GOOD GOVERNANCE: A GUIDE FOR CANADIAN FOUNDATIONS

By Hilary Pearson, PFC and Peter Broder, The Muttart Foundation

Philanthropic Foundations Canada 2011

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Disclaimer

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Table of Contents Page

1 Introduction

1.1 Purpose of the Guide

The goal of this practice guide is to provide an outline of the core elements of good governance for Canadian charitable foundations and grantmakers. Our purpose is to provide both practical information and resources for further study and self-assessment. The audience for this guide is primarily the trustees or directors of charitable foundations. We will refer throughout the guide to foundations as a general term for private and public foundations as well as charitable organizations that are grantmakers.

We have written the guide in a "plain language" form. While the content has been prepared with the assistance of lawyers, it is not intended to replace professional advice on specific issues of fiduciary responsibility, and is not a legal document in that sense. Rather, it is intended to be a guide to what governance is, not just from a legal perspective but in the context of an organization with a public benefit purpose.

Being the trustee or director of a foundation is a calling not only to legal and fiduciary responsibility but also to the fulfillment of the charitable vision and/or goals of the organization. Directors commit themselves to pursuing the best interests of the organization and of its beneficiaries to the best of their ability. Charitable foundations in Canada are expected to be working for the public benefit; many if not most of the founding donors of these charities receive a financial incentive from the federal treasury when they establish their charitable foundation because they are acting for the public good. The directors thus play a very important role as the stewards of the foundation's charitable purpose and performance, as well as its financial and legal obligations.

The guide therefore addresses the dual legal context that defines the governance roles and responsibilities of a charitable foundation or organization both as a corporation or trust, and as a charity. It describes a broad governance framework that can be used to guide the board members in defining and fulfilling their roles. To help board members think through their roles further, the guide offers a section on how foundation boards can get into trouble from a governance perspective. Finally, the guide offers an annotated list of the most up to date and useful governance resources for charitable boards.

We have modeled this guide after a similar handbook prepared for the members of Philanthropy Australia, and we are grateful for the inspiration provided by the author of that guide, David Ward. We have also benefited, as our colleagues in other jurisdictions have done, from the work of the U.S. Council on Foundations and its guide to *Stewardship Principles and Practices for Independent and Family Foundations*. All of these sources are listed in our Resources section at the end of this guide.

1.2 Governance: Some Definitions

Before we begin, we will define the term "governance" as it is used in this guide. Governance in the strictest sense is the "framework of rules, relationships, systems and processes within and by which authority is exercised and controlled".[1]

In a charitable foundation, governance is the system of stewardship of the assets and purposes of the foundation for public benefit. More specifically, governance includes stewardship of the organization's:

- mission
- financial assets
- risks
- human resources (particularly leadership) and
- impact

The responsibility of charitable governance is two fold: to ensure that an organization complies with its legal and regulatory requirements; and to ensure that it is working to achieve its charitable purpose. "Nonprofit and private sector experts suggest that effective governance requires an appropriate balance around compliance and performance."[2]

The primary custodians of governance are the directors or trustees of the organization, and it is for them that this guide is intended.

1 Cited in "Governance: The Need To Know" by David Ward, Australian Philanthropy, Winter 2009, Issue 73, p.6.
2 Trower, Cathy. *Govern More, Manage Less: Harnessing the Power of Your Non-profit Board*, 2nd edition, Board Source, 2010, p.3.

2 Understanding the Legal Framework

2

2.1 Federal and Provincial Statutes

To meet their governance obligations, both individual and collective, directors, trustees and like officials[3] must begin by familiarizing themselves with the legal framework within which their foundation operates.

The legal framework imposes various requirements on a foundation, its governing body and the individual members of that governing body. The present text focuses on governing bodies and members of governing bodies, and deals primarily with laws related to how the foundation is constituted and with the requirements of the *Income Tax Act (ITA)*.

In Canada, foundations have the option of being constituted either as a trust or as a corporation, but not as an unincorporated association. As corporations they can be constituted under a federal statute or under the laws of any of the thirteen provincial or territorial jurisdictions. As trusts they would typically be organized and governed by provincial or territorial statute and common law.

Across Canadian jurisdictions, there are a wide range of statutory models with some having detailed incorporation requirements and others allowing a lot of freedom. In some jurisdictions, regulatory authorities have discretion to deny corporate registration, while in others an entity must be registered if it meets all the regulatory prerequisites.

Foundations established as trusts have slightly different legal responsibilities than foundations set up as corporations. Similarly, where the foundation is a corporation, reporting and accountability provisions vary from jurisdiction to jurisdiction. A list of the applicable statutes can be found in the Resources section at the end of this guide.

Foundations that have a charitable purpose must become a registered charity in order to be tax exempt and to issue donation receipts, and so are governed by the relevant provisions of the *ITA*. Once a foundation is registered, it retains possession of its assets only so long as it continues to remain registered.

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3 The text will use "directors" to refer to "directors, trustees and like officials".

Even with the choices available for the legal regime under which a foundation is set up and operated, in most cases the responsibilities of its governing body and of the members of that body are remarkably similar.

The core requirement imposed on the directors is to take sufficient care in exercising their responsibilities. This generally entails efforts to oversee the foundation's operations with reasonable care, and more specifically to act diligently, competently and avoid self-dealing and other conflicts of interest. In certain cases, or with respect to certain assets, additional prudence is required and the degree of engaged, competent and loyal conduct required is more onerous. The duties of directors are described in more detail in Section 4.

In addition to the corporate and tax statutes, other statutes may need to be considered to ensure governance responsibilities are adequately fulfilled. Privacy, employment and fundraising legislation, for example, are the types of legislation that could affect charitable foundations. Compliance with this legislation is usually an operational matter for the charity, but members of the governing body should be aware that such obligations exist. To ensure obligations under other legislation are met, the foundation's governing body should regularly review the laws potentially affecting the organization.

2.2 Federal and Provincial Regulatory Bodies

a) Corporations and Trusts

Industry Canada is the federal agency responsible for not-for-profit corporations constituted under the *Canada Not-for-Profit Corporations Act* (2009). [At the time of writing, this Act had not yet been proclaimed in force; until it is in force, Industry Canada will continue to exercise its regulatory authority in this area under the *Canada Corporations Act* – which is expected to be repealed once the new legislation is proclaimed and corporations constituted under it have been given a chance to transition to the new statute.]

Federally, Industry Canada determines eligibility for incorporation, monitors adherence to the legislation under which the corporation is constituted and processes annual filings.

If provincially incorporated, foundations are supervised under the applicable provincial statutes. Provincial or territorial agencies, usually part of business or consumer services branches of government, perform similar functions to Industry Canada for corporations constituted in their jurisdictions. [Saskatchewan and Ontario are the only provinces with a modernized Not-for-profit Corporations Act].

For a list of federal and provincial agencies who register non-profit corporations, see the Resources section.

If a foundation is a trust rather than a corporation its operation is governed by the provisions of the trust document under which it was created and by common law or statutory requirements related to the treatment of trust assets. The law imposes distinctive obligations on trustees, and these obligations may apply even where a person dealing with trust assets is unaware he or she is acting as a trustee. In cases where a corporation holds trust assets, corporate directors may also be subject to these rules.

In all provinces (except Quebec), the Attorneys General (AG) have a supervisory or parens patriae authority to intervene where charitable assets are at risk, being misused or cannot be applied to the purpose for which they were designated. In Ontario, this jurisdiction over charitable trusts and property has been delegated by statute to the Office of the Public Guardian and Trustee. Outside Ontario, provincial *parens patriae* authority is typically administered by the AG's office and ultimately through the courts on a case-by-case basis, rather than through a specific regulatory agency.

Incorporated foundations have an annual filing requirement, and depending on what jurisdiction they are located in will face a range of rules and obligations related to membership, finances, governance and operational matters. The choice of jurisdiction (federal or provincial) may be determined by factors including the intended location of the foundation's work and whether the legislation imposes mandatory requirements or allows wide latitude in corporate processes.[4]

Charities operating outside the jurisdiction of incorporation may be required to register extra-provincially in the jurisdiction in which they operate. Most provinces and territories do not require registration or annual filings of charitable private foundations if they grant or *occasionally* operate in the jurisdiction, while based in another jurisdiction. Private foundations that carry out *direct* activities in another jurisdiction are likely, however, to be required to register in that jurisdiction.

Entities with offices or substantial operations in multiple jurisdictions are generally required to file an extra-provincial registration in any other jurisdiction where they have a significant presence. Foundations granting across provinces or nationally might choose federal registration.

Finally, depending on the type and scope of activities undertaken by the foundation, it may be subject to additional federal, provincial or territorial regulatory oversight. "For example, when foundations (or grant making entities) become registered under the *ITA* they are designated as private foundations, public foundations, or charitable organizations; based primarily on organizational structure, purpose, and intended activities. Each designation has different implications." Alternatively, this regulatory oversight could include agencies administering laws related to fundraising in the province, charitable gaming, or privacy of personal information.

4 Legal obligations may arise from the subject matter of an organization's work, rather than the jurisdiction of its incorporation. So, for example, provincial incorporation does not exempt a foundation from the federal *Lobbying Act,* if (within its permitted political activities) it exceeds the threshold for lobbyist registration.

b) Charities

The Charities Directorate of the Canada Revenue Agency (CRA) administers the federal regulation of charities registered under the *ITA*. Registration as a foundation or charitable organization exempts these organizations from tax on their income, allows them to issue tax receipts for donations, and also qualifies them to receive gifts from other registered charities. The CRA's mandate includes determining eligibility for registration, assessing compliance with the *ITA* requirements of registered charities and processing and publication of annual filings. The Charities Directorate requires copies of all governing documents for incorporated foundations. This includes incorporation documents and by-laws; for trusts the trust deed. Whenever changes are made to the incorporating documents, trust deeds or by-laws, these should be provided to the Directorate as well.

Separate registration for charities, based either on their purposes or activities, is also required in some provincial jurisdictions. Revenu Québec administers a registration process similar to CRA, which qualifies organizations as charities under that province's tax code. In Manitoba and Alberta, registration is tied to engaging in fundraising, and is not mandatory for organizations that do not solicit public funds.

3 Creating Your Foundation as a Charity

3

Public and Private Foundations

The *Income Tax Act (ITA)* divides registered charities into three categories: private foundations, public foundations and charitable organizations. The designation of a charity depends on its board structure and its mode of operation. Under the *ITA,* any charitable foundation that is not a public foundation is a private foundation.

Whether a foundation is public or private largely depends on what percentage of the foundation assets are controlled by non-arm's length parties and, more specifically, the relationship among a majority of the members of the foundation's governing body. Non-arm's length parties have family, business, or contractual bonds that may lead them to act in concert rather than independently. In a situation where the foundation board is controlled (more than 50% of the members) by a group of non-arm's length individuals, it would be deemed to be a private foundation.[5]

In a proposed change the definition of "public foundation" would be changed so that the source of a foundation's funding (the "contributions test") will no longer be the primary focus. Rather, the new definition concentrates on a two-pronged test that requires an assessment of both the contributions to, and control of, the foundation. If a donor who as contributed more than 50% of a public foundation's funding (first prong – the "contributions test"), has either direct or indirect control over the public foundation's operations (second prong – the "control test"), the public foundation will be deemed a private foundation.

Otherwise, the differences between a private and public foundation are first, a public foundation must grant at least 50% of its income to qualified donees. No such constraint is imposed on a private foundation undertaking its own activities (unless it is found in the foundation's objects or by-laws). In fact, a private foundation can devote 100% of its resources to those activities. That said, in our experience, most private foundations choose to support charitable work indirectly through grants or gifts to charities.

The other difference between public and private is that a private foundation is not permitted to carry on any business activity but a public foundation can carry on a "related business." A related business is considered to be either an activity that is run substantially all by volunteers (i.e. more than 90%) or a business that is linked and subordinate to the foundation's charitable purposes. A chart comparing public and private foundations and charitable organizations can be found on page 9.

5 Before 2002, whether a majority of a foundation's assets were contributed by non-arm's length parties was taken into consideration in determining what category it fell into. But the so-called "contribution test" is no longer considered a defining criterion. However, it has yet to be replaced in law.

Charitable Purposes

In understanding how charities are regulated (and court rulings about corporations or trusts with charitable assets), it is important to understand the concept of "purposes" or "objects". The litmus test both for evaluating organizational performance and for assessing whether directors have satisfactorily discharged their responsibilities is whether an entity's purposes have been furthered.

Charities are subject to a legal obligation to devote their resources exclusively to charitable goals. Generally, government or the courts determine whether something is a charity based on what it is created to do (i.e., its purposes or objectives), and on its activities. Subject to some exceptions, a charity's activities are acceptable so long as they contribute to furthering the charity's purposes. The *ITA* provides that "charitable purposes" include disbursements to qualified donees.

Qualified Donees

- Registered charities
- Registered Canadian amateur athletic associations
- Registered national arts service organizations
- Housing corporations in Canada set up exclusively to provide low-cost housing for the aged
- Municipalities in Canada
- The United Nations and its agencies
- Universities outside Canada with a student body that ordinarily includes students from Canada (these universities are listed in Schedule VIII of the *Income Tax Regulations*)
- Charitable organizations outside Canada to which the Government of Canada has made a gift during the donor's taxation year, or in the 12 months immediately before that period
- The Government of Canada, a province, or a territory
- Under proposed legislation, for gifts made after May 8, 2000, municipal or public bodies performing a function of government in Canada

Source: Canada Revenue Agency

Certain purposes have been considered by the courts to be charitable under common law. They fall into four broad categories:

- advancement of religion
- alleviation of poverty
- advancement of education
- other purposes beneficial to the community in a way the law regards as charitable

The fourth category is populated by purposes that the courts have found to exhibit demonstrable public benefit and to be analogous to purposes previously determined to be charitable, for example cultural institutions such as museums and charities devoted to environmental conservation.

Unlike most business corporations, which can pursue profit in any way they like (so long as it is not illegal), charities must continue to work toward achieving the purposes for which they were established, or they risk losing their registered charitable status.

Comparison of Registered Charities

	Private Foundation	Public Foundation	Charitable Organization
Relationship between directors and control by donors	Not required to have more than 50% of directors/trustees at arm's length	More than 50% of directors/ trustees must deal with each of the other directors at arm's length	More than 50% of directors/ trustees must deal with each of the other directors at arm's length
Disbursement Quota	Where assets not directly used for charitable purposes or administration exceed \$25,000, at least 3.5% of such assets must be disbursed annually	Where assets not directly used for charitable purposes or administration exceed \$25,000, at least 3.5% of such assets must be disbursed annually	Where assets not directly used for charitable purposes or administration exceed \$100,000, at least 3.5% of such assets must be disbursed annually
Business Activities	No business activity permitted	May carry on a related business	May carry on a related business
Granting Activities	May carry on their own charitable activities, or make grants; no requirement to give more than 50% of income annually to qualified donees	Must give more than 50% of their income annually to qualified donees	Carry on their own charitable activities. May grant to qualified donees but may not disburse more than 50% of their income annually to qualified donees
Organizational Form	Must be organized as either a corporation or a trust	Must be organized as either a corporation or a trust	Must be organized as a corporation, unincorporated association or charitable trust
Borrowing Activities	Cannot incur debts other than debts for current operating expenses, purchase and sale of investments, or administration of charitable activities	Cannot incur debts other than debts for current operating expenses, purchase and sale of investments, or administration of charitable activities	Do not have the restrictions applicable to foundations
Control of Other Corporations	Cannot acquire control of any corporation	Cannot acquire control of any corporation	No restriction

Source: Revised from Teresa Man and Terrance Carter, Carter & Associates, www.carters.ca.

4 Duties of Directors

The key focus of responsibility for directors is their fiduciary obligations. Because they are responsible for holding and dealing with assets that are not their own, directors are required to conduct themselves with a certain standard of care in directing and overseeing the foundation. Although the titles of those serving on governing bodies vary from organization to organization, the fiduciary duties of these individuals are usually quite similar.

It should be noted that generally, the law considers corporations, and – to a somewhat lesser extent – trusts, to have a distinct legal capacity from their members, directors, settlors, trustees or beneficiaries. So, for most routine actions or day-to-day activities taken on the entity's behalf, directors or other officials serving on governing bodies are not personally responsible.[6]

4

4.1 The Standard of Care

The legislation or common law under which the foundation was established or operates generally determines the standard of care that applies to particular actions of directors. The law imposes a somewhat higher standard of care on trustees than on corporate directors, particularly in regard to rules about investment decisions and situations where there are potential conflicts of interest. In some instances, this higher standard of care may apply even though the trust assets are held by a corporation and the responsible individuals are acting as directors of the corporation.

The **three standards of care** that apply in various circumstances include the subjective standard of care for directors, the objective standard of care for directors and the trustee standard of care.

- The *subjective* standard of care requires reasonable conduct taking into account the qualifications of the person taking the decision or action.
- The *objective* standard of care requires reasonable conduct of the person taking the decision or action.
- The *trustee* standard of care requires prudent conduct by the person taking the decision or action in accordance with what the conduct would have been had the assets been the person's own.

6 There can be exceptions to this, such as when a director contracts on behalf of a corporation that has yet to be constituted or without proper authorization. Another exception may be where an employee engages in a tortious act (a civil wrong) and the directors were aware of the risk of such an act and did nothing to manage against the risk of the act being committed.

In practice, there is often imprecise or limited guidance available on the distinctions between these different standards and on when they may be applicable, so it is advisable that directors always exercise abundant caution and carefully manage risk in fulfilling their responsibilities. Under the new *Canada Not-for-Profit Corporations Act*, for corporate purposes the standard of care will be objective. Any foundation that is federally incorporated should pay attention to the provisions of this Act. They should also be mindful that the legislation governing charitable property in the province in which they operate may impose the higher trustee standard because they are controlling charitable property. The new federal Act spells out the common law objective duty and also provides a due diligence defense that allows a director to avoid personal liability arising out of his or her duties as a director if he or she has acted in good faith and/or relied on professional advice even if a mistaken decision is made. But it is not clear this would prevent directors being held to a higher standard under provincial law.

4.2 Specific Duties of Directors

Directors must always act in the best interest of their foundation. Broadly, key aspects of the duties they must fulfill include the following:

Duty of Skill or Competence

In carrying out their functions, directors must use an appropriate degree of skill or competence. The requisite skill or competence is defined more precisely by the standard of care. As noted previously, there are variations on the strictness of the standard, with the reasonableness of a director's actions sometimes assessed against what a similarly qualified director would have done, sometimes against what a director regardless of qualifications would have done, and sometimes against what a director would have done had he or she been dealing prudently with his or her own assets. The statutory and common law framework and the nature of the asset being dealt with are the factors considered to determine the appropriate standard. As a general rule, the courts do not hold directors liable where there is a mere error in business judgment or where they have entrusted certain business matters to the officers of the corporation and there are no grounds for suspicion that the officers did not warrant that trust.

Duty of Diligence

This duty requires that directors act with diligence, and that decisions or actions are well-informed and adequately considered. Each member of the governing body has an obligation to devote the time and effort to understand his or her responsibilities, to gain a good grasp of the matters that arise in the governance of the foundation, and to contribute to the work of the governing body. Beyond attendance at meetings, this usually also entails sufficient preparation to deal with matters considered by the governing body, an obligation to keep apprised of issues addressed when one is absent from meetings, and tasks such as committee assignments. Governing bodies should convene frequently enough so that matters can be dealt with in a timely manner and fully deliberated.

Duty of Loyalty

This duty requires that directors act honestly and in good faith, and always take decisions or actions based on the best interests of the foundation. They cannot delegate their responsibility for governance as directors to others (although they may and in many cases do delegate the day-to-day operational functions to staff or volunteers). They must avoid acting in their own interest, in the interest of any party to which they have a contractual or familial connection or in the interest of any other organization with which they have an affiliation. Also entailed in this obligation is the responsibility to treat the deliberations of the governing body and, where appropriate, the affairs of the foundation, in confidence.

Trust Considerations

The fiduciary responsibilities of directors of charities may be considered to be stricter than those for directors of non-charitable entities. This is generally because the assets of the charity are considered to be held by the charity (whether established as a trust or corporation) in trust for public benefit (consistent with the charitable purposes).

Directors of corporate charities need to be mindful of this higher standard and should understand the duties imposed on them by the legislation they are established under and any other legislation which may apply (for example the Trustee Act in the province may deem the directors of a charity to be holding the assets as trustees).

If the charity is established as a trust, the trustees should be sure they understand their powers and responsibilities as established under the trust and the applicable trust legislation to ensure they meet the standard established. Subject matter such as the requirements for investment of trust assets or conflict of interest rules may be different for trust assets and this should also be kept in mind by trustees.

5 The Governance Framework

5.1 Roles of the Foundation Board

The board of a charitable foundation has all of the responsibilities of any nonprofit board, which include responsibility for ensuring that competent leadership is in place, that financial and legal responsibilities are carried out effectively and that assets are protected, and that risks are identified and managed adequately. In addition, registered charitable foundation boards have a very important role in ensuring that the charitable purposes of the organization are well defined and that the foundation focuses exclusively on carrying them out.

Our colleagues in Australia have defined three key areas of governance[7] for charitable foundation boards functioning primarily as grantmakers:

Investment: the investment of assets to protect their real value and to generate a flow of income over time

Administration: the processes of managing the foundation so that it is in compliance with its legal and regulatory requirements

Grantmaking: the distribution of foundation income to qualified donees according to donor wishes and in compliance with all legal requirements concerning grantmaking.

These are the areas in which directors of grantmaking foundations *must* be familiar with all legal governance obligations and *must* keep up to date with any changes in law or regulation.

In practice, directors *should* also undertake further activities that are important to the effectiveness and impact of a foundation. These include:

- defining and revising vision and mission
- developing a strategic plan
- evaluating the performance of executive leaders
- accounting to grantees, and other members of the public
- evaluating board effectiveness

7 *Trustee Handbook: Roles and Duties of Trustees of Charitable Trusts and Foundations in Australia*, by David Ward, Philanthropy Australia, 2008.

In addition, those foundations that carry out their own direct charitable activities will have to be familiar with the compliance obligations that relate to those activities. This guide is focusing on the compliance requirements, but there are other resources on the broader governance responsibilities of effective foundation boards that are listed in the Resources section at the end of the guide.

5.2 Establishing a Governance Framework

The most important element of a governance framework is the organizing document of a foundation. This can be the articles of incorporation of an incorporated foundation or through a trust document for a foundation set up as a trust. If the foundation is incorporated, it will have by-laws. Basic organizational by-laws are fairly standard and are drafted by legal advisors routinely when foundations are incorporated. They specify such things as the purpose of the organization, its location, its membership, board of directors, and powers and authorities, among other things. The by-laws are the legal rules that *must* be followed.

The governance framework of a trust, on the other hand, is established by the provisions of the trust document, together with the common law and statutory or regulatory requirements of the applicable jurisdiction. The courts have broad powers to supervise the proper use of charitable assets held in trust (whether held by a corporation or a trust). They can also re-direct the assets when they can no longer be put to their original intended use. It usually falls to the Attorney General of the particular jurisdiction to initiate an action or application dealing with charitable property.[8]

In addition, as part of its governance framework, a foundation can choose to have an articulated statement of mission or purpose that is more specific or written in language that is meaningful to the donor and directors. As a registered charity, a foundation must have stated charitable objects or purposes that are approved by the CRA and that frame its activities (in other words, its activities must be demonstrably in support of its stated purposes).

A foundation may also adopt some written policies to guide its directors and staff. More and more frequently now, charitable organizations are adopting (and making public) specific policies with respect to confidentiality, conflict of interest and ethical conduct. Other governance policies that could be articulated include a statement about the role of the board, mandates for any board committees, qualifications of directors, and board self-evaluation.

Finally, governance frameworks include sets of practices that are followed by directors and staff. Some of these practices relate to ensuring that the foundation is complying with all legal requirements. The board can ensure that the foundation is in compliance by directly participating in activities (such as investment reviews), or by broad delegation of responsibility to staff or volunteers with policy parameters to guide or direct organization conduct.

8 Ontario is the only jurisdiction that currently has a regulatory body specifically mandated for this purpose.

Checklists are a useful way of ensuring that a board is aware of and following through on its responsibilities. CRA has provided a model checklist[9] and others are listed in the Resources section at the end of the guide. It is good practice to perform an annual self-assessment or evaluation of the board's activities to confirm that it is pursuing its duty to ensure that the foundation meets all legal requirements.

5.3 Sharing Information about the Framework

Public expectations of transparency and disclosure are increasing in contemporary Canadian society. A foundation's willingness to disclose the names of directors and staff, and other information such as foundation policies and processes is helpful to beneficiaries and fulfills a charitable foundation's moral obligation to act openly and for the public benefit. It also helps to reduce pressure on regulators to require additional mandated legal disclosure, although there is a trend in this direction. Information required and publicly reported by the CRA has expanded in recent years, for example, to include names of directors, and compensation ranges of senior staff.

Some foundations produce an annual report highlighting major programs or activities, and outcomes. Increasingly, foundations are creating web sites as a way of making themselves more transparent and accessible. As part of an annual report or on its site, a foundation could outline granting criteria, application processes and evaluation reports. Policies dealing with conflicts of interest, and management of personal information could also be included. The extent of this type of disclosure will depend on the mission and values of foundation directors and on the expectations of beneficiaries.

It is a good practice for boards to prepare a dossier for their directors that is kept up to date and that includes all the key documents relevant to the governance framework. A useful checklist is provided on page 19.

Basic Guidelines for Maintaining Charitable Registration

- Engage only in allowable activities
- Keep adequate books and records
- Issue complete and accurate donation receipts
- Meet annual spending requirement (Disbursement Quota)
- File annual T3010 information return
- Maintain the charity's status as a legal entity
- Inform the Charities Directorate of any changes to the charity's mode of operation or legal structure

Source: Canada Revenue Agency, www.cra-arc.gc.ca/E/pub/xi/rc206/rc206-e.pdf

9 Basic Guidelines Checklist, www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/menu-eng.html

5.4 Governance of Investment

A well-articulated governance system for managing investments is essential to charitable foundations. This system should include:

- a clearly defined investment policy with specific objectives aligned to charitable mission and purpose
- linkage between investment policy and spending policy (the budget and grantmaking fund requirements of the foundation)
- an investment strategy that matches risk tolerance and asset allocation to a foundation's time horizon and charitable goals
- a well-informed and expert investment committee that either carries out the investment strategy or works with outside managers[10]

There are many good resources on the governance of investments available to foundations and we list some of them in the Resources section of the guide.

A Note on the Excess Business Holdings Rules

Directors of private foundations need to be aware of the complex rules set out in the *ITA* regarding corporate holdings by private foundations and related parties. These were introduced in 2007. The holdings must be reported on the annual reporting form to CRA. Divestiture requirements are specified if foundation holdings exceed certain limits. Foundations are subject to financial penalties and other sanctions, including revocation of their registration, for reporting failures or for not meeting divestment requirements.

Informed and full disclosure by directors as non arm's-length parties, and assistance in identifying shares held by relatives or business associates who may also be non-arm's length is crucial for the foundation to be in compliance with this aspect of the *ITA* requirements governing private foundations.

5.5 Governance of Administration and Grantmaking

The directors and trustees bear ultimate responsibility for the actions of the foundation, as well as for their own actions. Even if operational details or routine administration is delegated to staff, the members of the board are responsible for ensuring compliance through good internal policies and practices.

Much of the work of governance around administration and grantmaking consists of establishing and checking on such policies and practices. In the next section, we identify and expand on the most important policies and processes, through the device of identifying what happens when they are not in place.

10 *Strong Foundations* by Janet Rabovsky, www.BenefitsCanada.com, August 2009.

Checklist for Director/Trustee Dossier

It is recommended that each foundation provide a dossier for directors or trustees as a basic reference document containing the following:

- Governing documents (such as certificate of incorporation, letters patent, memorandum or articles of association, a constitution, trust documents, and by-laws)
- Notification of CRA registration
- Most recent T3010 report to CRA
- A summary of the legal structure of the foundation
- By-laws of the foundation
- Ethical code
- Mission statement
- Strategic plan
- A copy of all foundation policies:
    - Conflict of interest policy
    - Board Code of Conduct policy
    - Confidentiality policy
    - Investment policy
    - Granting policy
    - Employment policy
- Minutes of most recent Board and AGM meetings
- A list of directors/trustees and terms (including declared conflict of interest)
- Board mandate (roles & responsibilities)
- Sub-committee terms of reference
- Financial/budget information
- A copy of this guide

The dossier should be reviewed regularly to ensure all documents remain current. There should also be an orientation program for new directors to ensure they are fully aware of their legal responsibilities and the operational procedures of the foundation.

6 Common Governance Mistakes

Governance failures among foundations in Canada are uncommon. Those that occur often stem from lack of knowledge of legal requirements, rather than deliberate wrongdoing. The most common governance mistakes are those that can be easily corrected with the help of professional advisers (lawyers, accountants, auditors). The federal government (CRA) has the capacity and obligation to audit foundations as registered charities. Audits can be triggered by complaints from others or if the CRA staff notices too many "red flags" in the annual T3010 report, or simply at random. Therefore, directors should be diligent in checking the performance of their organization against lists of common governance mistakes.

This guide offers a list of ten common governance mistakes made by foundations, loosely divided between policy and process. It is not an exhaustive list and other mistakes are possible. But these are those most commonly checked by regulators.

Top 10 Governance Mistakes

Policy Mistakes:

- Not understanding the legal framework
- Self-dealing and conflict of interest
- Not managing risk
- Not being a prudent investor
- Inappropriately compensating board members

Process Mistakes:

- Not enough disbursements
- Making grants to non-qualified donees
- Failing to file required reports
- Not holding formal meetings or keeping adequate records
- Carrying on a business or in the case of public foundations an unrelated business

6.1 Policy Mistakes

a) Not Knowing The Legal Framework

All directors should be familiar with the basic legal framework (as described in Sections 2 and 3 of this guide) of their organization. This means that each director should be familiar with the letters patents or articles of incorporation of incorporated foundations, or trust document, by-laws, charitable objects and any other constituting documents (such as a statement of donor intent). Failure to become familiar with these basic rules is at the root of many later governance failures. To remedy this, as we have suggested in Section 5.3, it is very helpful to create and circulate a dossier that describes the legal framework. This is a dossier that should be reviewed and updated as often as necessary and certainly made available to each new director.

b) Self-dealing and Conflict of Interest

Self-dealing and conflict of interest are of major interest to regulators and to the public, in a negative sense. These mistakes by directors are enough to cause a foundation to lose its status as a charity and to be sanctioned monetarily, as well as to provoke public criticism.

The *ITA* penalizes undue benefits which may be received by donors or persons related to the donors. In the private foundation world, the donors and directors and staff may very well be the same people or at least be related. Family members and others who are related to donors in a non-arms length relationship should not enter into transactions with the foundation as they may be deemed to be receiving an undue benefit.

Examples of the kinds of transactions that could give rise to an undue benefit include:

- sale, exchange or lease of property
- loans
- extensions of credit
- furnishing goods and services to a director
- investments in a director's companies

If there is any question concerning transactions between directors and the foundation, it is very important to obtain legal advice and to be well aware of both federal and applicable provincial statutes.

Conflict of interest is also an area where directors must be especially scrupulous to avoid mistakes. Examples where a conflict of interest may be apparent include:

- a director entering into a paid contract for services with the foundation of which he/she is a director
- a director being involved in a decision to grant to an organization of which he or she is also a director

To avoid such mistakes, it is good practice to have a written conflict of interest policy to which each director signifies his or her adherence annually or at a minimum when he or she starts on the board.

c) Not Managing Risk

Every foundation faces certain risks, both internal and external, to the fulfillment of its mission and its operations. Examples include: failures or absence of leadership, financial market volatility, misjudged investment strategies, fraud or misbehaviour by grantees, over-commitment of funds, etc. It is the responsibility of directors to be vigilant about these risks and to have strategies to address them. Acting reasonably and in the best interests of the foundation, and making careful and well-informed decisions are ways in which directors can demonstrate good governance. The courts will not usually second guess operational decisions that turn out to be wrong but were duly considered at the time they were made.

It is a good practice to review key risks on an annual basis and to evaluate risk management and mitigation strategies. This process provides an opportunity to address changes in the external environment (e.g., implementation of a new government policy) or internal matters (e.g., succession planning). The Resources section includes reference to a legal risk management checklist.

d) Not Being a Prudent Investor

This mistake is a subset of the mistake of not managing risk. It is an area that is specifically singled out by provincial statutes since provinces have oversight of charitable investment policies and activities. The provincial Trustee Acts spell out expectations of the "prudent investor."

The key as far as regulators are concerned is to demonstrate prudence in investing assets across the portfolio. It is not prudent to leave assets idle; but it is equally not prudent to invest in too many overly risky assets. The regulators like neither speculation nor excessive conservatism. Balance is important.

Many questions face today's foundation directors in the area of investment governance. For example, to what extent must directors ensure that a well-defined mission and intent guide their investment decisions? Should directors consider the impact of extra-financial factors on investment return? Is mission-driven investment now part of a foundation's obligation to manage charitable intent, in a balanced portfolio approach? As mentioned in Section 5.4, a good governance system for investment management is an essential element in avoiding mistakes in this area.

e) Compensating Directors

The CRA's view is that directors may not be compensated for acting as directors of charitable foundations. In Ontario, a director cannot be paid under any circumstances unless permitted by court order. In other provinces, regulation is silent on compensation but typically, service as charity director is considered to be voluntary. However, reimbursement for expenses is commonly allowed. And foundations can compensate individuals who serve on advisory committees. Family members can be hired as paid staff at fair market rates, which should reflect value for money, and take into account the expertise of the individual and the circumstances of the organization. But it is not possible to hire family members if they are already directors.

Where a director does receive some fee, it must not be excessive. CRA looks for a record of paying reasonable and comparable fees. The appropriateness of the payments can be challenged in court, so it is important for boards to check for benchmarks and comparable compensation practices. There is greater flexibility in the compensation of trustees if the trust document specifically permits it.

6.2 Process Mistakes

a) Not Making Enough Disbursements

All charitable foundations are required by the *Income Tax Act* to disburse an amount equal to 3.5% of their invested assets (or property of the charity not used directly in charitable activities or in administration) annually. This amount can be calculated on a 24 month rolling average of the value of the assets. This is a fundamental requirement and it would be a basic mistake of governance for foundation directors not to assure themselves that the foundation has met its disbursement quota.

It should be noted that the disbursement quota can be met either by making grants to qualified donees or by funding a foundation's own charitable activities if allowed by the foundation's charitable objects. As noted in Section 3, private foundations can devote all of their income to their own charitable activities, while public foundations cannot disburse more than 50% of revenue on their own charitable activities.

b) Making Grants to Non-qualified Donees

Foundations cannot grant to individuals or to organizations that are not charities. Directors must take note of the categories of qualified donees including a list of registered charities maintained by CRA. This is noted in Section 3. Penalties for making such grants to unqualified donees can be severe: up to 105% of the amount gifted or possibly revocation of status. It is not permissible to make a grant to a charity as a way of getting it to a non-qualified donee, although it is possible to enter into a written agreement with a non-charity to carry out work on behalf of the foundation if its objects allow. It is not permissible to make a grant that supports partisan political activities although it is permissible (within the limits set out in the *ITA*) to engage in or fund activities that involve informing or enlisting support of policy makers or the public in furtherance of the foundation's charitable purposes. Directors should check the foundation's records at least annually to ensure that these rules are followed.

Foundations must also maintain sufficient direction and control over the use of their charitable assets. Intermediaries of foundations must document and formally report on their activities on behalf of a foundation, and the foundation must be able to demonstrate that it retained direction and control over use of its resources or assets if they are disbursed on activities inside or outside Canada. For foundations working overseas, this may entail regular and careful documentation of activity in remote locations, which may be logistically challenging. However, a registered charity that fails to adequately document the use of its resources for charitable ends risks revocation of its registration or other penalties under the *ITA*.

c) Failing to File Required Reports

All jurisdictions require that foundations, if constituted as corporations, file an annual report. If the foundation is incorporated, a report must be filed with the appropriate provincial or federal registrar. Many statutes provide for monetary or other penalties against corporate directors or like officials, if the reporting requirement is not met. The *ITA* also requires that all registered charities file an annual report (T3010 series) within six months of their fiscal year-end that details governance, purposes, programs and activities, finances, as well as other information (such as gifts to qualified donees and methods of fundraising). Portions of this report are publicly available once filed.

Timeliness is important and penalties for late or non-filing are severe, including monetary penalties and revocation of status by CRA.

In addition to the T3010 form, registered charities are required to submit financial statements, although there is no *ITA* requirement that these be audited professionally and no specified form they must take. CRA does not require but believes that it would be useful to have an independent audit by a qualified practitioner where revenues exceed $250,000 per year or assets exceed $1,000,000.

However, federal and provincial incorporation statutes may specify that some foundations that are incorporated must have financial statements prepared, whether they must be audited and who is qualified to audit them. These statutes also generally indicate whether such statements need to be disclosed publicly or are to be made available only to members of the corporation. In some cases, certain levels of financial disclosure are mandated as part of the registration requirements associated with fundraising legislation or other statutes.

d) Keeping Inadequate Records

Foundations, like all registered charities, have a statutory obligation under the *ITA* to maintain adequate books and records. These books and records must be sufficient to:

- verify receipted donations and other revenues
- verify exclusive use of resources on charitable work
- verify that the purposes and activities of the foundation continue to be charitable

Basically, the books and records must be complete enough so that CRA can be satisfied that the foundation continues to meet all the requirements of being a registered charity. As well, the charity's records serve as a cross-check against claims for donation tax credits filed by individual taxpayers.

Key books and records include, but are not limited to: copies of official donation receipts; minutes of director/trustee meetings; minutes of member meetings; the entity's governing documents and by-laws; copies of 10-year gift agreements; general ledgers and other financial records, as well as year-end statements and other financial summary materials; contracting and personnel documentation; source deductions and taxes payable; correspondence; publicity brochures; and any other documents that provide details about a charity's activities including agreements for activities outside Canada.

CRA guidance indicates that books and records must be kept in Canada and CRA prefers that such records be kept in either English or French. Generally, it is not necessary to translate receipts until CRA requests proof of a particular transaction during an audit.

Books and records must be retained in accordance with the time periods provided for in the *ITA*. These periods vary based on the nature of the book or record, but frequently the expectation is that the document be retained for six years. Reference should be made to CRA guidance in this area before destroying past documents. Charities are subject to revocation and other penalties if they fail to retain adequate records.

Separate from *ITA* books and records requirements, legislation under which private foundations constituted as corporations are incorporated may specify what books and records must be kept by the corporation. Where the foundation is constituted as a trust, it may also be subject to common law or statutory rules mandating the keeping of books and records.

Financial records, particularly annual reviews, are also important. The most basic financial review is a review by a layperson, with no requirement for special training or independence from the organizations whose statements are being reviewed. More familiar is an assessment by an independent third party with specialized financial knowledge. This can take the form of a full audit by someone who meets the criteria specified in the statute under which the entity was incorporated. It can also take the form of a "review engagement", which is a less onerous evaluation that is again done by a qualified practitioner. Review engagements are generally less expensive, and can be useful when the scope of the foundation's financial activity do not justify the cost of a full audit. Both a full audit and a review engagement may be completed in accordance with what are known as Generally Accepted Accounting Principles (GAAP).[11]

11 Note that GAAP requirements are sometimes at odds with the methodology for calculating amounts that must be reported on the T3010, which may mean that figures from the T3010 and the financial statements are difficult to reconcile.

e) Carrying on a Business

Directors of private foundations should be aware that these foundations are prohibited by the *ITA* from carrying on any business, including any investment in limited partnerships. Public foundations and charities on the other hand are permitted to run or to own a related business, as long as it is linked and subordinate to mission or largely (at least 90%) run by volunteers. The CRA has published guidelines that distinguish between business activities and charitable activities and between permissible and impermissible business activities. Directors should refer to the guidelines if the foundation contemplates carrying on a business.

7 Conclusion

This guide has been developed with the purpose of demystifying foundation governance, particularly as it applies to compliance. A central message of the guide is that governance mistakes can be avoided with due diligence, knowledge and care. Directors should inform themselves as well as they can about the applicable laws, regulations and expectations that will shape their conduct and that of the organizations that they govern.

We hope that as you come to the end of this guide you have a clearer idea of what constitutes good practice in foundation governance today. To summarize, we provide the following checklist of Good Governance Practices. These are not focused only on compliance requirements, which have been the focus of the preceding sections. They should be seen more generally as good practices that directors should consider as a way of ensuring that they are governing well and effectively.

Good Governance Practices for Foundation Boards

- Perform an annual self-assessment or evaluation of the board's activities to ensure that the foundation meets all legal requirements.
- Maintain an up to date dossier for directors that includes all key documents relevant to the governance framework.
- Commit to transparency by making public the foundation's granting objectives, criteria, and application processes.
- Have a written conflict of interest policy to which each director signifies his or her adherence annually or at a minimum when he or she is first elected.
- Review major risks to the foundation on an annual basis and evaluate risk management and mitigation strategies.

We close with a word of advice for directors, which we have borrowed from Richard Bridge, a Canadian charity lawyer:

« Act honestly, in good faith, and in the best interests of the organization, avoid personal interests that conflict with the organization's interests, and apply your best judgment to each decision. »[12]

If you act accordingly, as a director, you will indeed be practicing good foundation governance in the public interest.

12 Richard Bridge, www.lawyerforcharities.ca.

Glossary of Governance Terms for Charities and Nonprofits

A

Ad hoc committee
A temporary committee or task force established to address a specific issue.

Advisory council
A group created to advise and support a nonprofit and its board, also called advisory group, advisory committee, or advisory board; usually focuses on a specific issue.

Agenda for meetings
An outline for what will be discussed at a meeting; provides structure for a meeting.

Annual return
A document required to be filed in the jurisdiction of incorporation once per year which confirms basic information about the structure and operations of a corporation.

Arm's length
This term describes a relationship where individuals are independent of each other and are not related. Related persons are individuals who are related by blood, marriage or common-law partnership, or adoption. Related persons also include individuals or groups and the corporations in which they have a controlling interest. Persons related to these individuals or groups are also considered related to those corporations.

Articles of incorporation
A document creating a corporation, which provides the corporation's purpose and structure and is filed with the appropriate government agency on the incorporation of a business or not-for-profit corporation.

Articles of amendment
A document filed with the appropriate government agency subsequent to articles of incorporation which amends the provisions of the articles of incorporation.

Assets
All money and property owned by an organization.

Association
A membership organization that may be incorporated or unincorporated.

B

Board development
A process of building effective boards and educating board members about their governance role.

Board of directors
The governing body of a corporation; the board has specific legal and ethical responsibilities to the organization.

Business Judgement Rule
The principle that decisions taken by a governing body which were reasonable and in good faith, in light of the circumstances and available information when the decision was made, will not be considered negligent even if they turn out to be wrong.

By-laws
Regulations adopted by a corporation for its internal governance. By-laws often provide the methods for the election of directors, the appointment of officers and the description of their duties, the creation of committees, and the conduct of meetings, etc.

C

Canada Corporations Act (CCA) Part II
The Act which sets out the legal and regulatory framework for federally incorporated not-for-profits.

Canada Not-for-Profit Corporations Act
The act (expected to come into force in 2011) that governs every federally-incorporated non-profit organization. Once legislation is enacted, all non-profit corporations governed by Part II of the *Canada Corporations Act* will be required to apply for a certificate of continuance to maintain their incorporated status under the new regime.

Canada Revenue Agency (CRA)
The federal agency responsible for registering and monitoring charities for compliance with the Income Tax Act.

CEO
The chief executive officer; top staff position of a nonprofit organization or a for-profit company.

Chair
Elected leader of the board; the chief volunteer position in a not-for-profit organization.

Charter
The legal organizational document for a nonprofit; also known as the articles of incorporation or articles of organization.

Charitable objects (or Purposes)
An organization's objects (sometimes called purposes) are found in its formal governing documents. They describe and identify the reason(s) for which the organization was created, and what it intends to do. In essence, the objects authorize an organization to carry out certain activities and not others.

Code of conduct
The ethical standards expected of every board member.

Committee
A subgroup of a board organized to help manage the board's work.

Confidentiality policy
A board policy defining unauthorized and improper disclosures of confidential information by board members.

Conflict of interest
A situation in which the personal or professional concerns of a board member or a staff member affect his or her ability to put the welfare of the organization before personal benefit.

Consent agenda
A component of the meeting agenda that groups routine items and resolutions as one agenda item.

Constitution
A legal document that sets out the fundamental principles and structure of an organization that is not a corporation.

Corporation
A legal entity that exists in perpetuity until it is dissolved; a 'fictitious person,' separate from its managers or governors, usually given the same rights and obligations as natural persons.

D

Director
An individual elected by the members to supervise the management of the corporation. The directors of a corporation are collectively referred to as the board of directors. Both federal (Canada) and Ontario Corporations are required to have one or more directors, a majority of whom must be resident Canadians.

D&O (Directors' and Officers') insurance
Insurance that protects board members and top staff from liability created by board decisions or actions.

Dissolution (see also Winding up)
The act of terminating the legal existence of a corporation and distributing its assets. Dissolution may be voluntary or involuntary.

Due diligence
Reasonable efforts by the foundation and/or its governing body to ensure adequate measures are in place to manage risk and steward the organization's resources, in accordance with the foundation's charitable purpose.

Duty of care
A requirement that a board member exercises reasonable care when making decisions.

Duty of loyalty
A requirement that a board member remains faithful and loyal to the organization.

Duty of diligence
A requirement that a board member makes a reasonable effort to participate in decisions and keep informed about matters related to the foundation's governance.

Duty of competence
A requirement that a board member will discharge his or her governance responsibilities with reasonable skill and ability.

E

Emeritus status
An honorific title usually given to a former board member who is invited to stay on board as a non-voting member in an advisory capacity.

Endowment
A fund or collection of assets whose investment earnings support an organization or a specific project.

Ex officio
"By reason of their office"; a person serving on a board, usually but not always as a non-voting member, due to his or her position within the organization rather than through elections.

Executive committee
A committee that has specific powers, outlined in the bylaws, which allow it to act on the board's behalf when a full board meeting is not possible or necessary.

Extra-provincial corporation
A corporation registered in one province which carries on business in another province (i.e. opens a permanent office) can register in the second province under its corporate name as an extra-provincial corporation.

F

Federal incorporation
Incorporation under the Canada Corporations Act (Part II for not-for-profits). Federal Corporations, otherwise known as Canada Corporations have the constitutional right to carry on business under their registered corporate name within any Canadian province or territory, subject to any provincial or territorial requirements. This type of corporation can therefore operate across Canada under its own corporate name.

Fiduciary duty
One of a number of duties owed by directors to the corporation. The duties include loyalty, care, diligence and competence. A responsibility of board members and the nonprofit board as a whole to ensure that financial and other resources of an organization are sufficient and handled properly.

Financial audit
A review of financial transactions and activities of an organization.

Fiscal year
A period of twelve consecutive months chosen by a corporation as the accounting period for annual reports.

Fiscal agent
An organization or a legal entity managing the funds for a nonprofit organization.

G

Gift
Generally, a voluntary transfer of property without consideration; as the term "grant" is not used in the ITA, a transfer of property by way of a grant from a foundation, although not receipted for income tax purposes and usually subject to spending or performance conditions, is usually treated as a gift.

Governance
The legal authority of a board to establish policies that will affect the life and work of the organization while holding the board accountable for the outcome of such decisions.

Governance committee
A committee responsible for recruiting, orienting, and training of board members, as well as the maintenance of appropriate governance policies and systems for the organization.

Governing documents
Documents that establish an organization and govern its operations. Some examples are letters patent, articles of incorporation, memorandum or articles of association, constitution, trust documents, and bylaws.

I

In camera session
A meeting of a board in which no staff are present.

Incorporation (Incorporate)
The act of forming or creating a corporation by filing the required documents.

Insider
A board, staff, or family member of a board or staff member who has influence on the decisions made by the organization.

Intermediate sanctions
ITA penalties for charities that engage in certain forms of non-compliance.

J

Jurisdiction
A geographic area or subject in which a particular court or government has authority.

L

Legal audit
A process of systematically reviewing all legal documents and processes, usually with professional help.

Liability
Usually refers to a financial debt or commitment but can also refer to any legal responsibility, duty, or obligation.

M

Membership organization
A nonprofit that grants its members specific rights to participate in its internal affairs.

Minutes
A written record of the matters discussed, and decisions made at a meeting. They are generally presented to a subsequent meeting of the same group for approval.

Minute book (Corporate minute book)
A binder or book containing corporate records, documents, registers and resolutions of the corporation. All corporations must maintain an up-to-date minute book pursuant to statute.

Minutes (Organizational)
The initial resolutions of members and directors which set up the corporation's structure. Organizational minutes typically appoint directors and officers and approve the by-laws of the corporation.

O

Officer (see also Signing officer)
An individual appointed by the director(s) of a corporation to manage the daily affairs of the company, such as President, Vice-President, Treasurer, Secretary, CEO, CFO, etc. Although officer positions are distinct from that of director, officers can also hold the position of director.

Orientation
Educating board members on their roles, responsibilities, their organization, and how the board works.

P

Policy
A written guideline used to influence and determine decisions or actions about a specific issue.

Policy manual
A book in which all policies are compiled.

President
A term used to describe the chief volunteer officer or the chief staff officer of an organization.

Provincial Incorporation
Incorporation under the corporate statute of a particular province.

Q

Qualified donee
Qualified donees are organizations that can, under the *Income Tax Act*, issue official tax receipts for gifts that individuals or corporations make to them.

Quorum
The fixed minimum number of people entitled to attend a meeting who must be present for business to be conducted. Corporate by-laws may specify the minimum number of directors who must be present at a meeting of the board of directors or the minimum number of members who must be present at a members' meeting. If the bylaws do not set out the rules for a quorum, they are usually set out in corporate legislation.

R

Registered office
The address to which all corporate documents are sent. A provincially incorporated business must have its registered office within the province of incorporation. A federally incorporated business must have its registered office within Canada. The address of the registered office does not have to be the actual place of business but it usually cannot be a post office box.

S

Secretary
An officer position that involves taking minutes and keeping records and archives of the board.

Self-assessment
A process by which the board evaluates its own performance.

Signing officer
An officer of the corporation who is authorized to sign documents on behalf of the corporation, and who can legally bind the corporation.

Staggered term limits
An organizational structure where board members' terms expire in alternating years.

T

Term limits
A restriction on the number of consecutive terms that a person can serve as a board member.

Treasurer
A board officer position that is responsible for coordinating and ensuring financial oversight of the organization.

Trustee
An individual or corporation named by an individual who sets aside property to be used for the benefit of another person, to manage the property as provided by the terms of the document that created the arrangement.

U

Undue benefit
A disbursement by way of a gift or a transfer of any part of the assets of a charity for the personal benefit of a person who is not at arm's length with that charity (e.g. a major donor, proprietor, trustee), unless it represents reasonable consideration or remuneration for property acquired or services rendered to the charity or is a gift made in the course of charitable activities.

V

Values statement
A written description of the beliefs, principles, and ethical guidelines that direct a nonprofit's planning and operations.

Vice-chair
A board officer whose main duty is to replace the chair when the chair is not able to carry out his or her duties.

W

Winding up
The process of settling the accounts and liquidating the assets of a corporation for the purpose of distributing the net assets, in the case of a registered charity, to a qualified donee, and dissolving the corporation.

Resources

B

1. General Resources

There are few guides on governance written specifically for Canadian foundations. The books and guides on governance that are listed below are written mostly for a general nonprofit audience. There are many more nonprofit governance resources in the United States. We have included some of the ones we consider to be most helpful.

Many of the resources listed in this section are downloadable or can be purchased online or directly from the organizations listed. Simply refer to the links provided for more information.

1.1 Books and Guides

a) Canada

Strong Foundations: Strategies to Help Endowments and Foundations Achieve Excellence in Investment and Spending Governance, Janet Rabovsky, www.BenefitsCanada.com, August 2009.

Financial Responsibilities of Not-for-Profit Boards, revised edition 2008.

Published by The Muttart Foundation and the Alberta Culture and Community Spirit Board Development Program, PDF, www.culture.alberta.ca.

This self-guided workbook provides an overview of board roles and responsibilities, basic accounting principles, budgets, and financial management.

Governing for Results – A Director's Guide to Good Governance, by Mel Gill, Synergy Associates, Trafford Publishing 2005.

www.synergyassociates.ca

A user-friendly guide that adds perspective to the debate about governance models and offers guidance to board members with respect to board structure, responsibilities, governance practices and problems that commonly afflict boards. Available in hard copy or CD-ROM.

Guide to Good Governance: Not-For-Profit and Charitable Organizations , Ontario Hospital Association, 2005. Anne Corbett and James M. Mackay (principal authors) and Pamela L. Cross (contributing author). Guide is available in hard copy only - no electronic version is available. Contact the Ontario Hospital Association at

www.oha.com

Provides directors of non-hospital health service providers, charities and foundations with tools and guidance for achieving good governance practices. This guide contains some useful downloadable templates such as a sample statement of board roles and responsibilities, sample board policies on confidentiality and conflict of interest, etc.

National Study of Board Governance Practices in the Non-Profit and Voluntary Sector in Canada by Strategic Leverage Partners in partnership with the Centre for Voluntary Sector Research and Development (CVSRD), 2006.

www.strategicleveragepartners.com

This is the first national study of board governance practices in the Canadian non-profit and voluntary sector. The study identifies the key issues facing nonprofit boards and provides an inventory of proven successful practices that can be shared by organizations across the sector.

Primer for Directors of Not-for-Profit Corporations: Rights, Duties and Practices, edited by Peter Broder, CCP, CSAE, Canadian Bar Association, Industry Canada, 2002.

www.strategis.ic.gc.ca.

The Primer provides directors and prospective directors with guidance on the duties, rights and liabilities of serving on a not-for-profit corporation's board.

From Jeans to Jackets: navigating the transition to more systematic governance in the voluntary sector by Tim Plumptre and Barbara Laskin, 2003. Available to download from the Institute on Governance at www.iog.ca.

Starting a Foundation, Philanthropic Foundations Canada, second edition, 2008, available at www.pfc.ca.

A guide to the key issues in starting a grantmaking foundation, including questions about governing your foundation, and a resources section.

b) International

Govern More, Manage Less: Harnessing the Power of Your Non-profit Board, by Cathy Trower, second edition, Boardsource Governance Series, 2010. Available for purchase from www.boardsource.org.

The Handbook of Nonprofit Governance, BoardSource, 2010. A comprehensive guide that explores the principles and practices followed by effective nonprofit boards.

The Source: Twelve Principles of Governance That Power Exceptional Boards, BoardSource, 2005. A guide to the characteristics of exceptional nonprofit boards. Order from BoardSource at www.boardsource.org in Books and Tools.

Linking Principle to Practice: Governance in Foundations, presentation by Eugene Wilson, Council on Foundations, June 3, 2008. This presentation was made to a PFC seminar on good governance practices held in Calgary, Alberta in 2008. The full presentation is available at www.pfc.ca.

Principles for Good Governance: A Guide for Charities and Foundations by The Panel on the Nonprofit Sector, Washington, DC: October 2007. A guide for board members and staff leaders of charitable organizations as they work to improve their own operations.

The Roles and Responsibilities of Investment Committees of Not-for-Profit Organizations, by Joshua Mintz, General Counsel, The John A. and Catherine T. MacArthur Foundation, July 2009, www.benefitscanada.com.

Stewardship Principles and Practices for Independent Foundations, and for Family Foundations, Council on Foundations, Washington, D.C. These two sets of principles support foundations in their governance, management and grantmaking. Both sets are available to consult on the Council web site at www.cof.org under Those We Serve.

Trustee Handbook: Roles and duties of trustees of charitable trusts and foundations in Australia, by David Ward, Philanthropy Australia Inc, July 2008. Available free to download from Philanthropy Australia at www.philanthropywiki.org.

1.2 Organizations and Links

Institute on Governance

www.iog.ca

Founded in 1990, the Institute on Governance (IOG) is an independent, Canada-based, not-for-profit public interest institution, whose mission is "advancing better governance in the public interest." The IOG provides a range of services specifically designed to strengthen the governance of public-purpose organizations, including crown corporations, schools, professional associations, and a wide range of NGOs. The IOG site features a specific program in board and Organizational Governance, with several practical resources including 18 useful tips to strengthen board governance and a board self-evaluation tool.

Charity Village

www.charityvillage.com

Board of Directors and its Role. Under this heading, the website Charity Village has clustered many useful articles that have been published on the site over the last decade about various aspects of board governance in the charitable sector.

The Risk Oversight and Governance Board (ROGB) of the Chartered Accountants of Canada has a Not-For-Profit Organizations Task Force that has developed materials for boards of directors and senior management of NPOs. Their series 20 Questions Directors of NPOs should ask is available on their site at www.rogb.ca. Among the useful titles are:

- 20 Questions Directors of Not-for-Profit Organizations Should Ask about Board Recruitment, Development and Assessment
- 20 Questions Directors of Not-for-Profit Organizations Should Ask about Fiduciary Duty
- 20 Questions Directors of Not-for-Profit Organizations Should Ask about Governance
- 20 Questions Directors of Not-for-Profit Organizations Should Ask about Risk
- 20 Questions Directors of Not-for-Profit Organizations Should Ask about Strategy and Planning

Increasing Public Scrutiny of Not-for-Profit Organizations: Questions for Directors to Ask. www.rogb.ca. The ROGB has also released a short publication that suggests strategies to boards of NPOs facing increased public scrutiny. It addresses issues such as the need for a robust policy framework, ensuring that policies are applied, and responding to requests for information from members, media, or the general public.

2. Tax and Legal

2.1 Federal and Provincial Statutes

Federal Statutes

- *Income Tax Act* (Canada)
- *Canada Corporations Act* Part II
- *Not-for-Profit Corporations Act* (Royal Assent 2009)
- Other statutes as applicable

Provincial Statutes

Alberta	*Companies Act* *Societies Act* *Trustee Act*
British Columbia	*Society Act* *Trustee Act*
Manitoba	*Corporations Act* *The Trustee Act*
New Brunswick	*Corporations Act* *Trustee Act*
Nova Scotia	*Companies Act* *Corporations Registration Act* *Societies Act* *Trustee Act*
Newfoundland & Labrador	*Corporations Act* *Trustee Act*
Northwest Territories/ Nunavut/Yukon	*Business Corporations Act* *Societies Act* *Trustee Act*
Ontario	*Charitable Gifts Act* *Charities Accounting Act* *Not-for-Profit Corporations Act* *Trustee Act*
Prince Edward Island	*Charities Act* *Companies Act* *Trustee Act*
Québec	*Companies Act* *Loi sur la publicité légale des entreprises individuelles, des sociétés et des personnes morales*
Saskatchewan	*The Business Corporations Act* *The Non-profit Corporations Act* *The Trustee Act*

2.2 Federal Incorporation

Industry Canada

Industry Canada is the agency responsible for federal not-for-profit corporations. It determines eligibility for incorporation, monitors adherence to the legislation under which the corporation is constituted and processes annual filings. A foundation is incorporated federally in accordance with the terms of the *Canada Corporations Act.* Incorporation "provides limited liability for the members and is often the legal structure required by governments for an organization to be eligible for funding or to carry out certain activities."

For full information on the requirements and processes for creating and maintaining a not-for-profit corporation, visit the Industry Canada website: Industry Canada > Business Tools and Resources > Corporations Canada > Create / Maintain a Not-for-Profit Organization.

2.3 Provincial Incorporation

List of Provincial Corporate Registrars and Links for Information on Incorporation

Alberta	Service Alberta http://servicealberta.gov.ab.ca/674.cfm
British Columbia	BC Registry Services www.fin.gov.bc.ca/registries/corppg/default.htm
Manitoba	Companies Office, Ministry of Family Services and Consumer Affairs www.gov.mb.ca/cca/comp_off/index.html
New Brunswick	Service New Brunswick www.pxw1.snb.ca/snb7001/e/2000/2500e.asp
Newfoundland & Labrador	Registrar of Companies www.gs.gov.nl.ca/cca/cr/corp-inc.stm
Nova Scotia	Registry of Joint Stock Companies www.gov.ns.ca/snsmr/paal/rjs/paal268.asp
Northwest Territories	Corporate Registries www.justice.gov.nt.ca/CorporateRegistry/index.shtml
Nunavut Territory	Legal Registries Division www.justice.gov.nu.ca/il8n/english/legreg/cr_index.shtm

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List of Provincial Corporate Registrars and Links for Information on Incorporation (continued)

Ontario	Ministry of the Attorney General www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet2.asp
Prince Edward Island	Office of Attorney General www.gov.pe.ca/oag/ccaid-info/index.php3
Québec	Registraire des entreprises www.registreentreprises.gouv.qc.ca/en/demarrer/constituer_pmsbl/default.aspx
Saskatchewan	Ministry of Justice and Attorney General, Corporations Branch www.justice.gov.sk.ca/Forming-a-Non-profit-Corporation
Yukon	Registrar of Companies www.community.gov.yk.ca/corp/inc.htmlOntario

2.4 Charitable Registration and Compliance

Canada Revenue Agency: Charities and Giving

www.cra.gc.ca/charitiesandgiving

The Canada Revenue Agency Charities Directorate (CRA) administers the law related to charities registered under the *Income Tax Act*. CRA registers and monitors charities, educates them and facilitates compliance with the law. On the site, you can access: policy statements and technical information; brochures and guides; forms; the list of registered charities; definition of political activities and more.

Some key information on the Charities Directorate site:

- The public part of any registered charity's annual information return (T3010).
- Charities-related forms and publications (such as fillable forms; publications listed by topics such as: Becoming a Registered Charity, Operating Day-to-Day, Revoking Registered Status, and more).
- Check Lists, a Toolbox for Directors, webinars and information sessions.
- What's New, a section that keeps charities up-to-date on resources, information and policy issues of interest to charities.
- Charities Connection: CRA News, Information, and Events Specific to Registered Charities, an electronic newsletter posted up to ten times a year on the CRA site.

In addition to the *Income Tax Act,* charities must also be compliant with provincial or territorial requirements. **The Charities and Giving** site provides links to all relevant provincial and territorial agencies at www.cra.gc.ca/charitiesandgiving.

Charities Tax Tools and Sites

The CRA Charities Directorate has supported the development of many educational tools and resources for registered charities. The following is a list of some of the sites and materials that have been created in the 2008-2010 period.

Charity Tax Tools, Imagine Canada, http://charitytax.imaginecanada.ca/

This site contains information on the basic legal requirements for all Canadian charities that are registered with CRA and entitled to issue tax receipts for charitable donations. It provides examples and links to additional information for those who wish to know more.

Charity Law Information Program (CLIP) www.capacitybuilders.ca/clip/clip.php

CLIP is a project of Capacity Builders. Its goal is to help Canadian charities become more aware of their legal obligations under the *Income Tax Act*. Charity lawyer Mark Blumberg is the lead trainer and with other experts he provides plain-language guidance and materials. CLIP offers workshops and webinars on a Canadian charity's legal compliance requirements and how to strengthen its governance, ethical standards and financial controls. Resources and presentations from these webinars, including a presentation on Governance 101 for Canadian Charities and many useful checklists can be found on the site.

Office in a Box, www.charitycentral.ca/site/office

A free downloadable tool offered by Charity Central, a project of the Legal Resource Centre of Alberta, designed to help Canada's registered charities understand their responsibilities under the *Income Tax Act*. Office in a Box includes many resources such as place for key legal documents including certificate of incorporation, by-laws, and policies; other important documents and information that should be centrally located for quick and easy access; and a collection of saveable templates.

Legal Risk Management Checklist for Charities, www.carters.ca/checklst.html

Carters Professional Corporation, October 2009.

The Legal Duties of Directors of Charities and Not-for-Profits, www.charitylaw.ca/articles.html

By Terrance Carter and Jacqueline Demczur, January 2010.

2.5 Provincial Charity Regulation

In **Ontario,** the Office of the Public Guardian and Trustee has jurisdiction over charitable trusts. The Charities Accounting Act, Ontario has scope to impose various regulatory measures, including requiring the filing of returns, in that province.

Revenu **Québec** administers a charity registration process similar to CRA for charities registered and operating in Quebec.

In **Prince Edward Island, Manitoba** and **Alberta**, registration is tied to engaging in fundraising, and is not mandatory for organizations that do not solicit public funds.

2.6 Canadian Public Legal Education Organizations

In many provinces, there are public legal education organizations providing basic information on laws and regulations relating to charitable organizations. The following is a list of some organizations and links.

Alberta	Public Legal Education Network of Alberta (PLENA) www.plena.org Legal Resource Centre of Alberta www.legalresourcecentre.ca/
British Columbia	Law Courts Education Society of British Columbia www.lawcourtsed.ca Legal Services Society of British Columbia www.lss.bc.ca People's Law School www.publiclegaled.bc.ca
Manitoba	Community Legal Education Association (Manitoba) www.communitylegal.mb.ca
New Brunswick	Public Legal Education and Information Service of New Brunswick, www.legal-info-legale.nb.ca/
Newfoundland & Labrador	Public Legal Information Association of Newfoundland www.publiclegalinfo.com
Northwest Territories/ Nunavut/Yukon	Yukon Public Legal Education Association www.yplea.com
Nova Scotia	Legal Information Society of Nova Scotia www.legalinfo.org
Ontario	Community Legal Education Ontario www.cleo.on.ca Ontario Justice Education Network www.ojen.ca
Prince Edward Island	Community Legal Information Association of Prince Edward Island www.cliapei.ca
Québec	Educaloi (Barreau du Québec) www.educaloi.qc.ca SOQUIJ: Société québécoise d'information juridique http://soquij.qc.ca
Saskatchewan	Public Legal Education Association of Saskatchewan www.plea.org

About PFC

Who Are We?

Incorporated in 1999, Philanthropic Foundations Canada (PFC) is a national registered charity and member association representing independent and private grantmaking foundations and charitable organizations. PFC is based in Montréal.

The mission of PFC is to promote the growth and development of effective and responsible foundations and organized philanthropy in Canada through provision of membership services, resources and advocacy.

What Can We do for You?

Advice and information

Through our web site and staff, PFC can provide answers or sources of further information on topics ranging from grantmaking to trends in philanthropy and the voluntary sector in Canada. Members receive a monthly electronic newsletter with up-to-date information on philanthropy trends, topics and tools. The Members' Area contains many exclusive reports, presentations and tools available to members only.

Advocacy

PFC is your voice on regulatory and legislative issues that affect you as a grantmaker. Through our web site and regular member updates, PFC keeps you current on changes to government regulations and emerging regulatory issues.

Management support

PFC provides you with templates and best practices on all aspects of foundation management, from CEO job descriptions to governance to investment policies and practices.

Networking

PFC offers regular opportunities for seminars and other networking opportunities, rotating these opportunities across the country. Through PFC, you can learn about the activities of other grantmakers and foundations with similar interests in your region. PFC members are a part of a national network of grantmakers, exploring and sharing ideas and strategies, and ways of leveraging resources. PFC is also part of an international network of grantmaker associations, bringing our members the best of what is happening in global philanthropy.