled to an advance of funds pursuant to this policy, the Executive Secretary shall advise the Board member in writing of the decision and shall prepare a report for the information of the Board.

7. Where the Executive Secretary is satisfied that the Board member is not entitled to an advance of funds pursuant to this policy, the Executive Secretary shall advise the Board member in writing of the decision together with the reasons for the decision.
8. The decision of the Executive Secretary is final.
9. Where the Board member's claim for an advance of funds is successful and until the claim against the Board member is determined or otherwise settled, the Board member will provide any invoices for claim to the Executive Secretary, who will take any such steps as may be necessary to verify the claim and authorize it for payment.
10. At each meeting of the Board subsequent to a successful application for advance payment from the trust fund, the Executive Secretary will provide a report for the information of the Board indicating:
 - the details and amount of all invoices received with respect to the matter;
 - a cumulative total of all moneys to date paid out of the trust with regard to the matter;
 - any information that might affect the eligibility to the Board member to continue receiving funds; and
 - the amount initially estimated by the Board member.
11. The Executive Secretary may at any time inquire of the applicant as to the status of the claim and where the Executive Secretary is of the opinion that further explanation and details for an updated estimate of expenses in the matter may be required, the Executive Secretary may request such further explanation and details of the applicant Board member, reserving the right to suspend further advances from the fund until such time as the applicant Board member provides same.
12. At the conclusion of the claim, the Executive Secretary shall provide a report to the Board containing such information as the Board may reasonably require in order to determine whether the amounts advanced from the Fund are amounts to which the Board member would be entitled to be indemnified, and if not, whether steps should be taken for the recovery of those amounts.

*Accessing Moneys from the Trust in Advance of a Determination of Liability –
More than One Board Member Named in Claim*

More than one Board member may be named in a Statement of Claim and it may be necessary for more than one Board member to access funds from the trust in advance in order to respond to the claim. In such cases the Board members will have the option of seeking advance moneys from the trust individually or collectively as a group of Board members.

In either case, the above process is to be followed with such modifications as may be necessary to maintain the effectiveness and integrity of the process.

Efficiency of Process

The Board recognizes the need for timeliness in responding to potential claims against the Board or its members.

Where a member makes application to access funds to respond to a Statement of Claim, the Executive Secretary will endeavor to bring the process to a conclusion with the greatest efficiency.

Commencing with the Executive Secretary's receipt of the Board member's request, the Executive Secretary will provide the Board member with weekly progress reports regarding the indemnification process.

14.02 Not Limiting Board Member Right of Indemnification

Where for any reason a Board member has not availed himself or herself (or a group of Board members has not availed themselves) of the provisions allowing them to request moneys from the trust in advance of a determination of a Claim, nothing in this section of the Governance Manual is to be construed as prohibiting that Board member from seeking reimbursement from the trust in accordance with the terms of *The Trustee Act, 2009* for expenses reasonably incurred in responding to a Claim merely because the Board member(s) did not avail themselves of the process.

Where a Board member is (or Board members are) seeking reimbursement from the trust after the fact, the process described above is to be followed with such modifications as may be necessary to maintain the effectiveness and integrity of the process.

14.03 The Board's Position on Third-Party Liability Insurance

The Board can choose whether the risk of having to indemnify a member of the Board for a liability should be borne by the Fund, or shared with other parties through the purchase of third-party insurance. The choice is between risking a potentially substantial payment out of the fund or incurring a cost that is certain.

The Trustee Act, 2009 provides trustees who act honestly and in good faith with liability protection. This protection is not provided in the event of wilful misconduct or criminal activity. Similarly, liability insurance purchased through a third-party insurer does not provide protection in the event of wilful misconduct or criminal activity.

It is the position of the Board that it not purchase third-party liability insurance. The reasons for this include:

- *The Trustee Act, 2009* already provides liability protection for trustees who act honestly and in good faith, therefore there is no advantage to members of the Board in having insurance coverage for the same risk;
- Wilful misconduct and criminal activities are the only activities for which there is a real possibility of liability on the part of individual Board members. It is a matter of policy that there is an expectation that such activities will not be tolerated, and if they do occur, the member should face the consequences personally;
- The Board has adopted governance policies and procedures that minimize the risk of there being liabilities for which the fund would be responsible for indemnification; and
- The history of the administration of the Plan does not indicate a risk that justifies the additional cost of third-party insurance.

14.04 History

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