



GOVERNANCE RISK

A Guide

Abstract

The purpose of this guide is to provide the framework for governance risk management in the Corporation.

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GOVERNANCE RISK MANAGEMENT

INTRODUCTION

REVISION HISTORY

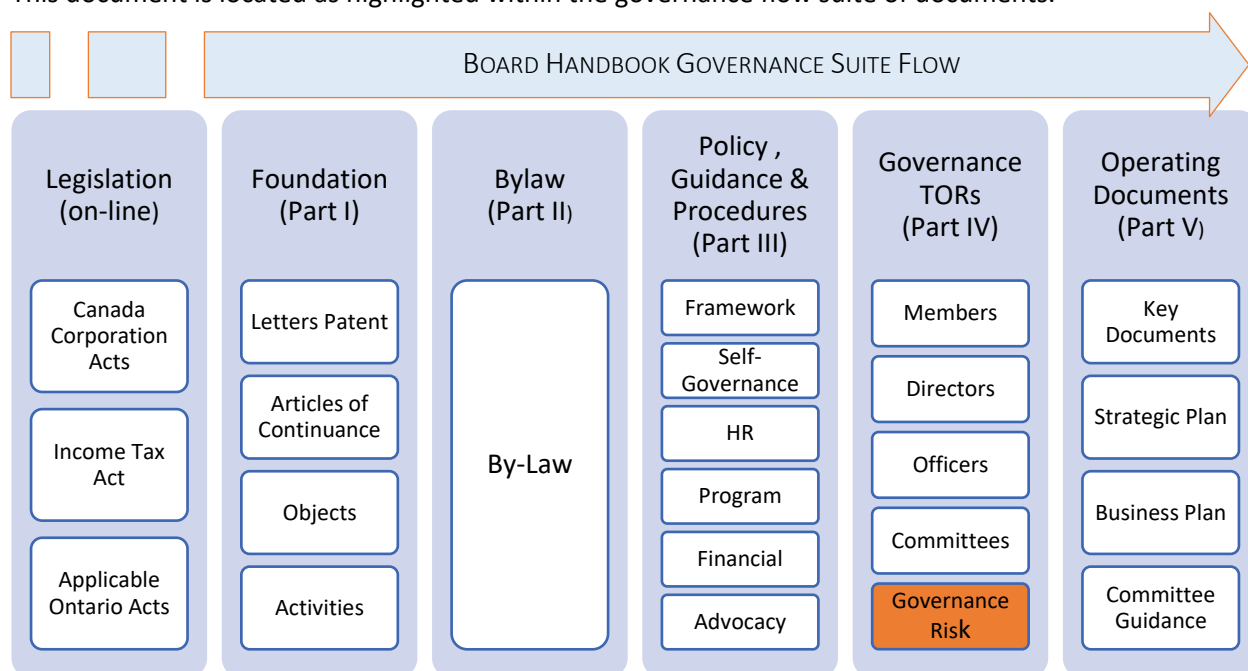
Version	Issue Date	Author	Reason for Change
Draft 1.0	November 2019	Thomas Burnie	Initial draft for comments
Draft 2.0		Thomas Burnie	Second draft comments
Draft 3.0	November 2020	Thomas Burnie	Third draft for comments
Draft 4.0	February 2021	Thomas Burnie	Governance map and final draft

APPROVALS

Version	Issue Date	Approving Authority	Comment
1.0	November 2019	Board of Directors	Approved as Provisional document
2.0	15 April 2021	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/>;
- 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 governance risk management in the Corporation.

Scope

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

- General Risk and Liability
- Risk Mitigation
- Annex A – Individual Risk Mitigation
 - Duties of Directors and Officers
 - Diligence
 - Good Faith
 - Right to Dissent
- Annex B – Corporate Risk Mitigation
 - Indemnification
 - Directors’ Insurance

GENERAL RISK AND LIABILITY

As a general rule, Directors and Officers are not personally liable for the contracts or the actions or omissions of the corporation that they serve because a corporation is considered to be a separate entity

at law. However, there are exceptions to this general rule, and there are instances of Directors' liability at common law and under statute, both federal and provincial. A Director can be held personally liable for his or her own actions or inactions, as well as jointly and severally with other members of the Board. Depending on the offence, penalties can be either a fine and/or imprisonment. The liability of Directors and Officers may occur in the following instances:

- liability and contracts, which relate to situations where Directors enter into a contract without proper authorization or on behalf of a non-existent corporation;
- liability in tort (a civil wrong), which relates to situations where a Director's own actions are tortious;
- liability for breach of fiduciary duty;
- liability for breach of Director duties, which relates to situations where the corporation is a charity or Directors deal with assets that are impressed with a trust;
- Common Law liabilities, which relate to Directors acting without proper corporate authority; and
- statutory liabilities, which relate to the numerous obligations imposed on Directors under federal and provincial legislation.

RISK MITIGATION

Elements of the CNCA and OPGT guidance to applicable Ontario law provide relief to the element of personal and corporate risk. [Annex A](#) describes some basic individual risk mitigate guidance and [Annex B](#) describes corporate risk mitigation guidance. Coupled with the individual and corporate risk guidance, the CNCA Part 16 s. 262 (5) allows that *"No person shall be convicted of an offence under this section if the person establishes that they exercised due diligence to prevent the commission of the offence."*

ANNEX A – INDIVIDUAL RISK MITIGATION

Directors and Officers can exercise various steps to mitigate personal risk. Highlighted below is partial CNCA guidance (Part 9 Directors and Officers) <https://laws.justice.gc.ca/eng/acts/C-7.75/page-11.html#h-158022> concerning the execution of duties and responsibilities, diligence, good faith and right to dissent which are applicable to Directors including those Directors appointed as Officers.

DUTIES OF DIRECTORS AND OFFICERS

CNCA s. 148 in part sets out the duties as follows:

(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall:

(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall:

(a) act honestly and in good faith a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with:

(a) this Act and the regulations; and

(b) the articles, the by-laws and any unanimous member agreement.

(3) Every director and officer of a corporation shall verify the lawfulness of the articles and the purpose of the corporation.

DILIGENCE

CNCA s. 149. (1) allows that a Director is not liable concerning certain financial liability issues if a Director has complied with his or her duties under subsection 148. (2) and (3) if the Director “*exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith*” including:

- CNCA s. 149. (1) (a) “*financial statements of the corporation presented to the director by an officer of the corporation or in a written report of the public accountant of the corporation fairly to reflect the financial condition of the corporation;*” or
- CNCA s. 149. (1) (b) “*a report of a person whose profession lends credibility to a statement made by that person.*”

CNCA s. 150. (1) allows for Officer reasonable diligence “*if an officer has complied with his or her duties under subsection 148(2) if the officer exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on a report of a person whose profession lends credibility to a statement made by that person.*”

GOOD FAITH

CNCA s. 149 (2) (a) and (b) allows that a Director has complied with his or her duties under subsection 148(1) of the if the director met the conditions listed in reasonable diligence of financial reports or a report of a professional.

CNCA s. 150 (2) allows for Officer good faith if *“an officer has complied with his or her duties under subsection 148(1) if the officer relied in good faith on a report of a person whose profession lends credibility to a statement made by that person.”*

RIGHT TO DISSENT

CNCA s. 147 describe the conditions when a Director has the right to dissent and when a Director loses that right.

Dissent

147 (1) *“A director who is present at a meeting of directors or of a committee of directors is deemed to have consented to any resolution passed or action taken at the meeting unless*

(a) the director requests a dissent to be entered in the minutes of the meeting;

(b) the director sends a written dissent to the secretary of the meeting before the meeting is adjourned; or

(c) the director sends a dissent by registered mail or delivers it to the registered office of the corporation immediately after the meeting is adjourned.”

Loss of Right to Dissent

(2) *“A director who votes for or consents to a resolution is not entitled to dissent under subsection (1).”*

Dissent of Absent Director

(3) *“A director who was not present at a meeting at which a resolution was passed or action taken is deemed to have consented to the resolution or action unless, within the prescribed period after becoming aware of the resolution or action, the director*

(a) causes a dissent to be placed with the minutes of the meeting; or

(b) sends a dissent by registered mail or delivers it to the registered office of the corporation.”

ANNEX B CORPORATE RISK MITIGATION

INDEMNIFICATION

Generally speaking, indemnification means making good the loss that someone suffered through another's act or default. The CNCA s. 151 (1) states that *"A corporation may indemnify a present or former director or officer of the corporation, or another individual who acts or acted at the corporation's request as a director or an officer in a similar capacity of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity."*

GUILD By-law 48 describes the corporation's intent to indemnify directors, officers and another person who undertakes or is about to undertake a liability on the behalf of the corporation so long as they have acted honestly and in good faith.

DIRECTORS' INSURANCE

Directors and Officers operate in an ever evolving and increasingly complex environment. Increasing litigation, accountability and regulatory scrutiny make the liabilities and legal obligations Directors and Officer more onerous, and "executive" liability coverage has become a cornerstone of any risk-management program. Insurance is a form of liability coverage. Insurance is designed to provide protection from/against an identified risk. Risk can be defined as the possibility that something harmful or undesirable may occur. Directors and Officers of charities potentially face two distinct harmful or undesirable happenings:

- that something will occur adversely affecting the corporation; and
- that they will be sued or otherwise held to account for a detrimental occurrence arising from their actions or inactions.

In Ontario, a regulation under the Charities Accounting Act allows charities to indemnify or buy liability insurance for their Directors, Officers or trustees to protect them against losses with which they may meet while managing the charity in good faith.

The GUILD maintains a Directors' and Officers' Liability Insurance Policy. At its most basic level, this type of insurance protects Directors and Officers from liability arising from actions or inaction connected to their corporate positions.

None of the various protections available to Directors – due diligence, indemnification by the corporation, statutory provisions, or insurance – are intended to provide an absolute protection against wrongdoing. Rather, the protection is meant to provide some latitude for honest mistakes and errors in judgment without unduly endangering the corporation and its Directors/Officers.