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Drafting General Investment Policies

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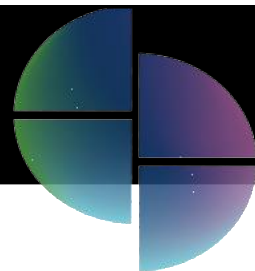
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Overview of Presentation

- Overview
- What Should a General Investment Policy Include?
- What Should a Specific Investment Plan or Strategy Address?
- Benefits of Good Investment Related Documents
- Key Takeaways

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A. Overview

- Charities which are incorporated in Ontario, have head offices in Ontario, or invest charitable funds in Ontario, generally have to comply with the statutory investment requirements set out in the *Trustee Act* (Ontario)
- The *Trustee Act* establishes the prudent investment standard governing investment decision making by the directors (or trustees) of Ontario charities, the structure and context of which is often set out by a charity in a general investment policy
- The *Trustee Act* also permits charities to delegate investment decision making to qualified investment advisors subject to compliance with certain requirements including, but not limited to, having an “investment plan or strategy” in place – sometimes called a “specific investment plan”
- An investment plan or strategy articulates the specific investment objectives and constraints that a charity has decided to put in place at a particular time, regardless of whether its investments are managed by the charity or by an external manager*

- In order to delegate investment decision making, a charity will also need to enter into an agency agreement – sometimes called a management agreement, account agreement, or other similar name – with the agent, which formalizes the delegation of investment decision-making and often is combined with a specific investment plan
- Directors may be held personally liable for any loss or damages that results from a breach of their statutory or common law duties
- Each province in Canada has its own *Trustee Act* that governs how charities are required to invest their charitable property

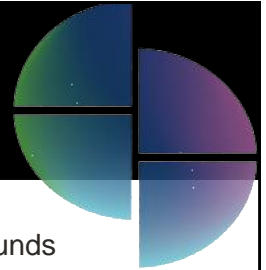


- Pro forma investment policies, specific investment plans and agency agreements often do not reflect all of the legal obligations that apply to the investment of charitable property, which generally differs by province or territory
- Charities should seek assistance from their legal counsel in reviewing and revising their investment related documents to ensure compliance with applicable provincial law
- Directors of charities also have fiduciary duty under common law to comply with any investment related limitations, conditions, terms of reference, directions or other restrictions imposed by the donors at the time of making their gifts

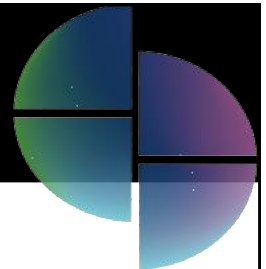
B. What Should a General Investment Policy Include?

- There is no one-size-fits-all precedent for the form of a general investment policy for a charity, as statutory requirements vary from province to province
- However, a general investment policy should generally address:
 - Purpose of the general investment policy
 - Applicability of the general investment policy (*i.e.* when it applies)
 - Explanation of the applicable investment power of the charity (*i.e.* applicable provincial *Trustee Act* or special legislation) and the board's commitment to meet all applicable statutory requirements

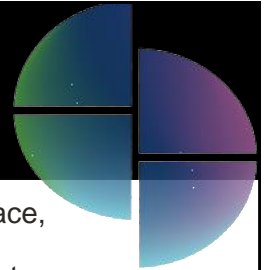




- Explanation of the authorized form of investments as a prudent investor, including mutual funds, pooled funds and segregated funds under insurance contracts as permitted by the *Trustee Act*
- Explanation of the prudent investor standard of care
- Listing the mandatory investment criteria to be considered by the charity in making investment decisions
- Explanation of any mandatory diversification requirements
- Provision for the creation of specific investment plans for each discrete fund(s) requiring separate investment terms of reference, including their relationship to the general investment policy, which document prevails in the event of a conflict and the required contents of a specific investment plan

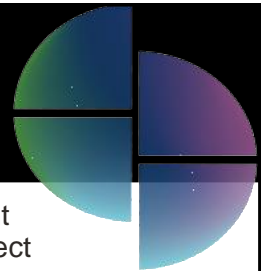


- Explanation of the statutory requirements in order to delegate investment decision making, including:
 - When delegation is permitted
 - The steps required to delegate to an investment manager (called an “agent” under the *Trustee Act*)
 - The documents that the investment manager must comply with at all times, as well as the general standard of care under the *Trustee Act*
- Explanation of how the board will monitor the investment manager’s actions and reaffirm its right to take action for breaches of duty
- Rules against sub-delegation by an investment manager
- Role of the board of directors versus an investment committee, if applicable, in making investment decisions



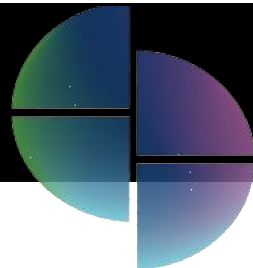
- Terms of reference for any investment committee to be put in place, e.g. its duties, how often any investment manager reports to the committee, how often the committee reports to the board of directors, etc.
- Rules to deal with conflict of interest related to investments and related decision making
- Requirements in order to commingle restricted funds, if applicable
- Process to review and amend the policy from time to time
 - Annual review generally recommended
 - Could require the investment manager to acknowledge and agree in writing to terms of any new investment policy put in place

C. What Should a Specific Investment Plan or Strategy Address?



- This is more of an investment document (prepared by an investment professional) than a legal one, but it is to be read as part of an subject to the charity's general investment policy (and the applicable *Trustee Act* by extension)
- This document is unique to each charity but will generally address the following:
 - Name and description of specific investment plan
 - Description of specific investment objectives
 - Set out the asset classes to be utilized as part of the plan





- Address the ranges for each of the asset classes, including a bench mark allocation for each class
- Impose constraints for each class of investments under the plan, including any circumstances under which there can be deviations from the constraints
- Explain how evaluation of the investments under the plan is to be done, including the manner and time frame of such evaluation
- Establish how investment management may be delegated by the charity

D. Benefits of Good Investment Related Documents

1. Compliance with Statutory Requirements

- It ensures the board meets statutory requirements to comply with the investment criteria (s 27(5) Ont. *Trustee Act*) and diversification requirements (s 27(6) Ont. *Trustee Act*)

2. Ensures Proper Authority is in Place to Delegate

- The Ont. *Trustee Act* (s 27.1) allows a charity's board to delegate investment decision-making to an agent (e.g., and investment manager)
- If the board delegates investment decisions to an investment manager, a "written plan or strategy" is required (s 27.1 Ont. *Trustee Act*)

3. Allows Flexibility for Multiple Types of Investments

- Ensures that the specific terms of investments for different funds of the charity are set out in separate investment plans often referred to as “specific investment plans”
- Specific investment plans are deemed incorporated by reference into the charity’s general investment policy, providing both flexibility and consistency for any future changes



4. Protection from Personal Liability

- A general investment policy that includes a specific investment plan can protect board members from personal liability if investment losses occur, provided the board relied on a “plan or strategy” that follows prudent investor standards (s 28 Ont. *Trustee Act*)
- Specifically, section 28 states that there will be no liability for trustees of charitable property if the “conduct...that lead to the loss conformed to a plan or strategy for the investment of the [charitable] property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances”

E. Key Takeaways



Well drafted investment documents are highly recommended for Ontario charities as they serve to protect a charity's charitable assets as well as the charity's directors from personal liability for investment decision making. They also encourage transparency, accountability and adequate risk management.



Legal requirements may vary from province to province, so it is important that charities seek legal advice to ensure compliance with common law and statutory requirements when adopting or drafting their investment documents.



Charities should not only adopt an appropriate general investment policy plus one or more specific investment plans, but must also monitor their investments to ensure they stay within scope of the investment related documents.



While adopting good investment documents is a crucial step towards good governance and risk avoidance, they are not a substitute for a charity board's ongoing responsibility to exercise the standard of care of a prudent investor in each individual investment decision.



Jacqueline M. Demczur, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*, *The Best Lawyers in Canada*, and *Chambers and Partners*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations* and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Charity & Not-for-Profit Law Seminars*

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