

Negotiating Donor Agreements with Universities:

A Toolkit for Canadian Foundations

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Preface and acknowledgments

This toolkit was researched by Maya Soren, a law student and intern with PFC, and co-authored by Maya Soren and Hilary Pearson. PFC is very grateful to Maya Soren for her contributions to this toolkit. PFC acknowledges and thanks the Max Bell Foundation of Calgary for its financial support of this project. PFC also wishes to thank the many members of PFC who willingly shared their donor agreements and experiences with our researcher. Particular thanks are owed to Paul Davidson, the CEO of the Association of Universities and Colleges of Canada and to his colleagues on the Joint PFC/AUCC Working Group who contributed their expertise and insights to the preparation of the toolkit.

This toolkit is designed as information for foundation boards and staff who are considering or in the process of negotiating donor agreements with universities, to help them consider what information they might need to make appropriate decisions. It is not legal advice. In a particularly complex situation a foundation might need to contact its legal advisors with any questions for clarification or to get an opinion about a particular element of the donor agreement.

About PFC

Philanthropic Foundations Canada (PFC) is a national member association of grantmaking foundations, charitable organizations and corporate giving programs. Established since 1999, PFC numbers over 120 members. PFC seeks to promote the growth and development of effective and responsible foundations and organized philanthropy in Canada through provision of membership services, resources and advocacy.

SECTION ONE

Introduction

1a. Purpose of toolkit

Education is the single largest field of grantmaking activity for Canadian grantmaking foundations. More than a quarter of the total dollar amount of all grants made annually by grantmaking foundations (generally private foundations in Canada) is directed towards education. In the majority of cases, this involves grants made to universities and colleges. Much remains to be understood about the nature of such charitable funding, and there is little information available about the ways in which the funds are distributed among different institutions and purposes. But it is safe to say that a very large number of Canadian foundations have at one time or another made a grant to an educational institution. In most cases, they have done so through a donor agreement.

The purpose of this toolkit is to provide grantmakers with a practical understanding of the key components of a donor agreement with a post-secondary educational institution. It is also intended to clarify some of the aspects of negotiating a donor agreement with a university that may be unexpected or difficult to understand for the funder. Because many foundations have relatively small staffs, they have neither the time nor always the expertise to do a lengthy due diligence and to negotiate the fine points of a donor agreement with a large institution. This toolkit is designed to help answer some of the questions that routinely arise, and to provide some guidelines based on actual Canadian foundation practice and experience. It will be revised on a regular basis as new issues and information arise.

The toolkit is the product of an initiative launched by Philanthropic Foundations Canada and the Association of Universities and Colleges of Canada. In July 2013, PFC and AUCC established a working group of representatives of three Canadian private foundations and Vice Presidents of Research from three Canadian universities to discuss how to improve the working relationship between charitable foundations as funders and universities as fund recipients and partners. The toolkit is one of the outcomes of this ongoing conversation, which continues to explore dimensions of the foundation-university relationship, including management of relationships, and communication about goals, expectations and constraints on both sides. The full working group was consulted in defining the issues to be covered by the toolkit, although PFC takes final responsibility for the development of its contents.

1b. How to use this toolkit

The toolkit is designed to be read in sections, not in consecutive chapters. Foundation users will find examples throughout of clauses and paragraphs covering various elements of donor agreements. These are drawn from actual donor agreements provided to PFC by PFC

members. Each donor agreement will be unique and will vary according to the type of funded project, needs of the foundation and requirements of the university. We do not suggest in this toolkit that there is a “one size fits all” donor agreement model, although we do include examples of donor agreements in the appendix for illustrative purposes. It is preferable, especially if the donor agreement has a number of provisions, to draft your agreement with legal advice.

1c. Donor agreements: A typology

To frame the discussion of donor agreements between foundations and universities, we begin with a description of the possible types of grants that foundations make to these institutions. Grants can have very different goals and take different forms. There are five major categories of grants to educational institutions:

- Grants for research by university academic personnel (for example scientific or medical and also research in all areas of the humanities and arts)
- Grants made to support training of academic personnel or quality of teaching (e.g. scholarships, chairs, faculty professional development etc.)
- Grants made to engage the expertise of academic staff in the design or management of community-based initiatives (for example evaluation, policy research, surveys etc.)
- Grants made to support professional development and learning in the community (e.g. leadership development, training for community-based individuals etc.)
- Grants made to support capital development of educational institutions (e.g. for buildings, equipment or other facilities)

In addition to the differences in purposes of funding agreements, there can also be important variations in the jurisdictional frameworks governing the educational institutions (e.g. variations in provincial laws and funding frameworks) and in the nature of the educational institutions themselves (research and professional faculty universities or community-based universities, for example).

Given the variations among the different types of funding agreements and institutions, it is clear that there can be no single template agreement. Nevertheless, there are core elements common to any such agreement (e.g. amount of funding, payment schedule, provisions for termination of the agreement on both sides, etc.). The toolkit describes the common elements, and also addresses specific elements that may be more pertinent for one agreement over another, based on the goals of the project or initiative being funded. Examples of donor agreements negotiated by PFC members are included as models in the appendices to this toolkit.

SECTION TWO

Defining the “Rules of Engagement”

Foundations can play multiple roles in their relations with universities, including not just funders but also advisors, conveners and disseminators. In some cases, foundations see themselves as strategic partners. Playing a broader role than funder entails the need for more meaningful interactions and opportunities for foundations to share their expertise and extensive networks of contacts. University representatives, on the other hand, are juggling the evolving dynamics of research and academic funding, with challenges that include heightened expectations regarding accountability to their faculties, funders, and the public, the complexity of managing multidisciplinary and collaborative research, intellectual property ownership terms and conditions, the role of faculty associations and the provisions of collective bargaining, and the expectations and involvement of students, faculty and administration in setting conditions around donor agreements. In a word, universities are increasingly concerned with issues around accountability (including potential conflicts of interest between donors and the university).

2a. Preambles and statements of principle

With increasing pressure from each side of the table for both greater openness and greater accountability, donor agreements need to be crafted in ways that define clearly for both parties the roles and expectations that each has of the other. One way of defining expectations more clearly is to mutually agree on a statement of the principles of the relationship. This can take the form of a preamble or cover text for the actual donor agreement. A statement can be especially important in foundation-institution relationships that cover several years and/or several initiatives, or that come into being because the donor foundation wishes to provide ongoing long-term support to the institution.

A statement can establish the mutual expectations of a foundation and a university working as partners. A partnership relationship can be defined as a cooperative agreement between the foundation and the institution in which the partners agree to share expertise, contacts and resources in order to achieve a common purpose.¹ In **Appendix A**, we provide an example of a statement of principles governing a long-term partnership between a foundation and an academic institution. This is a joint statement agreed to by the Max Bell Foundation of Calgary and McGill University.

Establishing a common agenda for the partnership in an overarching statement of principles before entering into detailed negotiations will facilitate collaboration through the duration of the partnership. Another benefit of a statement of principles is that it can ensure continuity in an agreement, even when individuals (on either side) turn over. The parties can agree on a

¹ The partnership may also involve other organizations such as corporate sponsors or community organizations.

written shared vision for the project as well as the goals or desired outcomes of the project and the nature of the collaboration, including a clear description of what the partnership entails at an organizational and an institutional level for both organizations. The statement will shape future discussions, enabling both parties to work together in a cooperative manner.

Conversely, if desired, the statement can clarify that the relationship is primarily a donor-recipient relationship, with the foundation acting simply as funder. An example of wording is provided.

Example:

The parties shall expressly disclaim any intention to create a partnership, joint venture or agency relationship. It is understood, acknowledged and agreed that nothing contained in this agreement nor any acts of the parties shall constitute or be deemed to constitute the parties as partners, joint ventures or principal and agent in any way or for any purpose.

2b. Managing the relationship

Another aspect of the foundation-university relationship that is important to clarify at the outset if possible is the way in which the university approaches and communicates with the foundation. Some universities, especially those with several faculties, may make multiple approaches to the same foundation. Sometimes the approach is coordinated through the President's Office, the Office of a Dean or the university Advancement Department. The academic institution is responsible for coordinating its multiple access points and staff. But if this is not clear, a foundation can state a preference for a single relationship manager and access point, so that it is not put in to the position of deciding among potentially competing proposals from the same institution. In cases where a foundation itself has approached a researcher or principal investigator, the question of who manages the relationship as the grant goes forward is an important one to ask at the beginning.

Good relations between the foundation and the university can be ensured even more effectively by a funder through visits to the institution from time to time, to meet chair, fellowship, scholarship and bursary beneficiaries, or to see how capital investments are being used by staff and students or to engage in discussion about the academic research supported by the grant.

SECTION THREE

Considerations in Negotiating Donor Agreements by Type of Grant

Different types of donor agreements require different levels of engagement between foundations and academic institutions. No matter the type of grant, before a foundation begins negotiations with a university, it is essential to define the role the foundation wishes to play within the academic, organizational and institutional realms of the university community. The foundation also has to determine which university has the capacity to handle the type of research the foundation wants to conduct and to find faculty and graduate students with suitable professional profiles. Once this is done, different considerations come into play based on the type of grant being considered (see grant typology in Section One). The following sections discuss some considerations pertaining to different types of grants.

3a. Direct research funding

Research grants are a common way for foundations to support innovation and the advancement of knowledge. Typically the academic researcher will apply directly to the foundation for a grant and it will be administered by the university; alternatively, the foundation will offer funds for a specific research project.

In planning a grant for research it is helpful to consult the policy statements and requirements of the Canada Revenue Agency (CRA). Research in the charitable sense is defined by the CRA as “the systematic investigation into and study of materials and sources on any subject that has educational value in order to discover or improve knowledge.”² For a research activity to be considered charitable at common law, the research activity must :

1. Represent a way to achieve or further the charity’s charitable purpose;
2. Be based on a research subject that has educational value and a research proposal that is capable of being attained through research;
3. Be undertaken in such a way that it might reasonably lead to the discovery or improvement of knowledge;
4. Be conducted primarily for the public benefit and not for self-interest or private commercial consumption; and
5. Be disseminated and made publicly available to others who might want access to the information.³

If a foundation’s granting activity does not fulfill these requirements, it is unlikely the CRA will consider the grant to be support for research in the charitable sense.

² Canada Revenue Agency, “Research as a Charitable Activity,”

³ Canada Revenue Agency, “Research as a Charitable Activity,”

The CRA notes that research in the charitable sense does *not* include the accumulation of information:

1. in an unstructured manner;
2. in an unsystematic way;
3. on a subject that has no educational value; or
4. that is selective, or unreasonably biased, or promotes a predetermined point of view.

Examples of such “research” that cannot be claimed as research in the charitable sense are provided in the policy statement. If a charity researches the donation patterns of its donors to understand its donors better, the study would not be viewed as charitable research, and should instead be reported as fundraising expenses. Research to explore the employment market and determine the most effective methods for recruitment of new employees would similarly not be considered research in the charitable sense and such expenses should be reported as administration on the charity’s annual T3010 form.⁴ These activities are for the charity’s administrative or fundraising benefit, and cannot be claimed as charitable. For further information, the CRA references various court decisions that define the ways in which information is to be accumulated in order to qualify as research in the charitable sense (**see Appendix B for details**).

3b. Support for quality of teaching and learning through chairs, fellowships, scholarships, bursaries

Providing funding for endowed chairs and post-doctoral fellowships is a common approach to support the development of research capacity within the university community; grants for scholarships and bursaries are also of interest to many foundations.

When considering this type of funding, foundations should take into account that there are both academic policies and CRA policies around donor direct involvement in candidate selection. While donors are allowed to direct funding toward a particular university program, the CRA’s gift policy statement suggests that donors cannot choose the specific individual beneficiaries of their donations.⁵ If a donor directs the funding to a specific individual beneficiary, the donation cannot be considered a gift at law and an official donation receipt cannot be issued by the University.⁶

4 Canada Revenue Agency, “Research as a Charitable Activity,”

5 Canada Revenue Agency “What is a Gift?”

“Was the gift directed to a specific person, family, or other non-qualified donee? A donation subject to a general direction from the donor that the gift be used in a particular program operated by the qualified donee is acceptable, provided that no benefit accrues to the donor or anyone not at arm’s length to the donor. Donors cannot choose the specific beneficiaries of their donations but can still give to a particular program once the charity has identified a beneficiary. The qualified donee must be able to reallocate the donated funds within the program as it deems appropriate. If the donor retains too much control, the donation will no longer be considered a gift at law and an official donation receipt cannot be issued.”

6 Canada Revenue Agency “What is a Gift?”

While it may be inappropriate for a donor to sit on a selection committee for chairs, fellows, scholarships and bursaries, it is reasonable for a donor to expect to be informed about the selection process, meaning that at a minimum a donor should be notified of progress and decisions at different stages of the process. In addition, a donor may be invited to public speaking events or receptions featuring the recipients of the funding, but only after the beneficiary is confirmed and the selection process has ended. A donor may also specify in the agreement that appointments be made within a reasonable time period and that the selected candidate participate in foundation activities such as conferences, lectures, seminars, workshops or other events.

Here are examples of wording in a donor agreement to clarify the priority given to institutional (academic) policies and procedures on appointments:

Example:

All appointments to the Chair will be conducted in accordance with the University policies and procedures for academic appointments, endowed chairs, professorships, lectureships and programs. The initial terms will be X years.

Example:

The parties affirm their mutual intention that any decision concerning appointments, the awarding of fellowships, admissions, research programs and curriculum be made by the University in its sole discretion, in keeping with its academic mission, and its policies and practices as they may be from time to time, with vigilant protection of freedom of speech and academic freedom.

Here is wording in a donor agreement that specifies the Foundation's rights with respect to collaboration with a university-designated Fellow:

Example:

During each year of the term of this Agreement, the Fellow will participate in the Foundation activities, including the annual conference and other events organized by the Foundation alone or in collaboration with other institutions and to which the Fellow may also be invited and the Fellow may use part of the Fellowship for such purposes. The Fellow will also endeavour to give an original Lecture during the second year of the term of this Agreement which will be made available by the Fellow for publication by the Foundation in the academic year following the Lecture.

A foundation may agree with a university to establish an Advisory Committee. This provides a mechanism whereby the foundation can be kept informed and provide input to the research project while not taking responsibility for execution. The donor agreement can determine the terms of reference of such a Committee, including how many members of the Advisory Committee will be foundation representatives and what kind of role each member of the Committee will play. This can be acknowledged in the following way:

Example:

An Advisory Committee will be established by the Director to guide curriculum development and research program strategies related to the Chair. Membership of the Advisory Committee will include two representatives from the University and two representatives chosen by the donor if so desired.

Example:

The Advisory Committee will be led by Person A. The Director of the Program is Person B and Person C will act as advisor to the program. A representative of the Foundation is also a member of the Committee.

It is important to note that an Advisory Committee typically does *not* serve as a Selection Committee for endowed chairs, post-doctoral fellows and scholarship and bursary recipients. Having a separate Selection Committee is important to maintain the impartial peer review process that is the gold standard within the university community. This separation also ensures that funders do not have a determining role in candidate selection.

3c. Funding for community research partnerships; or to train and support nonprofit organization people and processes

Foundations are increasingly interested in establishing community-research partnerships with universities for the benefit of their social partners such as community-based organizations. These kinds of agreements typically provide the foundation greater opportunities to assist in extending the work of social partners (through evaluation for example) or to help build their capacity (through leadership development for example). Generally, these types of donor agreements are more straightforward since the researcher is performing a defined service on behalf of the partner community organization. Ideally, the donor agreements should be flexible enough so that the parties (foundations, researchers and community organizations) can make joint decisions, yet be able to make adjustments in consultation with each other should things not go as planned.

3d. Capital funding

While foundations continue to give unrestricted grants to university capital campaigns, capital projects at academic institutions may be of less interest to foundations than in the past. One reason that foundations are more reluctant to fund capital projects is the fact that buildings come with both the initial capital costs and with ongoing operational and maintenance costs, which may require a foundation to keep funding going to the institution. A donor may find it difficult to refuse to provide a named building with additional funding for repairs etc. Another reason for donor reluctance is that building projects can have escalating costs that go beyond the initial budgets agreed to by the funders.

Some ways of safeguarding the interests of a foundation in a donor agreement for a capital investment are to include stipulations such as:

- Passing of a resolution by the University's Governing Council approving construction on the terms agreed upon by the parties
- The design and construction of the capital project to be carried out by certain architecture firms
- Specific completion dates
- Specific conditions for naming of the building, centre or property
- Matching of funds by government and/or other private partners

Example:

The University and the Foundation agree that if the following steps are not completed by December 31, 2014, the Property, less the architectural costs expended by the University (the "Returned Property") as provided in the following section, shall immediately revert to the Foundation and all proper steps shall be taken by the University to transfer the Property back to the Foundation, all with effect as if such returned Property had never been transferred to the University:

- a. the Board of Trustees must pass a resolution approving the construction on the terms agreed between the Parties;
- b. the University must sign an operating and governance agreement and all the other related agreements pertaining to the construction with the Foundation and/or the Construction Management Committee, as the case may be, which shall be in a form mutually acceptable by the parties.

SECTION FOUR

Core Elements of Donor Agreements

The following are elements that are likely to be included in virtually all donor agreements, no matter what type of grant is being provided. ***In each section below, an example of language used in an actual donor agreement is provided as a model.***

4a. Amount of funds

The agreement should specify the dollar amount of the grant to the recipient (the academic institution or qualified donee), and what the grant supports (i.e. scholarship fund, fellowship, capital investment, research project costs, perhaps including costs for staff, curriculum development, materials, evaluation and knowledge sharing).

Example:

The Donor has agreed to make a gift of \$X to the University (the Gift).

Example:

The Foundation has pledged, subject to certain conditions, the amount of \$X (the Pledged Amount) to the University in support of the construction of a new football stadium at the University.

Example:

The gift of \$X to the University from the Donor will be used to create an endowment fund, subject to the terms of this Agreement, for the benefit of graduate students at the University.

4b. Use for charitable purposes

The *Income Tax Act* grants tax privileges to foundations on the basis that they will be engaged in exclusively and legally charitable purposes (including purposes for the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community in a way the law regards as charitable).⁷ The donor agreement should therefore specify that the grant is to be used for charitable purposes.

Example:

The Grant (or Gift) shall be used solely for charitable purposes.

7 Canada Revenue Agency. "Research as a Charitable Activity."

4c. Payment schedules

The granting schedule should be set out in the agreement. This can take the form of a payment schedule specifying the period over which the funded project will last and, if pertinent, when instalment payments are to be made. If the foundation wishes to specify conditions upon which the instalment payments are to be made, it should do so in the agreement. The agreement should also describe how the funds will be paid to the university. Typically, the university is responsible for the management of the funds, investing them pursuant to internal policies and procedures. The university may choose to specify in the agreement how the funds will be invested and what should be done with investment income.

Example:

The Grant shall be paid to the Grantee in installments according to the Payment Schedule. The payment of each installment shall be conditional upon the Foundation's prior receipt, review and approval of the Grantee's written progress report with respect to the use and financial status of the Grant and the status of the Project. The Grantee is responsible for the management of the Grant and will invest the Grant pursuant to the Grantee's investment policies and procedures, as they may be amended from time to time.

Date	Foundation Payment Schedule	University Reporting Schedule
Date	\$X	--
Date	---	Progress Report
Date	\$Y	---
Total	\$Z	Final Report

4d. Goals, work plans and reporting

A clear donor agreement should include specific goals to be attained by the funded project and a work plan, which will vary depending on the nature of the grant. These materials are typically included as appendices to the agreement.

It is common practice for the foundation to require the institution to provide an annual or in some cases semi-annual progress report on how the goals of the funded project are being met as well as a comprehensive final report at the end of the granting term.

Foundations may require that the grantee institution and/or researcher provide a report using the foundation's standard reporting framework, which may ask for the following information:

- An explanation of any revisions to the original objectives and original work plan.
- An indication of whether granting requirements have been met with appended third-party confirmation of additional funds where necessary.
- A summary of project activities, successful deliverables and outcomes since the last project report with an explanation of any differences between the last proposed work plan where necessary.
- A summary of the challenges or barriers encountered since the last progress report and how they were dealt with.
- A summary of the work to be undertaken during the next reporting period, including activities, responsibilities, deliverables, deadlines and how these items relate to the project's objectives.
- A financial report of all the line items that appear in the project budget included in the original proposal compared with the revenues and expenditures for the current period; or, the budget as modified by mutual agreement between the parties, as in the following example:

	Current Period <i>(date to date)</i>			Project Total <i>(date to date)</i>		
	Budget	Actual	Variance	Budget	Actual	Variance
Personnel						
Project Director						
Research Manager etc.						
etc.						

Example:

The Grantee shall deliver a comprehensive final report according to the Foundation's reporting requirements, as they may be amended from time to time, which shall include a financial report for the use and status of the Grant, a report on cash and/or in kind contributions to the Project, an evaluation and summary of the Project activities to date, the Grantee's most recent audited financial statements and the Grantee's current summary operating budget. The Grantee's progress reports shall be due according to the schedule set out below.

Example:

A report of the fellow's research progress will be submitted to the Donor each year. The University will provide the Donor with an annual report on the status of the Fund.

In some cases, a funded project will have several funders, each of which has a different reporting requirement. In these multipartite projects, it would be helpful for the university and the foundation to discuss ways in which reporting requirements could be aligned or harmonized.

4e. Reciprocal termination

University agreement templates may specify only the university's power to terminate the donor agreements. Ideally, both parties should be granted the power to terminate the agreement, and this should be specified in the donor agreement.

Example:

The Foundation and the University acknowledge and agree that either party may, upon (X amount of time) prior written notice, terminate the Agreement and the Project. Upon receipt of this notice, the University will provide the Foundation with a report of work already performed and any completed deliverables. The Foundation shall provide payment for the work performed prior to the termination date. The Foundation will cease to be responsible for any costs or charges of any nature or kind related to the Project after the date of termination.

SECTION FIVE

Variable Elements of a Donor Agreement

Depending on the nature of the funded project, a donor agreement could also include clauses and sections related to the requirements of the academic institution, the jurisdiction (provincial) in which the institution operates, and other factors such as the ownership and sharing of information produced during the project, or liabilities and indemnification of both parties.

5a. Jurisdiction

Charity law does not have its own statute in Canada, but under s. 92(7) of the *Constitution Act*, the provinces have the authority to make laws in relation to charities. At the federal level, charities must comply with the *Income Tax Act* and regulations, as well as Canada Revenue Agency rulings and guidance. Among the provinces, however, practice varies widely. Ontario, for example, has laws that specifically regulate charitable activities, such as the *Charities Accounting Act*, the *Securities Act*, and the *Freedom of Information and Protection of Privacy Act*. Since there can be uncertainty in some instances as to which jurisdictional level of supervision applies (e.g. in relation to universities, foundations and third parties working together but in different provinces), the donor agreement should establish between the parties which provincial laws will govern the terms of the agreement.

Example:

This Agreement is governed by and construed in accordance with the laws of X province.

Example:

The laws of the province of Ontario and the federal laws applicable therein shall govern the terms of this agreement.

Example:

This Agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein.

5b. Disposition of the investment income earned on the grant

The agreement can specify what steps should be taken by the university with regard to the investment income earned on the grant and impose a duty on the university to consult the foundation.

Example:

The revenue generated by the Fund will be used exclusively to support programs and initiatives affiliated with the Chair, beginning in X number of years after the first payment of the Gift. The University will consult with the Donor on the programs and initiatives to be undertaken with the revenue.

Example:

The University will report annually on the status of the fund to the Dean of Faculty X or his/her designate, the Chair of the University's Department X, to the Donor and to the Foundation. The annual income from the Fund, less the portion added to the capital base as protection against inflation, will be made available by the University to support the salary of the Chair. At any time, the capital base may be increased by additional donations.

5c. Investing of restricted funds and disposition of unused funds; audit of grant

Donor restricted funds refer to special charitable purpose trusts, such as endowment funds, which are to be held and invested by the university in perpetuity.⁸ At common law, restricted trust funds cannot be co-mingled. However, in Ontario, charities are allowed to co-mingle restricted funds for investment purposes under the Charities Accounting Act. The agreement can specify that the grant is to be held in a separate restricted fund, while acknowledging that it is common practice for the university to co-mingle the grant with other restricted funds held by the university so long as the maintenance of books and records by the university is in accordance with the legal requirements of provincial accounting law for charities.

Example:

The Grant may be co-mingled with other restricted funds held by the Grantee for investment purposes, provided that the Grant's principal and any net investment income earned thereon is recorded as a separate restricted fund for the purposes of reporting to the Foundation and for accounting purposes in accordance with the legal requirements under provincial charity accounting law.

Example:

The University shall invest, reinvest and administer the Fund in accordance with the University's policies and procedures as established from time to time. In accordance with the Charities Accounting Act (Ontario), the University is permitted to co-mingle the Fund with other restricted funds under its administration for investment purposes solely.

The agreement can also specify what steps should be taken by the university in the event that the funds are not completely used up by the end of the grant period and impose a duty on the university to consult the foundation. Donor agreements can also specify that the Foundation reserves the right to audit the university's management of the grant.

Example:

If, upon completion of the Project as contemplated by this Agreement, the Grant funds have not been completely extended at the end of the Grant period, the Grantee shall provide a written statement of the balance of such funds and a plan for using the remaining funds to the Foundation.

8 Jane Burke-Robertson, "Primer for Directors of Not-for-Profit Corporations."

Example:

The University and the Fellow agree that the Foundation shall be entitled, if and when requested by the Foundation during business hours, on reasonable notice and at the expense of the Foundation, to audit the books and records of the University with respect to the disbursement of the funds represented by the Fellowship.

5d. Significant changes and modifications

During a multiyear project, there may be changes in institutional personnel or changes in the financial circumstances and/or policies of the university/college that could potentially affect the funded project. A section in the donor agreement can require the University to notify the Foundation in writing and within a reasonable time period of any significant changes within the university's organizational structure during the grant period or of any modifications to the project budget for prior approval.

Example:

After completion of the payment of the Grant, the Grantee shall keep the Foundation informed of the status and/or impact of the Project from time to time. The Grantee shall inform the Foundation promptly in writing of any significant changes, for example, leadership, governance, federal income tax status or financial changes, within the Grantee's organization during the Grant period or of any significant change that directly impacts the Project. The Grantee shall also submit in writing to the Foundation any proposed modifications to the Project Budget for prior approval.

5e. Indemnities and insurance

An indemnity is the “obligation resting on one to make good any loss another person has incurred or may incur by acting at the former’s request or for his benefit.”⁹ Indemnity and insurance clauses in university-foundation agreements typically absolve the foundation from all liability and acknowledge that the foundation’s insurance policies do not extend to university staff.

I. Indemnity

Example:

The Grantee understands and agrees that the Foundation, its directors, officers, members, employees and agents will not be liable for any of the Grantee’s contracts, torts, negligence or other acts or omissions, or those by the Grantee’s directors, officers, members, employees, volunteers, agents or Project participants. The Grantee understands and agrees that the Foundation’s insurance policies or self-insurance plans do not extend to or protect the Grantee or the Grantee’s directors, officers, members, employees, volunteers or Project participants. The Grantee understands and agrees that the Foundation will not provide any legal defence for the Grantee or any such person in the event of any claim against any or all of them. Unless prohibited by law, the Grantee shall hold the Foundation harmless from all liability, including but not limited to legal costs from the contracts, torts, negligence or other acts or omissions of the Grantee, its directors, officers, members, employees, volunteers or Project participants in any way connected with any activity of the Grantee including but not limited to the Project.

Example:

The University shall at all times indemnify and save harmless the Donor, any of its affiliated or related entities, and their respective employees, directors, officers, agents and all those for whom the Donor may be responsible at law from and against all claims, demands, losses, costs, expenses (including legal fees), damages, actions, suits or proceedings by whomsoever made, brought or prosecuted in any manner based upon, arising out of, related to, occasioned by or attributable to the execution of this Agreement, the Gift or any acts or omissions in any manner of rights arising hereunder.

9 Barron’s Canadian Law Dictionary, s.v. “Indemnity.”

II. Liability

Example:

The University accepts and acknowledges that the Donor is not and shall not be liable for any losses, liability or damages (collectively “Damages”) relating to this Agreement, the Gift, the Endowment Fund or any of the University’s programs or services. Such damages include direct, indirect, consequential, special, and incidental damages, even if such damages were reasonably foreseeable. Further, the University hereby releases and waives any claim or demand it has or may have against the Donor, any of its affiliated or related entities, and their respective employees, directors, officers, agents and all those for whom the Donor is responsible at law, for any detriment, damage, accident or injury of any nature whatsoever or howsoever caused with respect to any acts or omissions in accordance with this Agreement, the Gift or the exercise of in any manner of rights arising hereunder.

III. Force majeure

Force majeure clauses are commonly included in commercial contracts as a means of freeing the parties from liability when they are precluded from fulfilling their contractual obligations in extraordinary circumstances, such as natural disasters, war, and other risks that are beyond the reasonable control of the parties. They are sometimes included in agreements for funding for community-researcher partnerships and funding for institutions to train, evaluate or design community personnel, organizations and projects.

Example:

“Neither University X nor Foundation Y shall be liable for any delays in the performance of their respective obligations under this agreement resulting from circumstances or causes beyond that party’s control and in no such case shall any party be liable for loss of any direct or indirect damages (including any damages for loss of business, revenue or profit or other economic loss) resulting therefrom.”

5f. Publication of information about a project or its outcomes

The sharing of information about a funded project can be a sensitive issue and should be clarified in the donor agreement. The donor agreement could include a clause (depending on the nature of the grant) that outlines communications and publication guidelines. This clause may provide for mutual information to be exchanged around the public communication of the details of the funded project.

Example:

Neither party shall announce the execution of this Agreement or the provisions of this Agreement to the public unless and until such announcement and the manner and time of the announcement are approved by both parties.

It is also useful to clarify at the outset the expectations and requirements around publication of such agreement details as the title of the project, the name of the foundation, duration of project, institute or faculty department involved and names of individuals in leadership roles with respect to the project. Some jurisdictions require universities to divulge information about the amount of the gift, the source of the gift, the principal investigator, etc. These transparency and access to information requirements are obligations that the university cannot avoid. In this case, the donor agreement can include a provision that governs the disclosure of those parts not already subject to access to information requirements.

Example:

“Neither Party shall, without prior written authorization from the other Party, use any names, logos, trade or service mark(s) owned or controlled by the other Party. Additionally, neither Party shall use the name of the other Party, nor of any employee of the other Party, in any advertising or publicity without the prior written approval of an authorized representative of the other Party. Notwithstanding the foregoing, the Parties agree that they shall be free to disclose a) the names of the Parties and the nature of the relationship established herein, without disclosing the contents of the Agreement, b) the names of the University research participants, c) the title of the Project, d) the duration of the Project, and e) sum to be paid for the Project, without prior authorization from the other Party.”

If the foundation wishes to reserve a right to publicize its own information about the project, it is important to include a clause that confirms the foundation’s right to do so. A foundation may also wish to add a provision to the agreement that allows access to the researcher for purposes of speaking to the media, to conferences or other meetings convened by the foundation.

Example:

The Foundation reserves the right to include information relating to the Grant and the Project on the Foundation's website; in periodic reports and newsletters; and in other materials issued by or on behalf of the Foundation.

Finally, if the research work forms part of a student's thesis work, a defined publication mechanism must be included to ensure the student's rights to publish, defend and graduate in a timely way are protected (as part of the University's mandate to make information available for the purposes of scholarship). A foundation can ask that it be notified in a timely way when a student is publishing or defending a thesis using research information that might be sensitive to disclose.

5g. Matching provisions

Foundation-university agreements are often contingent upon the university's financial contribution (and sometimes also contribution from government or third parties) to the project. A foundation may ask the institution to match the funds that it provides. If so, the donor agreement should certainly make this clear.

Example:

The Gift should be matched by the Government of Ontario on a dollar for dollar basis pursuant to the terms and conditions of the Ontario Trust for Student Support program.¹⁰ Further, in recognition of the importance of the Gift, the University will match \$X in capital to the endowment. The combined endowment of \$Y will support Scholarship Z in perpetuity at the University.

¹⁰ Note that the Ontario Trust for Student Support program was redirected into the 30% Off Ontario Tuition Grant for the 2012-2013 academic school year.

5h. Administration fees

The question of “overhead” or administrative fees charged by a university can be particularly contentious for a foundation, especially if these charges come as a surprise after the gift has been made or agreed to. Universities typically will charge an administration or overhead fee to the foundation as they do to other private sector funders and, in many cases, to government funders. Depending on the type of university and nature of the research, this can amount to anywhere from 10% to 45% of the amount of funds granted, levied on top of the total dollar amount of a grant. This charge is justified by the institution as part of the real costs incurred by the university to support research or other projects. A generic percentage fee is levied as it can be very difficult to provide an exact itemization for the overhead cost attributable for each project. Costs that must be covered by the university can include building use and depreciation, utilities, maintenance of library resources, computer and network support, management and administration of research, financial services, legal services, human resources services, regulatory and research compliance, hazardous waste disposal, controlled goods, radiation safety, campus security and liability insurance.

Foundations (especially small foundations) can find the overhead costs charged by universities to be somewhat out of proportion. This can be especially true if the foundation is funding a project that is not research per se but intended to support community-based interventions with non-profits (evaluations etc.). Academic institutions argue that funders need to recognize the full costs of university expertise, which includes the large infrastructures required to design projects and execute research, as well as important peer review and ethics review procedures. Many universities have established rates to cover the administrative costs of research borne by the institution.

If a foundation decides for reasons of cost or simplicity to fund independent research through a consultant or think tank for example, it is important to note that Canada Revenue Agency reserves the right to request evidence that the researcher has the training or experience necessary to carry out the research; such evidence might include the researcher’s qualifications, employment experience or record of published work.¹¹ If CRA has concerns about the quality of independently contracted research projects, the foundation may be asked to provide an expert opinion on whether the research methodology, analysis, structure and evaluation techniques are likely to generate the data needed that might reasonably lead to the discovery or improvement of knowledge.¹²

11 Canada Revenue Agency. “Research as a Charitable Activity.”

12 Canada Revenue Agency. “Research as a Charitable Activity.”

To set limits on unacceptably high (to the foundation) institutional overhead charges, a foundation may consider adopting a Board resolution or policy that states that it will not pay any overhead charges or that caps payment of overhead charges at a specific percentage (example 15%). Alternatively, some foundations can require that overhead charges be built into the project budget proposal made by the researcher. These statements can be negotiated as part of the donor agreement (**see below**) or can be referred to by the foundation in negotiations leading up to the final donor agreement. It should be noted that adoption of a cap or prohibition does not mean that the Foundation can avoid negotiation of an administrative charge. The nature and amount of the charge can be negotiated but only if the University has flexibility to do so.

Example:

The University will be permitted to charge annually to the project administration costs not exceeding 15% of the grant amount received in that year.

5i. Terms and conditions of intellectual property ownership

The terms and conditions of intellectual property ownership may be important, especially in agreements to fund research. According to the CRA's guide to research as a charitable activity, any decisions regarding the protection and use of intellectual property arising from research funded by a charity need to be made with the charitable purpose and its associated public benefit as the primary consideration. Furthermore, the CRA requires that research results be "disseminated and made widely available to others who might want access to them."¹³

There are generally three kinds of intellectual property rights:

"Intellectual property" (or "IP") means all intellectual property in a general sense, including technical information, know-how, models, drawings, specifications, prototypes, inventions and software.

"Background Intellectual Property" refers to intellectual property that was conceived, created, or developed prior to, or independent of, any research performed pursuant to or related to the agreement or project in question. While Background Intellectual Property remains the exclusive property of the originating party, a right to use the Background Intellectual Property may be granted to the other party in connection with the work in the applicable project and for the applicable duration of the project.

"Foreground Intellectual Property" (or "Arising Intellectual Property") means intellectual property that is discovered, created or reduced to practice in the performance of the project. It includes the improvement, enhancement or modification to Background Intellectual Property.

Foreground Intellectual Property ownership is typically what is at issue in negotiations between foundations and universities. Under section 13(3) of the *Copyright Act*, when an author's work is created during the course of the author's employment, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright.¹⁴ Under many university intellectual property policies, the university typically owns the work of its employees, students and other members of the university community who create or develop work in the course of their employment. Collective agreement provisions are also important. They typically allow researchers to publish their work without censorship from the institution, consistent with section 14.1 of the *Copyright Act*, whereby the author of a work has a right to the integrity of the work and to be associated with the work as its author.¹⁵

13 Canada Revenue Agency. "Research as a Charitable Activity."

14 Copyright Act, RSC 1985, c C-42, s 13(3).

15 Copyright Act, RSC 1985, c C-42, s 14(1)

For these reasons, a university is likely to require that intellectual property ownership of funded research be consistent with collective agreements and/or with university policy. Intellectual property ownership may vary university by university. Some universities grant ownership to the creator while others claim ownership of any work created.

Here is an example from the University of Toronto, which publicly posts a model showing the assignment of intellectual property rights arising from sponsored research and collaboration:

Background Intellectual Property of a Party shall remain the exclusive property of such party.

- a. The owner of such Background Intellectual Property hereby grants to the other Party, for the duration of the Project, a royalty-free, non-exclusive, non-commercial, non-transferable right to use the Background Intellectual Property, as set out in the Appendix, solely in connection with the work on the applicable Project. No other rights or licenses are granted by a Party to the other Party in Background Intellectual Property.
- b. The sponsor (funder) shall own all Foreground Intellectual Property created solely by the sponsor's personnel.
- c. The University shall own all Foreground Intellectual Property created solely by the University's personnel.
- d. The Parties shall jointly own all Foreground Intellectual Property created jointly by the Parties' personnel. Creative contribution shall be determined according to the rules of inventorship under patent law, whether IP is patentable or not.¹⁶

¹⁶ University of Toronto Research & Innovation, "Sponsored Research and Collaboration Agreement."

5j. Academic freedom

Academic freedom and integrity of institutional autonomy are key issues for university faculty and administrators. Universities must be vigilant in defending their freedom from donor “interference”. The Association of Universities and Colleges of Canada issued a Statement on Academic Freedom in October 2011, **(see Appendix B)**. Affirmation of this statement is a guiding principle of AUCC membership. The Canadian Association of University Teachers (CAUT) is also vigilant in matters of academic freedom and recommends the implementation of a number of procedures linked to the execution of donor agreements¹⁷ **(see Appendix B)**. These reference points underline the commitment of university administrators to protect academic freedom and the scrutiny that is put on them to ensure that such freedom is not compromised. This explains why there may be requests or requirements by the university to include specific academic freedom clauses in the donor agreement.

Example:

The Donor and the University affirm that the Gift does not and shall not in any way (a) compromise the University’s Mission and Vision Statement, (b) constrain academic freedom on campus (as described by the University’s statement on Academic Freedom), (c) contravene any policy of the University or (d) reflect negatively on the University’s public image. The Donor and the University also affirm that the focus of the academic priorities at the University may shift over time, and it may become impossible, inadvisable or impracticable to apply all or part of the Gift for the purpose set out above. In those circumstances and in consultation with and subject to the approval of the Donor, the University may amend the purpose such that the amended purpose is consonant with the spirit and intent underlying the Gift.

17 Canadian Association of University Teachers, “Open for Business – On What Terms? An Analysis of 12 Collaborations Between Canadian Universities and Corporations, Donors and Governments.” p. 1

5k. Use or recognition of the name of the foundation

Public recognition of a foundation's gift is something that a foundation should consider. The foundation may add to the donor agreement a clause that requires that the university request the foundation's prior written consent before using or recognizing the name of the foundation publicly. As in Section 5f, there may be legal requirements for provision of information by the university that override a donor agreement. Nevertheless, it is important that a foundation inform itself of these requirements, and, if relevant, add a section to the agreement specifying how public recognition should be made.

Example:

The Foundation's name shall be used only with the prior written consent of the Executive Director or the Program Manager of the Foundation.

Example:

Neither party shall announce the execution of this Agreement or the provisions of this Agreement to the public unless and until such announcement and the manner and time of the announcement are approved by both parties.

SECTION SIX

Frequently Asked Questions

1. *What are the basics that need to be covered by a donor agreement with a university?*

Any type of donor agreement with a university should specify the amount of funds to be granted, that the funds are to be used for charitable purposes, the purposes of the grant, payment schedules, reporting provisions and terms of reciprocal termination. **See Section Four: Core Elements of a Donor Agreement for more information.**

2. *Does every funding decision need to be covered by a donor agreement?*

Yes, every funding decision should be covered by a donor agreement, for greater clarity and mutual protection.

3. *Do I need to have a donor agreement prepared by or reviewed by a lawyer?*

Like any legal agreement, a donor agreement should at a minimum be reviewed by a lawyer; however, it is ultimately up to foundation directors to decide whether legal advice is required, depending on the type and the amount of the grant.

4. *Should a donor agreement be reviewed every year?*

It is common practice for the foundation to require the institution to provide an annual progress report on how the goals of the funded project are being met. **See Section Four: d) for more information.**

5. *What are university administrative or overhead charges?*

University administrative charges are institutional costs justified by the institution as part of the real costs incurred by the university to support research or other projects. A generic percentage fee is levied as it can be very difficult to provide an exact itemization for the cost attributable for each research project. Costs can include building use and depreciation, utilities, maintenance of library resources, computer and network support, management and administration of research, financial services, legal services, human resources services, regulatory and research compliance, hazardous waste disposal, controlled goods, radiation safety, campus security and liability insurance. **See Section Five: h) Administration fees for more information.**

6. *Are funders obliged to pay administrative charges?*

No, a funder can either refuse to pay any administrative charge or pay only up to a certain percentage (e.g. 15%). It is useful to have a formal foundation policy statement and to discuss it with the principal researchers and university staff before negotiating the agreement. It should be noted that if universities have a formal policy on administrative or overhead charges, these policies may come into conflict and impede any donor agreement negotiation.

7. *What are the rights of a funder to determine how a grant should be disbursed by the university?*

CRA specifies that the qualified donee must be able to reallocate the donated funds within the program as it deems appropriate. If the donor retains too much control, the donation will no longer be considered a gift at law and an official donation receipt cannot be issued.¹⁸ But funders can add clauses in the donor agreement specifying their own payment or disbursement schedules, and can ask for an audit of the university's management of the grant.

8. *What are the respective rights of funders and universities regarding academic freedom?*

Universities have internal policies protecting academic freedom as well as collective agreements with faculty members that should be respected in donor agreements. Academic freedom and institutional autonomy are key issues for university faculty and administrators. As discussed in **Section Five: j) Academic Freedom**, faculty and administrators can be vigilant in defending academic freedom from donor "interference", which explains why there may be requests or requirements by the university to include specific academic freedom clauses in the donor agreement.

9. *How can we as funders play an ongoing role in overseeing the progress of the project we are funding at a university?*

If the funded project has an Advisory Committee, funders can play a role in the oversight of the funded project. For the selection of endowed chairs, fellows, and scholarship and bursary recipients, funders may also be kept informed and notified of progress and decisions at different stages of the selection process, though CRA policy restricts funders from selecting funding recipients. A donor may also be invited to public speaking events or receptions featuring the recipients of the funding, but only after the beneficiary is confirmed and the selection process has ended. **See Section Three: b) Support for quality of teaching and learning through chairs, fellowships, scholarships, bursaries for more information.**

18 Canada Revenue Agency, "What is a gift?"

10. When a donor agreement is contingent upon the university matching funds, does the donor have a right to reconsider the grant if the matching is not done within a reasonable time frame?

Yes, if specified in the donor agreement.

11. If donor funds are used by a university to create an Institute or Research Centre, can the donor play a role in the governance structure?

Yes if it is not a controlling role; in other words, a donor should be careful to specify in a donor agreement under what conditions it will be involved in governance (e.g. a seat on the governing body of the research centre but not a majority of the seats) to avoid the perception that the donor is in charge of a university-based institution.

12. What is a reasonable frequency of financial reporting from a university? Is a financial statement enough or should university management of the grant always be audited independently?

This depends on the size and length of time over which the grant will be disbursed. Generally it is helpful particularly if the grant is large or the project is complex to request semi-annual reports. An independent audit of the grant management should only be required if the grant is disbursed over many years or being distributed to several faculties and/or projects.

13. What happens in a situation where there are several funders involved in a funded project with a university? Is a separate donor agreement with each funder required? How can requirements of funders be coordinated in this case?

Again, this depends on the nature of the project. A donor agreement is always a good idea whether there is one or many funders. If it is a single project to which more than one funder is contributing, it might be best to identify one funder as the lead funder for negotiation of a donor agreement to which all funders are parties. The funders would need to agree on how they can be represented. It would also be helpful to agree on a single or similar set of requirements to avoid conflict or additional work.

SECTION SEVEN

Appendix A

General Statement of Principles : Example of McGill University and Max Bell Foundation

“During his life, Max Bell had a strong connection to McGill University. He completed an undergraduate degree there, later served on the Board of Governors, and received treatment at the Montreal Neurological Institute for the cancer that ultimately took his life.

In setting up the Foundation that would bear his name, he ensured that 30% of all gifts the Foundation makes will go to McGill. He further stipulated that half of those gifts go to the faculty of medicine, and the other half to other purposes of the University. Hence, the relationship between McGill and Max Bell Foundation actually pre-dates the Foundation itself.

The relationship has evolved over time. Since 2001, it has been governed by successive 5-year Agreements, signed by the Principal of the University and Chair of the Foundation, that articulate a partnership in grant making. The Agreements have been designed such that the annual gift from the Foundation to the University honours the Letters Patent of the Foundation and aligns the University’s priorities and the Foundation’s mission.

The current partnership Agreement is scheduled to expire in June 2014. As a result, the Agreement and associated programming is currently under review to improve the strategic deployment of resources and the evolving relationship between the foundation and university.

The current partnership Agreement includes the following elements:

- Annually the University and the Foundation share with each other their priorities;
- Together, the partners develop a call for applications to the funding program that is consistent with the priorities and procedures of both;
- The partners each and separately apply their own review procedures to applications, and then come to an agreement about which applications to present to the Foundation’s Directors for their consideration and decision;
- The partners keep each other informed in a timely way of the administrative activities by which the Agreement is executed;
- At least 5% are allocated to student awards or financial aid;
- Funded projects report semi-annually to the Foundation via the Principal Investigator and the University’s Vice-Principal of Research and International Relations.

The McGill-Max Bell program, as you can see, operates by a rigorous standard. Under these terms, the program has supported many truly excellent projects. From the Foundation’s perspective, working closely with a University of such high standing has exposed it to learnings and opportunities that have improved its overall grant making.”

Appendix B

Charitable Research: CRA Definitions

According to the Canada Revenue Agency (CRA), research in the charitable sense excludes the following forms of accumulation of information:

- a. The accumulation of information cannot be done in an unstructured manner. The *Vancouver Society of Immigrant and Visible Minority Women* decision by the Supreme Court of Canada stated that “[s]o long as information or training is provided in a structured manner and for a genuinely educational purpose – that is, to advance the knowledge or abilities of the recipients – and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.”
- b. The accumulation of information cannot be done in an unsystematic way. The *Human Life International* decision of the Federal Court of Appeal ruled that the material the appellant produced was primarily concerned with the dissemination of a set of opinions on various social issues defending “the human rights of persons born and unborn”, “natural methods of child creation”, and “education of persons in their obligation to respect and protect human life.” Since the charity was unable to demonstrate that its distribution of literature and conferences constituted significant research or the systematic development of a body of human knowledge, the Court upheld the Minister of National Revenue’s revocation of charitable status.
- c. The accumulation of information cannot be on a subject that has no educational value. In *Re Hopkins’ Will Trusts* (1965), the first case at common law to begin to define research in the charitable sense, Lord Wilberforce held that a gift to the Francis Bacon society to search for the Bacon-Shakespeare manuscripts was for research in the charitable sense under English law. He also expanded on the requirements more broadly stating, “...the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover – education in this last context extending to the formation of literary taste and appreciation.”
- d. The accumulation of information cannot be selective, or unreasonably biased, or promote a predetermined point of view. This point has developed through a series of cases; CRA references the following: In *Re Bushnell* [1975] 1 All E.R.721 (Ch. D.), at p.729 paras. f-g; *Positive Action Against Pornography v. M.N.R.* [1988] 2 F.C. 340 (C.A.), page 349; *Vancouver Society of Immigrant and Visible Minority Women v. The Minister of National Revenue*, [1999] 1 S.C.R. 10 at para. 169; *Challenge Team v. Canada (Revenue Agency)*, [2000] F.C.J. 433 (Fed. C.A.).

Appendix C

1. Association of Universities and Colleges of Canada Statement on Academic Freedom (October 2011)

What is academic freedom?

Academic freedom is the freedom to teach and conduct research in an academic environment. Academic freedom is fundamental to the mandate of universities to pursue truth, educate students and disseminate knowledge and understanding. In teaching, academic freedom is fundamental to the protection of the rights of the teacher to teach and of the student to learn. In research and scholarship, it is critical to advancing knowledge. Academic freedom includes the right to freely communicate knowledge and the results of research and scholarship. Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.

Why is academic freedom important to Canada?

Academic freedom does not exist for its own sake, but rather for important social purposes. Academic freedom is essential to the role of universities in a democratic society. Universities are committed to the pursuit of truth and its communication to others, including students and the broader community. To do this, faculty must be free to take intellectual risks and tackle controversial subjects in their teaching, research and scholarship. For Canadians, it is important to know that views expressed by faculty are based on solid research, data and evidence, and that universities are autonomous and responsible institutions committed to the principles of integrity.

The responsibilities of academic freedom

Evidence and truth are the guiding principles for universities and the community of scholars that make up their faculty and students. Thus, academic freedom must be based on reasoned discourse, rigorous extensive research and scholarship, and peer review. Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission. The insistence on professional standards speaks to the rigor of the enquiry and not to its outcome. The constraint of institutional requirements recognizes simply that the academic mission, like other work, has to be organized according to institutional needs. This includes the institution's responsibility to select and appoint faculty and staff, to admit and discipline students, to establish and control curriculum, to make organizational arrangements for the conduct of academic work, to certify completion of a program and to grant degrees.

Roles and responsibilities

University leadership: It is a major responsibility of university governing bodies and senior officers to protect and promote academic freedom. This includes ensuring that funding and other partnerships do not interfere with autonomy in deciding what is studied and how. Canada's university presidents must play a leadership role in communicating the values around academic freedom to internal and external stakeholders. The university must also defend academic freedom against interpretations that are excessive or too loose, and the claims that may spring from such definitions. To ensure and protect academic freedom, universities must be autonomous, with their governing bodies committed to integrity and free to act in the institution's best interests. Universities must also ensure that the rights and freedoms of others are respected, and that academic freedom is exercised in a reasonable and responsible manner.

Faculty: Faculty must be committed to the highest ethical standards in their teaching and research. They must be free to examine data, question assumptions and be guided by evidence. Faculty have an equal responsibility to submit their knowledge and claims to rigorous and public review by peers who are experts in the subject matter under consideration and to ground their arguments in the best available evidence. Faculty members and university leaders have an obligation to ensure that students' human rights are respected and that they are encouraged to pursue their education according to the principles of academic freedom. Faculty also share with university leadership the responsibility of ensuring that pressures from funding and other types of partnerships do not unduly influence the intellectual work of the university.

<http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/>

2. CAUT Operational Standards

- Clear detail must be provided about how faculty may apply for funding in relation to a donor or other collaborative agreement, and about what evaluation and selection criteria will be used.
- Any grants or research funding related to an agreement should be evaluated and awarded using academic methods of independent impartial peer review.
- The planning, design, data collection, analysis and dissemination of results should be under the control of the researchers, not the donor or organizational partner.
- Agreements cannot permit the donors or collaborators to have any right to change the content of publications nor permit delays in publication for longer than 60 days, and then only if there is a compelling reason for the delay.
- Relationships between faculty members and graduate students should be safeguarded by ensuring a bright line between the involvement or non-involvement of graduate students in collaborative agreements and their admission, program choices, and evaluations.
- The university must ensure that there is no negative impact on the work of those within the department/faculty, university who choose not to be part of a collaborative agreement.
- Intellectual property in relation to a donor or corporate collaboration should be consistent with the faculty association collective agreement or, in the absence of a collective agreement, with university policy.
- Researchers and their immediate families should have no direct or indirect financial interest in any organization funding the collaborative agreement.
- No member of the university's senior administration (at the level of the president or vice-president) should have direct or indirect financial interest in any donor or collaborative partner organization (such as membership on a corporate board or owning of stock).
- An independent post-agreement evaluation plan must be part of the agreement. The results of the evaluation should be a public document readily available to the academic community.
- In no case should a funder or private collaborator or their representatives have any voice in matters related to the academic affairs of the institution or academic aspects of the collaboration.
- Faculty and researchers involved in donor agreements and/or collaborative arrangements must have explicit protection for academic freedom.¹⁹

19 Canadian Association of University Teachers, "Open for Business – On What Terms? An Analysis of 12 Collaborations Between Canadian Universities and Corporations, Donors and Governments," pp. 3-4.

Appendix D
Examples of Donor Agreements

EXAMPLE ONE

Date DONOR AGREEMENT Between abc foundation and the university of xyz			
The ABC Foundation Address		The University of XYZ (<i>the “Grantee”</i>) Address	
Approved:		Date:	
Project Title:			
Grant No:		CRA BN:	
Grant Amount:		Estimated Project Budget:	
		Estimated Contribution to Project by Grantee and/or Project Partners:	
Date	The ABC Foundation Payment Schedule \$	Grantee Reporting Schedule	Estimated Contribution to Project \$
Date		..	<i>Per project proposal</i>
Date		Progress Report	<i>Per project proposal</i>
Date		..	<i>Per project proposal</i>
Date		Final Report	<i>Per project proposal</i>
Total		..	
Grant Support: The grant provides support toward project costs, including costs for staff, materials, evaluation and knowledge sharing			
Project Description: <i>Project goal</i> <i>Secondary objectives</i> (herein referred to as the “Project”)			

Terms of Reference for the Grant from the ABC Foundation to the Grantee:

1. The Grantee agrees to hold and apply the Grant exclusively for the purposes of the Project set out above and subject to the terms and conditions of this Agreement;
2. The Grant shall be used solely for charitable purposes;
3. The Grant shall be paid to the Grantee in installments, in the form of cash, according to the ABC Foundation Payment Schedule set out above. The payment of each such installment shall be conditional upon the ABC Foundation's prior receipt, review and approval of the Grantee's written progress report(s) with respect to the use and financial status of the Grant and the status of the Project, as outlined below, which progress report(s) is/are due according to the Grantee Reporting Schedule set out above;
4. The Grantee shall acknowledge promptly in writing receipt of each installment from the ABC Foundation, which written acknowledgment shall include the Grantee's charitable Business Number pursuant to the Income Tax Act (Canada);
5. The Grantee and/or its Project partners shall contribute an estimated \$56,000 in cash and/or in kind to the Project as described in the Project proposal and set out in the Estimated Contribution to Project schedule above;
6. The Grantee shall provide the ABC Foundation with written progress report(s) according to the ABC Foundation's reporting requirements, as they may be amended from time to time, which report(s) shall include a financial report for the use and status of the Grant, a report on cash and/or in kind contributions to the Project, an evaluation and summary of the Project activities to date, the Grantee's most recent audited financial statements and the Grantee's current summary operating budget. The Grantee's progress report(s) shall be due according to the Grantee Reporting Schedule set out above;
7. The Grantee shall deliver a comprehensive final report according to the ABC Foundation's reporting requirements, as they may be amended from time to time, on the application of the Grant and the status (or completion, as the case may be) of the Project to the ABC Foundation according to the Grantee Reporting Schedule set out above;
8. Any investment income earned by the Grantee on the Grant prior to its disbursement will be spent on the Project's initiatives;

9. The Grantee is responsible for the management of the Grant and will invest the Grant pursuant to the Grantee's investment policies and procedures, as they may be amended from time to time. The Grant may be co-mingled with other restricted funds held by the Grantee for investment purposes, provided that the Grant's principal and any net investment income earned thereon is recorded as a separate restricted fund for the purposes of reporting to the ABC Foundation and for accounting purposes in accordance with the legal requirements under the Charities Accounting Act (Ontario);
10. If, upon completion of the Project as contemplated by this Agreement, the Grant funds have not been completely expended at the end of the Grant period, the Grantee shall provide a written statement of the balance of such funds and a plan for using the remaining funds to the ABC Foundation;
11. After completion of the payment of the Grant, the Grantee shall keep the ABC Foundation informed of the status and/or impact of the Project from time to time;
12. The Grantee shall inform the ABC Foundation promptly in writing of any significant changes, for example, leadership, governance, federal income tax status or financial changes, within the Grantee's organization during the Grant period or of any significant change that directly impacts the Project;
13. The Grantee shall submit in writing any significant proposed modifications to the Project and Project Budget to the ABC Foundation for prior approval;
14. If the ABC Foundation, in its sole discretion and after careful review and consideration, determines, that: (a) it is not satisfied with the quality of the Grantee's work or the progress made toward achieving the objectives of the Project; (b) the Grantee is incapable of satisfactorily completing the Project; (c) the Grantee fails to meet any one or more of the terms and conditions set forth in this Agreement; (d) the Grantee's federal income tax status changes; (e) any significant changes within the Grantee's organization may affect the viability of the Grantee; or (f) the directors and/or members of the Grantee resolve to dissolve the Grantee, the ABC Foundation, in its sole discretion, reserves the right to terminate this Agreement and permanently cease funding the Project and payment of any remaining unpaid installments of the Grant.

Without limiting the generality of the foregoing, the ABC Foundation may have based its decision to fund the Project on the qualifications of specific individuals named by the Grantee as being responsible for carrying out the Project work outlined in this Agreement.

In the event these specific individuals named by the Grantee are no longer involved in the Project for whatever reasons, the ABC Foundation, in its sole discretion, reserves the right to terminate this Agreement and permanently cease funding the Project and payment of any remaining unpaid installments of the Grant if the ABC Foundation believes replacement staff or Project participants proposed by the Grantee cannot complete the Project in a timely fashion or in an acceptable manner.

If this Agreement is terminated prior to the end of the Grant period, the Grantee shall provide The ABC Foundation with a full accounting of the receipt and disbursement of Grant funds for the Project from the date of the last written report provided to the ABC Foundation in accordance with the Grantee Reporting Schedule set out above through to the effective date of the termination.

If this Agreement is terminated by the ABC Foundation in accordance with the terms of this paragraph 14, The ABC Foundation agrees to reimburse the Grantee for all reasonable expenses incurred or committed, as at the termination date, toward the specific activities of the Project being funded by the ABC Foundation upon appropriate approval and verification of such expenses by the ABC Foundation;

15. The Grantee will comply with applicable privacy legislation, and will not provide the ABC Foundation with any personal information in connection with the Grant or the Project;
16. All the materials, including for example and without limitation, manuals, binders, videos, publications, papers, and other intellectual property, created using Grant funds are the property of the Grantee. Copies of all such materials created shall be provided to the ABC Foundation by the Grantee;
17. The ABC Foundation's name shall be used only with the prior written approval of the Executive Director or the Program Manager or other officer of the ABC Foundation;
18. The ABC Foundation reserves the right to include information relating to the Grant and the Project on the ABC Foundation's Website; in periodic reports and newsletters; and in other materials issued by or on behalf of the ABC Foundation;
19. This instrument, including those documents incorporated by reference into this instrument, is the sole agreement between the parties with respect to the Grant and the Project. The present Agreement may not be modified without the consent of all the parties to the Agreement, and any modification shall be made in writing and signed by all the parties to

the Agreement or their duly authorized representatives. Any clause that, for any reason whatsoever, is found to be illegal or invalid will have no effect on the legality or validity of the other clauses in the present Agreement;

20. It is acknowledged that the focus of priorities of the Grantee may shift over time, and that it may become impossible or impracticable to apply the Grant for the purposes of the Project as set out above. If the Grantee is of the opinion that a revised purpose is appropriate as a result of the impossibility or impracticability of the Project, the Grantee shall exercise its discretion, in consultation with the ABC Foundation, and use the Grant to the best advantage of the Grantee for other purposes consonant with the spirit and intent of the ABC Foundation's Grant. If it is determined by the Grantee that it has become impossible or impracticable to apply the Grant for the purposes of the Project set out above, the ABC Foundation, in its sole discretion, reserves the right to terminate this Agreement and cease payment of any remaining unpaid installments of the Grant and agrees to reimburse the Grantee for all reasonable expenses incurred or committed, as at the termination date, toward the specific activities of the Project being funded by the ABC Foundation upon appropriate approval and verification of such expenses by the ABC Foundation;
21. The ABC Foundation is a funding source only and does not participate in or direct any of the activities or services of the Grantee. Accordingly, the Grantee understands and agrees that the ABC Foundation, its directors, officers, members, employees and agents will not be liable for any of the Grantee's contracts, torts, negligence or other acts or omissions, or those by the Grantee's directors, officers, members, employees, volunteers, agents or Project participants. The Grantee understands and agrees that the ABC's Foundation's insurance policies or self-insurance plans do not extend to or protect the Grantee or the Grantee's directors, officers, members, employees, volunteers or Project participants. The Grantee understands and agrees that the ABC Foundation will not provide any legal defense for the Grantee or any such person in the event of any claim against any or all of them. Unless prohibited by law, the Grantee shall hold the ABC Foundation harmless from all liability, including but not limited to legal costs, from the contracts, torts, negligence or other acts or omissions of the Grantee, its directors, officers, members, employees, volunteers or Project participants in any way connected with any activity of the Grantee including but not limited to the Project;
22. Each individual executing this Agreement on behalf of the Grantee warrants that he/she has full power and authority to execute this Agreement on behalf of the Grantee. Further, the Grantee warrants that the board of directors of the Grantee has taken all action required by law, the Grantee's Letters Patent/Incorporating Statute/Articles of Incorporation or other constating documents, By-Laws or otherwise to authorize the execution and delivery of this

Agreement and the consummation of the transaction contemplated herein. The Grantee further warrants that this Agreement constitutes the valid and binding obligation of the Grantee, enforceable in accordance with its terms;

23. All references to currency in this Agreement are to Canadian dollars, unless otherwise specified; and

24. This Agreement is governed by and construed in accordance with the laws of Ontario.

The Parties hereby acknowledge the acceptance of the Grant and agree to its terms.

The ABC Foundation Address	The University of XYZ Address
Grant No:	Project Title:
Approved: Date:	Amount:

EXAMPLE TWO

Donor Agreement with University XYZ

The Board of Directors of Foundation ABC has authorized a grant of up to \$X over five years to [University XYZ] in support of the project titled _____, subject to the conditions detailed below.

Our understanding of the project for which this support is provided is summarized in an attachment to this letter. Please advise us if this summary is incorrect in any significant way.

Conditions of the Grant:

1. that the grant is used exclusively for the above purposes;
2. that the funds are used solely for charitable purposes;
3. that any use of the ABC Foundation name will occur only with prior written approval from our Foundation;
4. that our Foundation be kept informed of The Project's progress and evaluation activities by the anniversary date of the first payment of the grant;
5. that the second and third year grant installments are contingent upon
 - receipt of your annual progress reports for the project including an annual accounting of the funds; and
 - confirmation that you are successful in securing the balance of funding to complete the project;
6. that our Foundation be kept informed of the impact of The Project with periodic updates after completion of our three year funding commitment.

We acknowledge acceptance of this grant and its conditions for The University of XYZ

Director of Research Grants
University XYZ

Dr. Smith, Co-Principal Investigator
Dr. Jones, Co-Principal Investigator

Appendix E

Example of a Donor Agreement for an Endowed Chair

**MEMORANDUM of UNDERSTANDING
BETWEEN
(Foundation) AND (University)**

Collaboration on the establishment and management of the Chair (Center/Program) at the (University)

The (Foundation) and the (University) have agreed to collaborate on the establishment and management of the X Chair. (Insert description of objectives of Foundation and the scope or objectives of the Chair if relevant).

To achieve the objectives of the Chair, the (Foundation) agrees to provide support as outlined in the attached Schedule.

The (University) will establish a Chair of X. (optional)[The University agrees, further, that it will hire Y as the inaugural Chair in X]. The holder of this Chair will hold a tenured faculty position at the (University) and (optional) [will lead the University's strategy to attract and retain other faculty in the area of X, contribute to designing graduate programming related to knowledge innovation and act as a key advisor to the development of an anticipated Center for X (where the Chair will be housed). The Center will operate as a standard academic research and graduate teaching unit and will be subject to the regulations and management requirements of the (University) Senate).

The (University), while collaborating on initiatives of mutual interest, will not have a formal management relationship with the (Foundation) or any initiative undertaken by the (Foundation).

(Optional) insert a clause re ability of the Foundation to appoint a representative to the management structure of the Center or Program operated by the University (and led by the appointed Chair).

This Memorandum of Understanding covers the period of X to Y. The (Foundation) and the (University) understand that the MOU is renewable, based on mutual agreement.

President
(Foundation)

(Date)

President
(Foundation)

(Date)

SECTION EIGHT

Resources

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<http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/>

Canadian Association of University Teachers, “Open for Business – On What Terms? An Analysis of 12 Collaborations Between Canadian Universities and Corporations, Donors and Governments,” November 2013,

<http://www.caut.ca/docs/default-source/academic-freedom/open-for-business-%28nov-2013%29.pdf?sfvrsn=4.>

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Canada Revenue Agency. “What is a gift?”, last modified March 4, 2014.

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ABOUT PHILANTHROPIC FOUNDATIONS CANADA

PFC is a national member association of Canadian grantmakers, including private and public foundations, charities and corporations.

PFC promotes the growth and development of effective and responsible foundations and organized philanthropy in Canada through provision of membership services, resources and advocacy.

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