

## The Role of Employees

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A board of trustees has the authority to hire employees to manage the day-to-day operation and administration of the improvement district, to provide support to the board and to implement board decisions.

Every improvement district is required to establish two corporate officer positions. One position is responsible for corporate administration and the second is responsible for financial administration. The same person can be appointed to both positions and assigned any title the board decides is appropriate such as manager, administrator, or corporate officer. A number of mandatory duties are assigned under the Act to each position but the board of trustees can assign additional duties.

Mandatory duties assigned to the corporate officer in the Act include keeping and protecting the minutes of the trustee meetings, bylaws and other records. Mandatory duties assigned to the financial officer in the Act include expending and disbursing funds in the manner authorized by the board of trustees and keeping accurate records of the improvement district's financial affairs.

As an employer, the board of trustees is required to comply with requirements that are set down in provincial and federal legislation such as the *Employment Standards Act*, *Workers Compensation Act* and the *Income Tax Act*.

A job description and/or an employment contract can clarify such things as an employee's duties, salary, benefits, and indemnification. These documents are also important for performance appraisal purposes.

The termination of an improvement district officer **without cause** can only be decided by a vote of at least two-thirds of all trustees, not just two-thirds of the trustees at the meeting. The board of trustees must first give reasonable notice of termination to the officer. The termination of an officer **with cause** can be decided by a majority vote of the trustees and no notice is required to be given to the officer. Given the complexities of employment law, it may be beneficial to seek legal counsel prior to making the decision to terminate an officer or employee.

## Trustee/Employee Relations

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Trustees are elected to provide leadership, not to operate and administer the day-to-day operation of the improvement district. A trustee who handles financial transactions (for example) could provoke public concerns about fiscal improprieties, whether they exist or not. Also, the actions of a trustee who works on the improvement district's water system could have serious implications if they were to inadvertently damage the water system, or injure themselves.

Similarly, employees do not make policy decisions on behalf of the improvement district. The two roles are independent and a blurring of these roles can result in situations where employees are given conflicting instructions by trustees, or a trustee interferes with an employee's duties. Trustees, in turn, may feel that an employee is over-stepping their role by taking actions that are inconsistent with the board's policies.

These situations can result in a poor trustee/employee relationship and may create unwanted tension, lead to resignations or dismissals and generally reflect negatively on the overall management of the improvement district.

Employees have a fiduciary responsibility (obligation) to advise the board of trustees about the implications for their decisions, particularly if it could cause harm or be contrary to a legislative requirement. However, once an employee has given their advice to the board of trustees, the board's decision must be respected and implemented by the employee.

A board of trustees may wish to use the following tools to foster and maintain a positive relationship with their employees:

- establish a clear line of communication between the trustees and employees;
- provide clear policy decisions and directions;
- keep current and inclusive job descriptions for all employees;
- conduct regular performance appraisals;
- adopt a policy controlling access by trustees to records and the improvement district's buildings, offices and other facilities;
- establish a policy regarding the hours during which trustees or employees can be contacted unless there is an emergency;
- establish a policy that trustees and employees do not issue public statements purporting to reflect the board's opinion without prior approval by the board;

- adopt a code of conduct for the trustees and employees;
- create a package of information to orient new employees and trustees to the improvement district; and,
- establish a strategic plan that outlines key goals and objectives of the improvement district.

## Committees

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There may be times when a board of trustees will need to reduce its workload or obtain expertise from people other than the trustees or improvement district employees. One of the ways to manage these needs is for the board of trustees to create a committee. There are two types of committees that can be established: a select committee; and a standing committee.

A select committee is established to consider or inquire into a specific matter and then report its findings and recommendations to the board. For example, a committee may be established to investigate options for water treatment, or to review contractor bids. Once the review has been undertaken and a report is presented to the board of trustees, the committee's business is finished and it ceases to exist.

A standing committee is established for matters that are more ongoing in nature. For example, where an improvement district delivers multiple services, the board of trustees may choose to establish a committee that deals with issues related to one of those services. The board may also want to establish a standing committee to deal with specific subjects such as finance, or public works.

The board of trustees establishes select and standing committees and appoints their members. Persons who are not trustees may be appointed to committees, but at least one member of the committee must be a trustee.

Select and standing committees are purely advisory in nature. The board of trustees is ultimately responsible for making all decisions being considered by a committee, and cannot delegate any of its authority to a committee. The board of trustees is not obligated to accept the committee's advice.

The role of the committee and its purpose must be clearly defined by the board when the committee is established so that its members can focus on accomplishing the task at hand rather than discussing the committee's role. Committees are not intended to undertake or duplicate any actions that are the responsibility of improvement district employees, and committees do not have any authority to give them direction.

Select and standing committee meetings can be scheduled for times that are convenient to its members. In the interest of transparency, committee meetings should be open to the public – just as trustees' meetings should be open.

There can be several advantages for a board of trustees to create committees, such as:

- reducing the time needed to conduct a board meeting by having a committee research and discuss a complex matter and then present a summary to the board;
- appointing persons other than trustees to committees allows the board of trustees to receive input from people who have professional expertise, are directly impacted, or have a particular viewpoint; and,
- providing a forum where all stakeholders can express their opinions may result in a more balanced view of the issue and a more informed recommendation.

The meeting procedure bylaw enacted by the board of trustees contains the procedures to be followed by a committee for scheduling its meetings and conducting its business.

## Conflict of Interest

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A conflict of interest occurs when a trustee votes on a matter where there is a direct or indirect opportunity to further their private interests. The Act does not contain specific provisions regarding the issue of conflict of interest for improvement district trustees. However, a trustee can be convicted of a conflict of interest under common law.

Since there are a wide range of circumstances in which a conflict of interest can exist, there is no specific listing of situations that a trustee can consult in order to determine if they are in a conflict of interest. For example, if a trustee votes in favour of a contract with a company that is owned by the trustee's spouse, a conflict of interest almost certainly exists. However, if the contract was with a brother-in-law, or a former business partner, a conflict of interest may not exist. Each situation is unique and depends on the relationship between the parties and other relevant information.

The Courts have recognized that a conflict of interest does not exist where the interests of elected officials are in common with other people. For example, trustees are not in a conflict of interest when they set tax levels and establish regulations that affect all property owners in the improvement district.

If a trustee believes they may be in a conflict of interest, they can take steps to avoid or minimize the potential risk. The *Community Charter* outlines conflict of interest rules for municipal councils and regional district boards that can serve as a guideline for improvement district trustees. One course of action would be for the trustee to state the reason that they may be in a conflict of interest at a trustees meeting and then:

- remove himself/herself from any part of a meeting during which the matter is under consideration;
- refuse to participate in any discussion related to the matter; and,
- refrain from voting on the matter or attempt in any way to influence the voting on the matter, whether before, during, or after a meeting.

In some cases, even the appearance of a conflict of interest can cause harm to a trustee's reputation and affect the public's confidence in the board. When a trustee is not sure whether they are in a conflict of interest, obtaining a legal opinion may clarify the situation. The board of trustees may consider adopting a policy as to whether or not the cost for obtaining legal opinions will be borne by the individual trustee, or by the improvement district.

## Liability

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Improvement districts have the status of a “legal person”. This means they can initiate a legal action, or be the subject of a legal action. For example, if a water main owned by an improvement district bursts and damages private property and the board of trustees does not compensate the property owner, the property owner could seek damages from the improvement district through the Courts. Similarly if a person damages the improvement district’s water system, the board of trustees may choose to recover any cost to repair the damage from that person through a Court action.

The Act contains limits on the types of actions that can be brought against an improvement district, the trustees, committee members and employees. For example, they are not liable for damages arising out of the performance of their duties unless they are found guilty of dishonesty, gross negligence, malicious or wilful misconduct, libel or slander, by the Courts .

An improvement district is not liable in any action based on nuisance if the damages arise, directly or indirectly, out of the breakdown or malfunction of its sewer system, water system, or dike. The Courts have made decisions that establish the duty of care, tests of reasonableness and considerations for contributory negligence that would determine the outcome of any Court action.

A risk management analysis can be very useful for minimizing the risk for liability. Many insurance carriers can provide advice about the actions the board of trustees can take to manage risk. For example, in some improvement districts it may be considered that the main risk for liability lies with the improvement district’s aging infrastructure. Therefore, a risk management strategy could be targeted to that issue. The risk management process involves identifying potential hazards and implementing the appropriate measures to reduce or eliminate those hazards.

## Insurance

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Even though there are limitations on the legal actions that can be brought against an improvement district, its trustees, employees and committee members, purchasing insurance is another way to manage risk.

There are a wide variety of insurance plans available and the one best suited to an improvement district will depend on factors such as the complexity of their operations, the risks involved with the types of service(s) delivered by the improvement district, and the cost of the insurance plan. Insurance policies can cover such things as earthquakes, flood, crime, accidental death, and employee bond. Personal liability insurance can also be purchased for trustees.

Insurance carriers can provide advice about the amount of insurance coverage that would be sufficient to cover claims for personal injury, death, property damage, or third party or public liability claims. The minimum amount recommended by most insurance underwriters is \$2 million.



## Indemnification

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Despite having a risk management system and insurance in place, the actions of a trustee or employee can be challenged in Court – which means that costs will be incurred by the trustee or employee to defend the action. A board of trustees has the ability to indemnify (pay the costs) incurred by a trustee or an employee in defence of a Court action. The improvement district can pay costs for:

- trustees;
- officers;
- employees;
- volunteer fire-fighters;
- a volunteer who participates in the delivery of services by the improvement district under the supervision of an officer or employee; and,
- select or standing committee members.

The costs must be related to an action or prosecution against that person in connection with the performance of that person's duties. The costs that may be paid are strictly related to the person's defence (e.g. legal costs, Court costs, or any other cost necessarily incurred as part of a Court proceeding or to protect or defend the person), or damages recovered against the person. However, improvement districts cannot pay a fine imposed as a result of the person's conviction for a criminal offence.

There are two methods by which the board of trustees can authorize payments in defence of a Court action. The first method is for the board to enact a bylaw that identifies which of the positions noted above that it will make payments for, and what type of payments it will make (i.e. whether the improvement district will pay defence costs, damages, or both). This bylaw would be enacted proactively – that is, the board of trustees would consider whether or not it wanted to pay these costs before any legal action had been initiated.

This proactive approach means the board would not be put in the difficult position of making a decision about payment in the middle of a Court action. However, once the bylaw is enacted, the board of trustees is obligated to pay the costs it has set out in the bylaw, regardless of how they view the merits of the case.

The second method is for the board to wait until an action or prosecution is brought against one of the people in a position noted above, and make decisions on a case-by-case basis. A decision by at least two-thirds of all trustees is required to pay the person's defence costs, damages recovered against the person, or both, not just

two-thirds of the trustees present at the meeting. This means that the trustee against whom the prosecution or action is brought can vote on the motion to indemnify himself/herself.

The second approach is more reactive. It allows the board to make individual decisions as the need arises and on the basis of the merits of the case. However, since the board may decide against the indemnification, it does not provide the certainty that some trustees may prefer. In addition, it may appear that the trustees' decision to indemnify one trustee but not another shows favouritism.

The Act restricts the board of trustee's ability to recover costs from individual trustees, officers, employees, or volunteers. If the improvement district is faced with a Court action in its own name, the board of trustees cannot commence a suit against any of these individuals to recover its legal costs or damages unless the claim relates to gross negligence, or the person acted contrary to the terms of their employment or an order given by their supervisor.

When considering the matter of indemnification, trustees may choose to consider the following:

- providing for the indemnification of trustees may reassure potential candidates for office about the limited potential for personal liability;
- indemnifying staff members may assist in attracting and retaining professional staff;
- deciding on a policy as to what positions to indemnify in advance, should avoid the perception of favouritism or bias;
- indemnifying a person can be controversial since the public may perceive that their taxes or tolls are going toward legal fees instead of into the maintenance or operation of services; and,
- enacting an indemnification bylaw may have an impact on liability insurance rates.

Enacting an indemnification bylaw does not necessarily mean that insurance is no longer necessary for trustees, officers, employees and volunteers as a means of coverage against claims.