

# Rights and Powers

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## INTRODUCTION

Generally, the rights and powers of directors of a not-for-profit corporation are found in the legislation governing its incorporation, which in the case of a federal corporation is the *Canada Corporations Act*<sup>1</sup>, in the corporation's letters patent and, to a limited degree, in the common law. The federal Corporations Directorate Policy Summary on Not-for-Profit Corporations<sup>2</sup> (Policy Summary) provides a general guideline that directors of federal not-for-profit corporations can use to review their rights and powers.

## DIRECTORS' RIGHTS

### Management access

The board of directors is responsible for the effective management of the affairs of the not-for-profit

corporation. In fact, the Policy Summary provides that the bylaws of a federal not-for-profit corporation must state explicitly that the board has this power, although they may also specifically exclude certain powers that are instead to be exercised by the membership of the corporation. The power to manage the corporation involves:

- ensuring that the objects of the corporation are properly carried out;
- setting long-range objectives and strategic plans for the corporation;
- being responsible for all aspects of the corporation's operations;
- ensuring the corporation's financial stability and overall performance; and,
- supervising management and staff.

Each individual director of a not-for-profit corpora-

tion is also responsible for his or her own acts and omissions while in office. The board of directors must, therefore, have unimpaired access to all the resources of the corporation as necessary in order to effectively perform their management duties.

### Books and records

A federal not-for-profit corporation is required to keep a book, or books, that records all the constitutional (otherwise known as 'constating') documents of the corporation, as well as the names, addresses and occupations of all members and directors of the corporation.<sup>3</sup> It must also keep proper books of account and accounting records of all financial matters and other transactions of the corporation.<sup>4</sup> Failure to do so is an offense under the *Canada Corporations Act*.

The *Income Tax Act* (Canada)<sup>5</sup> requires charitable corporations to keep certain records and books of account, duplicates of all charitable receipts issued for donations by the charitable corporation, and information that verifies donations made to the charitable corporation.<sup>6</sup>

Because of these statutory requirements, a director of a federal not-for-profit corporation has the right at any reasonable time to inspect and copy all the books, records, and documents (not only those that are publicly available) and to inspect the physical property owned or used by the corporation. This allows directors to exercise their managerial and administrative powers, make informed decisions about the affairs of the corporation, confirm that the corporation is in compliance with all applicable laws, and ensure that any funds collected from the public by the corporation in trust are used only for the designated purposes.

### Notice of meetings

Meetings of the board of directors of a not-for-profit corporation are an essential way for directors to exercise their power to manage and administer the affairs of the corporation. Therefore, each director has a right to receive proper advance notice of all board meetings.

Federal not-for-profit corporations must include provisions in their bylaws that address how the corporation will hold its meetings.<sup>7</sup> Generally, the bylaws must establish either a specific amount of time that is reasonable for notice of directors' meetings or must indicate that reasonable notice will be given. While a specific time period is not outlined in the *Canada Corporations Act*, the Policy Statement recommends a minimum of 14 days for notices sent to directors by mail. The bylaws may also permit notice of directors' meetings to be sent by electronic means, including e-mail or facsimile, or notice to be waived by directors who attend the board meeting.

If a director is not able to attend a meeting of the board of directors, he or she has the right to review the minutes of such a meeting and any financial statements presented, and may voice an objection to any information these contain.

The right to attend meetings is subject to directors' fiduciary duty to avoid any conflict of interest. In some circumstances, conflict of interest issues will preclude the director from being present for discussions and votes on particular matters; occasionally, where curing the conflict requires that the director resign, the right to attend meetings will be lost. In such situations, other directors need to be wary of the former director's continuing presence at meetings even as a guest, as this may give rise to an opportunity to improperly influence decisions. Where a director

is absent temporarily, owing to a conflict of interest issue, this absence should be carefully recorded in the minutes. (Please see Chapters 2 and 6 for more information on conflicts of interest.)

### Right to vote

All directors of a federal not-for-profit corporation, except *ex-officio* and honorary directors, have the right to vote at meetings of the board of directors. The bylaws of the corporation may also, however, give *ex-officio* and honorary directors the right to vote. However, where the bylaws of the corporation provide voting rights to directors, such voting rights must be equal for all voting directors. This means that such directors may not be given either votes that are weighted differently than other votes (for instance, double or half votes) or the right to vote only on certain specified matters (for instance, giving an honorary treasurer a vote only on financial matters).

While the right to vote is a basic right, it is subject to directors' fiduciary duty to avoid any conflict of interest in any contract or proposed contract of the corporation. (Please see Chapters 2 and 6 for more information of this duty.)

### Minutes

A federal not-for-profit corporation must keep minutes of all meetings of its members, directors and the executive committee.<sup>8</sup> Directors have the right to vote on the approval of the minutes of all previous meetings of the board of directors and to voice any objections to them.

Directors also have a right to inspect the minutes of all meetings as part of their right to access and inspect the corporation's books and records. If the corporation has established committees, the board of

directors has the right to receive copies of the minutes of each committee's meetings. This allows directors to fulfill their responsibility to exercise overall management of the corporation.

## DIRECTORS' POWERS

Generally, the powers of directors of a federal not-for-profit corporation are set out in its letters patent. Directors should carefully review the letters patent of the corporation on which they serve as a board member. They should also refer to the *Canada Corporations Act*, which sets out the standard powers of a federal not-for-profit corporation.

### Power to manage the affairs of the corporation

The board of directors of a federal not-for-profit corporation has the power to manage the affairs of the corporation. In all provinces except Québec, directors of a charitable corporation have an additional trustee-like duty imposed on them by common law and must manage and account for the assets of the corporation in a manner akin to that of a trustee. As such, directors of charities are considered to have a higher fiduciary position in relation to the assets of the corporation and a higher duty of care than directors of either other not-for-profit corporations or for-profit corporations. This means that they have the same powers as directors of other not-for-profit corporations but must exercise such powers with somewhat greater care than their not-for-profit counterparts. As it is a civil law jurisdiction, this additional trustee-like common law duty does not apply in Québec.

### Standard powers provided by statute

The *Canada Corporations Act* (Section 16) outlines all of the standard powers of a federal corporation. Legally, these are known as incidental and ancillary powers. The most important are:

- the power to purchase or acquire assets or properties in order to carry out the purposes of the corporation (e.g., buying equipment or furniture for the organization's work or to carry out its functions);
- the power to apply for, purchase or acquire any intellectual property that may be used for the corporation's purposes, and to sue, exercise, develop or grant licenses relating to this intellectual property (e.g., to buy or create, use and protect trademarks or copyright materials);
- the power to amalgamate or enter into partnerships or other arrangements with any other company, firm or person carrying on business or transactions that the corporation is authorized to carry on (e.g., contracting or establishing joint ventures to achieve the corporation's goals);
- the power to enter into any arrangements with any government or authority that are conducive to the corporation's objects in order to obtain rights, privileges and concessions (e.g., entering into fee-for-service arrangements with government to achieve the corporation's goals);
- the power to purchase, lease, acquire, sell or otherwise deal with any real or personal property (e.g., renting or purchasing office space);
- the power to apply for and secure, and to exercise and carry out any power, right or privilege that any government or authority or any corporation or other public body may be empowered to grant, and

to pay for, aid in and contribute towards carrying the same into effect (e.g., the right to be licensed or accredited by a government body for a particular purpose, or the right to appear before an administrative tribunal);

- the power to invest and deal with the monies of the corporation (e.g., buying term deposits with the corporation's cash funds); and,
- the power to do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company (e.g., expanding services to a broader group or different geographical area in keeping with the corporation's mandate).

Federal not-for-profit corporations may also be subject to special statutory requirements in the different jurisdictions in which they operate. So these standard powers may be limited by provincial legislation. For instance, under the *Charities Accounting Act*, (Ontario)<sup>9</sup> charitable corporations in that province are not allowed to hold surplus land in Ontario for longer than three years.

### Power to borrow money

The *Canada Corporations Act* (Section 65(1)) gives statutory borrowing powers to directors of a federal not-for-profit corporation. Directors must first pass a special borrowing bylaw. They must then hold a special meeting of the general membership of the corporation to allow members to vote on the bylaw. The bylaw goes into effect only if it is sanctioned by at least two-thirds of the votes cast at this special meeting of members.

Statutory borrowing powers permit the directors of the corporation to:

- borrow money upon the credit of the corporation;
- limit or increase the amount to be borrowed;
- issue debentures or other securities of the corporation;
- pledge or sell such debentures or securities; and,
- secure such debentures, securities or borrowing by mortgage, hypothec, charge or pledge of real and personal property.

Under the *Canada Corporations Act*, not-for-profit corporations are able to borrow funds in much the same manner as business corporations. The *Income Tax Act*, however, applies some limitations to this power for charitable corporations.

For instance, charitable foundations are only allowed to borrow if they do not incur debt for anything except current operating expenses, the purchase and sale of investments, and the administering of charitable activities.<sup>10</sup> If they do, this could be a basis for de-registration as a registered charity under the *Income Tax Act*. In addition, directors must ensure that any security given for a loan by the corporation is the beneficial property of the corporation (i.e., owned for the benefit of the corporation) and not trust property (held for the benefit of a particular party or purpose), such as an endowment held by a charitable corporation.

Directors of a federal not-for-profit corporation have the power to delegate borrowing powers to other officers or directors if authorized by bylaw.<sup>11</sup> They must, however, closely monitor the borrowing process and how the money borrowed is being spent.

### Power to invest

Directors of a federal not-for-profit corporation have the power to make investments. The *Canada*

*Corporations Act* (Section 16) grants federal not-for-profit corporations the power “to invest and deal with the monies of the corporation not immediately required in such manner as from time to time may be determined.” The letters patent of the corporation may also contain specific provisions that override or supplement this power. Directors have a common law duty to invest special purpose funds for their specific purposes. This means that they have the power to deny requests or demands by donors or other parties to divert such funds for any other purposes.

If a federal not-for-profit corporation holds property in trust, such as an employee benefit fund, provincial legislation may include provisions that mandate the corporation’s investment power over these assets. Such provisions may also apply to not-for-profit corporations that are registered charities.

#### EXAMPLE

The *Trustee Act* in Ontario says that directors of a charitable corporation have the power and duty to invest the assets of the corporation as a prudent investor would. This includes the power to invest in mutual funds and to delegate investment decision making to qualified investment managers. Directors must, however, comply with certain statutory requirements, such as mandatory investment criteria, establishing and complying with an investment plan, and ensuring that a written agency agreement is entered into between the corporation and the qualified investment manager appointed by the board of directors.

Investment powers are not uniform in various Canadian provinces. It is therefore important that a not-for-profit corporation carefully determine what investment powers apply in the jurisdiction in which it is investing the funds.

### **Power to dispose of property**

Directors of a federal not-for-profit corporation have the power to sell, lease, exchange, mortgage or otherwise dispose of any property of the corporation. This is subject to any restrictions that may be included in a trust document or agreement establishing a gift to a charitable not-for-profit corporation, such as a ten-year gift agreement. Directors of a not-for-profit corporation, particularly a charitable corporation, need to determine the nature of the property being disposed of and whether any restrictions may apply.



### **SAMPLE QUESTIONS FOR PROSPECTIVE DIRECTORS TO ASK THE ORGANIZATION**

- 1) Do I understand all the rights and powers associated with the office of director?
- 2) Does the corporation have procedures or measures that will assist me if exercise those rights and powers?

### **SAMPLE QUESTIONS FOR DIRECTORS TO ASK THEMSELVES**

- 1) Am I aware of and exercising the full range of my rights and powers?
- 2) Should I be seeking any logistical assistance from the organization to facilitate the exercise of my rights and powers (e.g., better access to books, records, etc.)?
- 3) Should I be seeking any procedural assistance from the board or board officers to facilitate the exercise of my rights and powers (e.g., more meeting notice)?

## RIGHTS AND POWERS CHECKLIST

SUBJECT	TO BE CONDUCTED BY	HOW OFTEN	COMMENT
1. Management powers	Full board	Annually	Review whether bylaws set out powers, and note any exclusions that reserve powers to the members.
2. Books and records	Chair, audit committee, or other individual or committee designated by the board	Annually, typically in conjunction with the audit if there is external review of corporation's finances	Verify availability of corporate books and records.
3. Meeting procedure	Full board	Annually	Annually Is meeting notice adequate? Are directors aware of any restrictions on voting rights? Are minutes prepared and distributed regularly?
4. Standard powers	Full board	At time of decision	Is there proper authority to undertake this action, either through standard powers or through board powers provided elsewhere?
5. Borrowing	Full board	At time of decision on transaction	Is there proper authority to enter into the transaction? Does the nature of the corporation or type of asset used as collateral raise any additional concerns (e.g., is there a trust involved?)
6. Investment	Full board	At time of decision on transaction	Is there proper authority to enter into the transaction? Does the nature of the corporation or type of asset used as collateral raise any additional concerns (e.g., is there a trust involved?)