



# DIRECTORS IN THE CORPORATION

Terms of Reference

[Abstract](#)

The purpose of this guide is to provide the framework for Director involvement in the Corporation

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# DIRECTORS INVOLVEMENT IN THE CORPORATION

## INTRODUCTION

### REVISION HISTORY

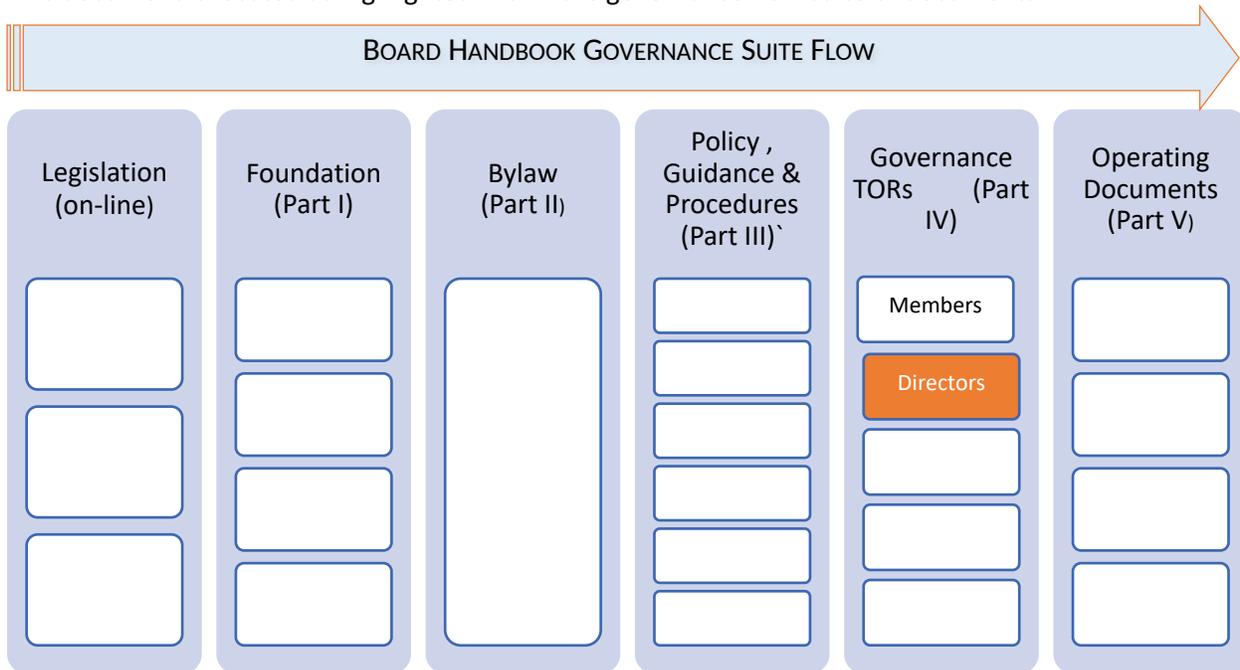
Version	Issue Date	Author	Reason for Change
Draft 1.0	November 2019	Thomas Burnie	Initial draft for comments
Draft 2.0		Thomas Burnie	Second draft comments
Draft 3.0	November 2020	Thomas Burnie	Third draft for comments
Draft 4.0	February 2021	Thomas Burnie	Added map and final draft for approval

### APPROVALS

Version	Issue Date	Approving Authority	Comment
1.0	19 September 2019	Board of Directors	Approved as Provisional Document
2.0	15 April 2015	Board of Directors	Approved as Operating Document

### GOVERNANCE FLOW SUITE OF DOCUMENTS

This document is located as highlighted within the governance flow suite of documents.



### REFERENCES

This document uses the following references:

- Canada Not for Profit Corporations Act (CNCA) [https://laws-lois.justice.gc.ca/eng/acts/C-7.75/;](https://laws-lois.justice.gc.ca/eng/acts/C-7.75/)
- The Corporate By-law;

- Office of the Public Guardian and Trustee (OPGT) for Ontario Guidelines for Charities, [Charities - Ministry of the Attorney General \(gov.on.ca\)](#);and
- The GUILD Policy, Guidance and Procedures (PGP) Manual.

## CONVENTIONS

The following conventions are used:

- “Board” means “Board of Directors”;
- citations from other sources are in *italics*;
- reference to the PGP will include the applicable By-law where appropriate; and
- where practicable, [hyperlinks](#) are used internally in this document or externally with other documents.

## DISCUSSION

### **Purpose**

The purpose of this guide is to provide the framework for Director involvement in the Corporation.

### **Scope**

Following the general implications from the references, the scope includes the:

- Role
- Election
  - Number of Corporate Directors
  - Election
  - Vacancy in Office
- General Duties and Powers
  - Source Authorities
  - Signing Authority
- Annex A – General Requirements
  - Universal Duty

## ROLE

Subject to the Canada Not for Profit Corporations Act (CNCA), the articles and any unanimous member agreement, the Directors shall manage or supervise the management of the activities and affairs of the corporation (*CNCA article 124*).

## ELECTION OF DIRECTORS

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### NUMBER OF CORPORATE DIRECTORS

By-law Section 31 authorizes the minimum and maximum number of Directors. GUILD Policy 2.6.1 states the number of Directors and their role.

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### ELECTION

By-law Section 32 authorizes the election of Directors and the term of office. GUILD Policy 2.6.2 sets out the related requirements for the election process, succession planning and the re-election process.

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### VACANCY IN OFFICE

By-law Section 33 describes conditions by which the office of a Director shall be automatically vacated. GUILD Policy 2.6.3 sets out the Management Committee action and Board decision action.

By-law Section 34 sets out how a vacancy for the office of Director may be filled and GUILD Policy 2.6.4 sets out the remedial course of action.

## GENERAL DUTIES AND POWERS

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### SOURCE AUTHORITIES

Canada Not-for-profit Corporations Act (CNCA). Directors shall be guided in all their deliberations by the CNCA, the Canada Not-For-Profit Corporations Regulations, the GUILD Articles of Continuance, by-laws, policies, Board rules, Directives, etc. The CNCA, PART 9, Sections 124-159 contain specific provisions with respect to Directors and Officers. [Annex A](#) sets out the details devolved from the Act and from guidance devolved through various legal corporations specializing in Charity Law.

Office of the Public Guardian and Trustee (OPGT). In addition to the CNCA, the Ontario OPGT sets out the duties of a Director and Trustee in an incorporated charity in Ontario such as the GUILD. Directors manage charitable corporations. While slightly repetitious of the CNCA, [Annex B](#) is an extract of the requirements.

The Guild. For effective governance, [Annex C](#) sets out the Guild's expectations of performance from its Directors.

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### SIGNING AUTHORITY

By-law Section 6 authorizes the appointed Board officers or Directors as Signing Officers for the execution of corporate documents. However, PGP policy 2.3.4 authorizes designated Officers only as signing Officers.

## ANNEX A – GENERAL REQUIREMENTS

### UNIVERSAL DUTY

The CNCA Part 9 sets out some mandated duties for Directors. The Guild By-law is silent on this topic while various legal firms suggest best practices.

Directors owe several basic fiduciary duties to the corporation and are charged with a variety of tasks in the fulfillment of their duties. These duties and expectations include the six (6) duties listed below.

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#### DUTY OF CARE

The duty of care imposes on Directors a duty of competence or skill and diligence that must be performed to a certain standard. It requires a Director to be familiar with the GUILD finances and activities and to participate regularly in its activities and governance.

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#### DUTY OF LOYALTY

The duty of loyalty requires that each Director act honestly and in good faith in the best interests of the GUILD and requires that personal interests not be placed in conflict with those of the GUILD. The good-faith requirement is the core of the fiduciary relationship. Loyalty requires that any conflict of interest, real or perceived, be disclosed in advance of joining the Board. Should a conflict arise while the Board is sitting, it must be declared, the Director must not participate in any discussion or vote and, depending on circumstances, the Director may have to resign. The duty of loyalty imposes a duty to support Board decisions.

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#### DUTY OF OBEDIENCE

The duty of obedience requires Directors to make sure the GUILD complies with applicable laws, regulations and its own governance documents and processes.

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#### DUTY OF DUE DILIGENCE/ DUTY TO ACT IN GOOD FAITH

The duty to exercise power requires that Directors actively manage the GUILD as an entity, develop and ensure implementation of policies and directives to ensure effective and efficient operations, pursue the GUILD Purpose and Activities, properly maintain books, records and minutes and hold funds collected in trust and use them properly. The Board may delegate certain responsibilities, but Directors must supervise/oversee the activities and they remain responsible for results.

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#### DUTY TO EXERCISE POWER

The duty to exercise power requires that Directors actively manage the GUILD as an entity, develop and ensure implementation of policies and directives to ensure effective and efficient operations, pursue the GUILD Purpose and Activities, properly maintain books, records and minutes and hold funds collected in trust and use them properly. The Board may delegate certain responsibilities, but Directors must supervise/oversee the activities and they remain responsible for results.

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#### DUTY TO CONTINUE

The duty to continue means there is a continuing obligation to the GUILD which cannot necessarily or always be relieved by resignation (resignation to avoid personal liability is ineffective and may constitute a breach of the fiduciary duty).



### OPGT GUIDELINES

The OPGT charitable property program *inter alia* investigates complaints about alleged misuse of charitable property and is involved in court cases if necessary, to represent the charitable interest. To help mitigate misuse, the OPGT sets out eight (8) duties of a Director.

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#### 1. DUTIES ON APPOINTMENT AS A DIRECTOR

A new Director should know the purposes of the charity. These will be found in the Letters Patent if the charity is a corporation or in the document which creates the trust (the constitution for an unincorporated association or the trust deed for a trust). New Directors should be familiar with the general requirements of charities law and if the charity is a corporation, of the Corporations Act.

The Director should review the past administration of the charity. They have a duty to investigate any suspicious circumstances which suggest the charity's property has not been properly used. Action should be taken to correct any problems.

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#### 2. DUTY TO BE REASONABLE, PRUDENT AND JUDICIOUS

Directors must handle the charity's property with the care, skill, and diligence that a prudent person would use. They must treat the charity's property the way a careful person would treat their own property. They must always protect the charity's property from undue risk of loss and must ensure that no excessive administrative expenses are incurred.

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#### 3. DUTY TO CARRY OUT THE CHARITABLE PURPOSES

The charity's property can only be used for purposes of the charity. It cannot be used for any other purpose.

Charities may have more than one purpose. If a charity is incorporated the purposes are found in the corporation's Letters Patent. If property is improperly used, Directors or trustees may be required by a court to repay the money.

Some charities have funds or property that are supposed to be used for one specific purpose. The Directors or trustees must make sure that the property is used for that purpose.

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#### 4. DUTY TO AVOID CONFLICT-OF-INTEREST SITUATIONS

Directors should avoid conflicts of interest. A conflict of interest arises when a Director has a personal interest in the result of a decision made by the charity.

Directors must always consider the interests of the charity and not allow their personal interests or preferences to affect their conduct and decisions.

Directors must also avoid the **appearance** of conflict of interest. Certain investments, such as loans to donors or Directors of the charity, or to companies in which they have shares can be a breach of the duty of a Director. Even if these investments are made at market rates, there may be an appearance of conflict of interest.

If the Directors have any discretion in choosing the people who benefit from the charity, they must use this power with complete fairness. The choices must be fair and must also appear to be fair.

To avoid the appearance of conflict of interest, in general, a Director should not transact business with the charity or accept any personal benefit from the charity. Authority to transact business with, or to be a client of, the charity can be given by Court Order. It may also be given in any regulations made under the Ontario Charities Accounting Act.

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## 5. DUTY TO ACT GRATUITOUSLY

Generally, a charity cannot pay a Director to act in the capacity of a Director. Also, a Director cannot be paid for services provided in any other capacity unless permitted by a court order. In appropriate circumstances, payment for services other than as a Director may be allowed by Court Order or by an Order made under section 13 of the Charities Accounting Act where it is in the charity's best interest to do so. A charity can reimburse a Director for reasonable expenses.

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## 6. DUTY TO ACCOUNT

Directors are responsible for the charity's property. They must make sure that proper accounts are maintained and that invoices supporting the accounts are kept.

The Public Guardian and Trustee may ask a charity to file its financial statements with the Office of the Public Guardian and Trustee.

The Public Guardian and Trustee may also request information about the management of a charity. Any charity can be compelled by the Public Guardian and Trustee to pass its accounts. This is a court process where the accounts are reviewed by a judge of the Superior Court of Justice. A charity will be asked to pass its accounts where there are serious concerns about the administration of the charity. Charitable trusts often pass their accounts voluntarily on a periodic basis.

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## 7. DUTY TO MANAGE THE CHARITY'S ASSETS

The Directors are responsible for the management of the charity's funds and assets. They should not delegate this responsibility to employees or financial consultants, although they may rely on the advice and assistance of such people if it is prudent to do so. Directors may use the management services of accountants, stockbrokers, and other financial consultants if the capital is substantial. They may pay for these services as part of the administrative expenses of the charity. Whatever form the financial service arrangements take the Directors must, at all times, retain general control over the funds.

Directors must act in person and make all major decisions concerning the charity. They can delegate the day-to-day management of the charity to employees, but they remain responsible and must maintain proper supervision and control over the work of the employees.

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## 8. DUTY TO MANAGE THE CHARITY'S ASSETS

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### POWER TO INVEST

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The power of a charitable corporation to invest is usually set out in the Letters Patent of the corporation. If no power to invest is specified in the Letters Patent the charity must invest as set out in the Trustee Act. Directors of a charity have a duty to invest funds not immediately needed to carry out the charity's purposes.

### FACTORS TO CONSIDER WHEN INVESTING

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The Trustee Act provides a useful guide as to the factors a Director should consider when investing in a charity's property. There are seven criteria that Directors and trustees should consider in addition to any others that are relevant to the circumstances. The seven criteria are:

1. General economic conditions.
2. The possible effects of inflation or deflation.
3. The tax consequences of the investment decisions or strategies.
4. The role each investment or course of action plays within the charity's overall portfolio.
5. The expected total return from income and growth of capital.
6. Needs of the charity for liquidity, regularity of income and preservation or appreciation of capital. The need to produce sufficient income to allow the charity to carry out its purposes must be balanced against the need to maintain and, if possible, increase the capital for the future.
7. An asset's special relationship or special value, if any, to the purposes of the charity.

## ANNEX C – GUILD EXPECTATIONS OF A DIRECTOR

To establish and achieve corporate due diligence, the GUILD has the following expectations of its Board members.

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### COMMITMENT

Directors must be ready, willing, and able to commit significant personal time if they are to fulfill their fiduciary role and governance duties of care, loyalty, and obedience.

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### ATTENDANCE

Directors are expected to attend Board meetings and meetings of those committees upon which they have agreed to serve. In addition, Directors are expected to participate where possible in selected public events conducted by or on behalf of the GUILD. From time to time, they may be called upon to promote the work of the GUILD and advocate its interests.

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### PREPARATION

Directors are expected to come to Board and Committee meetings fully informed and prepared to deliberate on agenda issues and recommend action. This requires:

- a working knowledge of the GUILD's governing documents, the GUILD's Purpose and Activities, Vision, Strategic Plan, and policies;
- reading distributed materials provided with the meeting agenda, particularly those with respect to financial and budgetary matters, strategic planning, and GUILD activities; and
- becoming informed about and discussing evolving issues with Board or Committee colleagues.

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### PARTICIPATION

Directors are expected to participate in Board and Committee deliberations and activities by:

- making informed interventions based upon their knowledge, judgement, personal perspective, and life experience;
- exercising independent judgement when voting on all organizational decisions; and
- making decisions affecting the GUILD based on full consideration of all appropriate material and on the advice of professionals where required.

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### COMPORTMENT

Directors are expected to conduct themselves in accordance with the general responsibilities, duties, policies, and directives of the GUILD. In particular, they are expected to maintain a spirit of collegiality and respect for the collective decisions of the Board, not to profit in any way from their relationship with the GUILD and to subordinate any personal interests to the best interests of the GUILD.

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### EVALUATION

Directors are required to participate in a continuous process of evaluation by assessing:

- the performance of the GUILD in fulfilling its purpose, activities, vision, and mission;
- the effectiveness of the Board and any committees upon which they may sit; and
- their own contribution to the Board.

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## RESIGNATION

A Director facing any of the following situations should consider either resigning from the Board or declining to put his/her name forward for re-election for a subsequent term as a Director:

- a personal breach of ethical propriety;
- an inability to support a particular Board decision; or
- an inability to continue the necessary commitment to attend meetings and make a significant contribution to the effective governance of the GUILD.

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## RISK MANAGEMENT

A Director is expected to manage personal and corporate risk, using the guidance set out in the governance risk document, to minimize unnecessary issues affecting the GUILD.