



Module 7:

Board Handbook for

Legal and Fiduciary Responsibilities

Version 2 – October 3, 2002

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LEGAL AND FIDUCIARY RESPONSIBILITIES

I Introduction

What is **governance**? It refers to the structure and processes that are used to direct and manage an organization's operations and activities. It defines the division of power and accountability among stakeholders, the board and management. Good governance systems help organizations to focus on the activities which contribute most to their overall objectives: To use their resources (i.e., financial & human) effectively and to ensure that they are managed in the best interests of their principal stakeholders¹. Boards are encouraged to use their branch's bylaws as a reference, which outlines the official rules and regulations for governing the branch.

Legal and fiduciary responsibilities are two of the key responsibilities of a governing board. The board has a legal duty to be loyal, prudent, and act in good faith in the best interests of the organization. As well, the board holds the fiduciary responsibility to manage the funds of the organization (e.g., establish financial controls). It is vital that members of the board, both new and old, have a clear understanding of the responsibilities placed upon them as a result of their governance role (including legal and fiduciary responsibilities).

VON Context

The **scope of governance** is different for LVAS and NVA branch boards. LVAS branch boards are responsible for governing the branch's operations and activities, including all of the services and programs provided by the branch. NVA branch boards are responsible for governing the management of the branch's charitable funds.

Purpose of the Handbook

The purpose of this handbook is:

- To provide a general overview of the roles and responsibilities placed upon the members of our branch boards;
- To help VON branch boards understand the concept of accountability and what this entails;
- To discuss the legal obligations for VON branch boards; and
- To help VON branch boards better comprehend their fiduciary responsibilities to the branch.

II Governance Roles and Responsibilities of VON Branch Boards

In Module 1: Board Handbook for Roles and Responsibilities, the specific responsibilities or expectations placed on general board members as well as those filling specific positions (i.e., chair, secretary, committee chairs, etc.) were discussed. The role of governance places responsibilities upon the members of the board.

BoardSource (formally the National Center For Nonprofit Boards) has developed a list² of the basic roles and responsibilities of governing board members. This list can serve as a guide for our branch boards. Depending on the branch board's scope of governance, there may be a difference in how these roles and responsibilities apply to a particular branch board. In such circumstances, the difference will be noted.

1. **Determine the branch's mission and vision.** A statement of mission and vision should articulate the branch's goals, means and primary clients served. It is the board of director's responsibility to create the mission and vision statements and review these periodically for accuracy and validity. Each individual board director should fully understand and support them. In the VON context, branches accept and adopt the mission and vision that are developed by the national board.
2. **Select the Branch (Executive) Director.** It is VON Canada's responsibility to determine the Branch (Executive) Director's job description. Branch boards will participate with VON Canada in the recruitment of the Branch (Executive) Director. For LVAS branches, the Branch (Executive) Director is an employee of the branch whereas for NVAS branches, the Branch (Executive) Director is an employee of VON Canada.
3. **Support the Branch (Executive) Director and assess his or her performance.** Branch boards should ensure that the Branch (Executive) Director has the moral support, and offer advice, direction and assistance to ensure that she or he needs to further the goals of the branch. The Board will participate with VON Canada in assessing the performance of the Branch (Executive) Director.
4. **Ensure effective organizational planning.** Branch boards must actively participate with the Branch (Executive) Director in an overall planning process. The focus of such a process would be dependent upon the branch boards' scope of governance.
5. **Ensure adequate resources.** One of the foremost responsibilities for our branch boards is to ensure that there are adequate resources for the fulfillment of the branch's operations and activities that are within their scope of governance. Branch boards shall work in partnership with the Branch (Executive) Director and fundraising staff (where applicable) to raise funds from the community.

6. **Manage resources effectively (*).** Branch boards are responsible for effectively managing the resources that are within their respective scope of governance. To fulfill this responsibility, branch boards must assist the Branch (Executive) Director in developing the annual budget and ensuring that proper financial controls are in place. This enables the branch boards to remain accountable to their donors, the community, the public, and to safeguard their tax-exempt status.
7. **Determine, monitor, and strengthen the branch's programs and services.** The board's role in this area is to determine, in partnership with the Branch (Executive) Director, which programs and services within their scope of governance are the most consistent with the branch's mission, and to monitor their effectiveness.
8. **Enhance the branch's public image.** Boards are the branch's primary link to the community, including the constituents, the public, and the media. Clearly articulating the branch's mission, accomplishments, and goals to the public, as well as garnering support from important members of the community, are important elements of a comprehensive community relations strategy. The branch board must work in concert with the Branch (Executive) Director in implementing their community relations strategies. To assist the branch board in this role, it is beneficial to designate a spokesperson (e.g., the Chair or a designate) from among its membership. This individual would be the primary contact through which the board would communicate with the public.
9. **Ensure legal and ethical integrity and maintain accountability (*).** Branch boards are responsible for ensuring that the operations and activities within their scope of governance adhere to legal standards, VON Canada standards, provisions within the branch bylaws and ethical norms. In addition, LVAS branch boards must ensure that there are solid personnel policies, grievance procedures, and a clear delegation to the Branch (Executive) Director for hiring and managing employees to help ensure proper decorum in this area.
10. **Assess its own performance.** Branch boards shall evaluate their success as boards. By evaluating their own performance in fulfilling their responsibilities, boards can recognize their achievements and reach consensus on which areas need to be improved.

For many of these roles and responsibilities, previous board education modules serve as a valuable resource for boards (e.g., fundraising, strategic planning, community relations, etc.). However, in relation to two of these responsibilities (denoted by a *), our branch boards require additional resources to assist them in understanding and meeting their responsibilities for their **scope of governance**. These are in regards to the board member's **accountability**, specifically for ensuring the **legal** integrity and managing the financial resources of the branch (i.e., **fiduciary** responsibilities). The following sections will provide information and clarify the branch board's responsibilities in relation to each of these areas.

III Accountability and the Branch Board

Although the main focus of this module is to explore the legal and fiduciary responsibilities of our branch board members, it is equally as important for them to possess an understanding of what accountability is and what it entails. Accountability for how an organization's activities and responsibilities have been carried out is critical to ensuring its credibility and to maintaining public confidence in it.

What is Accountability?

Accountability is formally defined as “the requirement to explain and accept responsibility for carrying out an assigned mandate in light of agreed upon expectations”³. It is especially important in situations that involve public trust. However, a commitment to accountability should not be thought of as answering only to external audiences. Rather, accountability can also be used as a constructive tool for organizational development, strategic planning, enhancing management practices and self-evaluation⁴.

The application of accountability involves three fundamentals⁵:

- Consideration of the public's trust in the exercise of responsibilities;
- Provision of detailed information that illustrates how responsibilities have been carried out and what outcomes have been achieved; and
- Acceptance of the responsibility for outcomes, including problems created or not fixed by an organization or its officials and staff.

In the voluntary sector, accountability is multi-layered. It means accountability to different audiences, for a variety of activities and outcomes, through many different means. This multidimensional nature is the principal complexity of accountability in the voluntary sector⁶. This concept of multi-layered accountability holds true within the VON, whereby we have numerous stakeholders (both internal and external to the organization) to whom we are accountable for our activities.

Accountability to Whom?

Voluntary organizations have accountabilities upward, downward and outward. Our VON branch boards are accountable to their clients, fellow board members, volunteers, staff, partners and affiliates, donors and funders, and governments (municipal and provincial), as well as to the general public⁷.

Branch boards are accountable in different ways to these different constituencies⁸. For example, VON branch boards are accountable to VON Canada. The specific obligations that VON branch boards have to VON Canada are defined within the branch bylaws. Each board is encouraged to review its branch's bylaws and to be fully aware of its obligations and accountability to VON Canada (See the list of obligations as defined within Section 8.0 “Powers and Functions” section.)

Accountability for What?

Voluntary organizations are self-governing agencies which hold a public trust related to a particular mission and they generally use donated funds to accomplish this mission. This holds true for the VON. As a result, these organizations are responsible for what they chose to do and how well they do it. This means they are, at minimum, accountable for⁹:

- Establishing an appropriate mission (accomplished by VON Canada Board of Directors) and/or policy priorities and ensuring their relevance;
- Sound management of funds received from donors, funding agencies and governments;
- Sound management of expenditures;
- Effective organizational governance, including structures and processes for managing human resources (Note: Applicable to LVAS branch boards only); and
- The outcomes, quality and range of their programs and services.

Accountability by What Means?

Voluntary organizations are expected to use a range of accountability methods. Some are applied by external regulatory agencies, while others constitute internal self-regulating measures. These include, among others: legal frameworks, government regulations, governance by the board, professional standards, accreditation, codes of ethical conduct, and outcome-based assessments of programs. In many respects, organizations in the voluntary sector already have to meet more and higher standards of accountability than in the private sector¹⁰.

On a national basis, VON Canada has already sought accreditation from an external body, the Canadian Council on Health Services Accreditation (CCHSA). In December 2001, VON Canada and its branches were successful in receiving a three-year accreditation from the CCHSA.

Example:

Branch boards are responsible for ensuring that adequate resources are in place to support the branch's charitable activities. Fundraising is the primary vehicle through which these resources are sought. VON branch boards are accountable to the donors, funders, VON Canada, those who receive services funded by these donated dollars, etc. (the "**who**") for how they raise and use these funds (**the "what"**). To formalize this accountability, the organization as a whole has adopted the Canadian Centre for Philanthropy's Ethical Fundraising and Financial Accountability Code as its policy (see Appendix C in Module 6: Board Handbook for Fundraising for a copy of this code). This code formalizes branch boards' obligations in relation to donor's rights, fundraising practices and management of the donated funds (the "**means**").

IV VON Branch Boards – Legal Obligations

In carrying out their responsibilities, members of branch boards must fulfill certain legal duties (obligations) to the branch and the community they serve. These duties are usually referred to as the duties of care, loyalty, and obedience. Branch boards are responsible for fulfilling these duties but only as they relate to their respective scope of governance.

Duty of Care

The duty of care describes the level of competence that is expected of a board member, and is commonly expressed as the duty of care that an ordinarily prudent person would use in a similar position and under similar circumstances. This means that a board member owes the duty to exercise reasonable care when he or she makes a decision as a member of the corporation¹¹.

In exercising the duty of care, responsible board members should, among other things, do the following¹²:

- Regularly attend board meetings and actively participate in discussions and decision-making. Even if a board member does not attend a meeting, he or she will still be held legally accountable for the decisions made at the meeting.
- Read meetings minutes and all reports, including financial reports. Also, read reports prepared by employees and outside professionals, and have a general knowledge of the information contained in those reports.
- Read any literature produced as part of the branch's programs and services. Branch board members must be knowledgeable about all of the branch's programs and services, as part of their role is to promote the image of VON.
- Ensure that the board spends some of its time on strategic planning.
- Encourage diversity among board members. Diversity will help ensure a board committed to serve the branch's mission with a range of appropriate skills and interests.
- Be familiar and comfortable with all issues addressed by the board. Ask for additional information if any issue is not clear.
- Be involved in the selection of the Branch (Executive) Director. The board is responsible for ensuring that the individual in this position has the appropriate education, skills, and experience. NVAS branch boards would not be involved in the compensation or be held responsible for the qualifications of the Branch (Executive) Director.
- Ensure that the branch has proper internal controls and policies in place to safeguard, promote and protect the branch's funds and other assets.
- Engage in careful oversight of the branch's finances. Even if a board member does not understand the financial statements, he or she will still be held legally accountable for the decisions made.
- Question any activity or transaction that is unclear or troubling.

VON Context

The reviewing of financial statements is an important role for branch boards. If the membership of the board does not possess the capacity to fulfill this role, the board is encouraged to seek assistance either through VON Canada or an external source.

Duty of Loyalty

The duty of loyalty is a standard of faithfulness; a board member must give undivided allegiance when making decisions affecting the organization. This means that a board member can never use information obtained as a member for personal gain (whether it be the individual themselves or their family members), but must act in the best interests of the organization¹³.

This duty requires that any conflict of interest (actual or potential), must always be disclosed in advance of joining a board. In exercising this duty, board members must be careful to examine all business that involves board members or their families. The board must not approve any business that is not fair or reasonable to the organization and the conflicted board member must not participate in the vote¹⁴.

For a copy of VON Canada's written "conflicts of interest" policy and form, please refer to Appendix K in Module 1: Board Handbook for Board Development.

Duty of Obedience

The duty of obedience requires that board members be faithful to the organization's mission. They are not permitted to act in any way that is inconsistent with the central goals of the organization and engages the organization in unauthorized activities. A basis for this duty lies in the public's trust that the organization will manage its donated funds to fulfill the organization's mission¹⁵.

For some VON branch boards, these terms "duty of care", "duty of loyalty" and "duty of obedience" may be completely new. However, it is quite likely that these boards have been aware of these "duties" by different labels. Rather than focus on the names of these terms, it is more important that our VON branch boards understand and abide by the concepts inherent within them.

Director's Liability

The fact that any activity involves a certain amount of risk is also true for charitable organizations, such as the VON, as well as for the individuals who serve on their boards. Legal action taken against a corporation which results in personal liability for board members often arises from federal, provincial, or municipal governments; creditors; regulating bodies; employees; other directors; and as a result of the failure of the branch. Claims have been made with regard to such matters as withholding taxes, wages, wrongful dismissal, enforcement of bylaws, and breach of duty or contract¹⁶. In the case of the branch becoming insolvent, board members may find themselves personally liable for paying unpaid taxes, wages and pension contributions¹⁷. It is

important to note that the extent of the board member's liability will depend upon provincial legislation (i.e., appropriate provincial Corporations Act under which the branch is incorporated). There may be additional provincial legislation that specifies items for which the board members are liable. Revenue Canada is another source that defines the board members' potential liabilities in relation to federal tax, GST and source deductions.

Because members of LVAS branch boards hold the liability for the branch's operations and activities, there is a heightened possibility for litigation. Some of the more common "problem areas" which may result in litigation against the LVAS branch boards include¹⁸:

1. **Tax liability** – Board members are liable for ensuring that all employee source deductions are withheld by the corporation and remitted to Revenue Canada on behalf of the employees (see Appendix A for a sample case).
2. **Employee related claims** – The liabilities for board members will vary by province but may include liability for salaries not paid for services rendered, severance, vacation, sick time, termination pay and pension funds.
3. **The environment** – Board members are liable for damage or contamination of the natural environment as a result of a branch activity.
4. **Liability to third parties** – Directors and officers are increasingly being held liable to third parties based on tort (i.e., any civil wrong or injury other than breach of contract). This area is of particular concern to VON, as there are inherent risks involved with clinical practice and we are a provider of programs and services to third parties (i.e., clients and the public).
5. **Delegation of responsibility** – Board members must assume a level of responsibility for the actions of those to whom it delegates its power and authority (e.g., board committees, officers, employees or external experts).
6. **Breach of contract** – Although breach of contract suits are usually between the companies or corporations, there has been an increasing tendency for including the directors and officers personally within these suits, based upon alleged misrepresentations or broken promises.

These problem areas and the resultant level of liability present a concern for our LVAS branch board members. In addition to these problem areas, our board members should be aware of the excuses which the courts are unlikely to accept to exonerate a board member from personal liability including¹⁹:

1. Honest ignorance;
2. Being on a leave of absence or not in attendance when the issue was discussed;
3. Not knowing the details;
4. Not signing the relevant documentation;
5. Recently resigned from the board; and
6. The organization is incorporated thus limiting the liability of the members.

To alleviate concerns about personal liability for branch board members, VON Canada continues to provide **indemnification** provisions within the bylaws. Indemnification

means that the organization relies on its own resources to pay board members' legal costs for claims that result from board service²⁰. Within the bylaws²¹, indemnification is provided to directors if:

- a) *such person acted honestly and in good faith with a view to the best interests of the corporation; and*
- b) *In the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, such person had reasonable grounds for believing that such person's conduct was lawful.*

In addition to the indemnification provisions, VON Canada purchases **Directors' and Officers' insurance** for branch boards. This insurance covers costs that the organization may incur while indemnifying its board members²². Provisions regarding the insurance are detailed within the bylaws. It is important to note that, within the bylaws, exceptions for coverage are stipulated, specifically "where the liability related to such person's failure to act honestly and in good faith with a view to the best interests of the corporation"²³. In other words, members of a board will still face exposure to liability for any of their own actions that are inconsistent with the duties owed by the directors to the corporation they serve.

Please see Appendix B for a listing of some of the basic steps that board members can take to help minimize their liability.

V VON Branch Boards – Fiduciary Responsibilities

Understanding Terminology

Fiduciary – An individual, corporation or association holding assets for another party, often with the legal authority and duty to make decisions regarding financial matters on behalf of the other party²⁴.

Stewardship – Stewardship is the active oversight of organizational governance by the board of directors. It is the duty of the board to oversee the conduct of the organization’s business, ensure that an effective team is in place to carry out the day-to-day operations, account for its financial and other resources, and ensure that no issue falls between the cracks in steering the organization toward the fulfillment of its mission²⁵.

In close relation to the legal duties previously described, one of the primary obligations of any board is to ensure that the finances of the organization are being allocated appropriately (i.e., **fiduciary responsibility**). In a for-profit corporation, the overriding concern is usually to provide the greatest financial return to the investors. In a voluntary, public-benefit organization (i.e., charitable), especially if it is financed in part with contributions from donors, corporations or granting agencies, the overriding concern is more likely to be that the social benefits of the contributions are as great as possible, and are in keeping with the organization’s stated mission and goals. In both kinds of organizations, however, there are legal requirements on how money is accounted for, and how its spending is reported. The board has ultimate responsibility to ensure that these requirements are met. As noted within the Director’s Liability discussion, should the organization fail, board members may be held personally responsible for paying outstanding debts, wages and benefits²⁶.

To fulfill their fiduciary responsibilities in relation to their respective scope of governance, our VON branch boards must²⁷:

- Approve a budget that reflects the organization’s priorities and that is based on realistic assumptions (of revenues, costs, and other factors such as inflation);
- Monitor and control expenditures, based on appropriate accounting procedures;
- Oversee the **stewardship** of the organization’s assets and liabilities;
- Provide oversight of the issuance and recordkeeping of receipts for charitable donations; and
- Approve annual reports, including financial statements.

Transparency or openness of activities to the community at large will lend itself to help our branch boards to demonstrate successful stewardship over the funds that they are responsible for. To demonstrate this transparency, our branch boards should²⁸:

- Respond appropriately to complaints and requests for information by its members, clients, and the community at large; and
- Provide easy public access to information about themselves (e.g., annual report, audited financial statements).

Management of the Branch's Funds

As previously noted, one of the fiduciary responsibilities of our branch boards is to manage the funds within their respective scope of governance. All branch boards are responsible for making the decision as to how donated funds will be invested (e.g., through the branch's general fund, investments, local foundation, local trust, or VON Canada Foundation). When making this decision the branch board would need to consider such factors as the expected rate of return and the associated administrative costs (e.g., fees for brokerage, bookkeeping, and auditing services) that each option offers. As will be discussed below, branch boards must ensure that their decision meets investment standards.

Over the past few years, there has been some discussion on the management of funds by boards. “[T]he rules for investing by non-profit organizations are changing, and volunteer directors are being held to a higher standard when it comes to managing their money”²⁹. The ultimate result of these “new rules” is positive for the organization, as they will force better investment decisions to be made. However, as noted, it also raises the standard that must be met by board members in managing the branch's funds. If this standard is not met, these board members may in fact be held liable for actions that they have taken or have failed to take.

For additional information on this subject, please refer to Appendix C.

VI Conclusion

In conclusion, the role of governance places responsibilities upon the members of our VON branch boards. Branch boards are accountable by many means to a variety of stakeholders for the branch's operations and activities. In addition, members of branch boards must fulfill certain legal duties (i.e., Duty of Care, Duty of Loyalty, and Duty of Obedience) to the organization. Branch boards also possess the fiduciary responsibility to manage the branch's funds appropriately. Each branch's degree of responsibility for meeting these duties is directly dependent upon the branch board's respective scope of governance.

APPENDICES

Appendix A

The Case of the Moose Jaw Flying Fins Swimming Club

The Moose Jaw Flying Fins Swimming Club was a small, parent-run swimming club with approximately 90 members and a \$65,000.00 annual budget. Almost all of the individuals involved were volunteers. Some of the swimming coaches received an honorarium of a few hundred dollars. The head coach entered into a contract with the swimming club through which he received less than \$12,000.00 and claimed about \$2,000.00 in expenses.

The Club believed that: (1) the honorariums were tax free; and (2) the head coach was an independent contractor and therefore, they did not withhold unemployment insurance, tax or Canada pension plan contributions. As a result of a falling out among members, Revenue Canada was made aware of the honorariums. Ultimately, Revenue Canada assessed the recipients of the money and ruled that the head coach was not an independent contract but rather, an employee.

As a result of this ruling, the Club faced back payments for the unemployment insurance and Canada pension plan in addition to the tax costs. These totaled approximately \$4,000.00. Although the Club contested the ruling, the tax court found in favour of Revenue Canada. As the Club did not have the sufficient funds to pay Revenue Canada, the volunteer directors were held to be personally liable and required to pay. This case illustrates how a small, community-based organization can very innocently run into problems with the complex requirements of the law. As the Directors of the swimming club did not follow due diligence, they were unable to exonerate themselves from liability.

Source: Myles, R. W., & Linehan, D. Director's and officer's liability: Non-profit organizations in the 90's.

Appendix B

Branch Boards – Directors’ and Officers’ Liabilities Checklist

Basic Steps to Discharge Your Duties and to Minimize Liability

1. Always attend meetings.
2. Insist that all material be available well in advance of meetings especially when there will be a vote on a particular issue.
3. Obtain written advice on all legislation and guidelines that are relevant to the activities of the organization.
4. Always review and read documents, legislation and so forth prior to meetings.
5. Insist on written opinions from legal and other professionals on any important decision.
6. Periodically or on major issues where regular counsel or advisors have provided advice, insist on independent outside counsel or advisors for a fresh perspective.
7. Review all opinions given by professional consultants.
8. Review the minutes of all meetings and insist that they be accurate.
9. Keep your own notes.
10. Ensure that your dissent is recorded even if this means sending a registered letter to the board.
11. Review the corporation’s objects and bylaws.
12. Encourage the development of a director’s manual.
13. Know what trust accounts the corporation holds.
14. Keep information about the corporation confidential.
15. Avoid even the appearance of a conflict of interest.
16. Ensure that bylaws provide for the indemnification of directors.
17. Ensure that committees and management report to the board.
18. Ensure that the corporation acquires and maintains officers and directors indemnify insurance coverage.

In addition to these basic steps, LVAS branch boards should also:

19. Review all internal controls especially with respect to cheque signing and contract execution.
20. Know what trust property the corporation holds.
21. Monitor tax credit receipts and payment of employee deductions and sales taxes.
22. Ensure that the corporation maintains sufficient reserve funds for contingent liabilities (e.g., sick time, severance, retirement allowances).

Source: Myles, R. W., & Linehan, D. Director’s and officer’s liability: Non-profit organizations in the 90’s.

Appendix C

Volunteer directors given new task: Legislation is making them more accountable for their investment decisions

Kelly Rodgers, The Globe & Mail, March 23, 2000

Philanthropists may want to be aware of the fact that the rules for investing by non-profit organizations are changing, and volunteer directors are being held to a higher standard when it comes to managing their money.

In July, 1999, Ontario adopted a prudent investor standard, which spelled out the criteria that must be considered when making investments on behalf of an organization. These criteria include an examination of the current economic situation, the possible effects of inflation and deflation, expected tax consequences, and the expected total returns from income and appreciation of capital.

Some provinces, and territories were already using this standard, and it is expected that the rest will follow.

The new Ontario Act specifically states that directors of non-profit organizations - whether incorporated or trusts - will be held to the criteria outlined. This is excellent legislation from the perspective of the organization because it forces better investment decisions, but it could cause problems for board members who aren't paying attention, meaning that they can be held liable for actions they take - or fail to take.

Too many boards, knowing how hard it is to raise money, have deliberately taken an overly conservative approach to investing. If investments are long term in nature, where the capital will not be needed in the next seven to 10 years, a conservative approach that invests in T-bills, guaranteed investment certificates and other fixed-term deposit instruments is not only a poor choice because of the lack of long-term growth, but it also could land directors in trouble for not providing enough returns.

The need to consider both the income and the total return (income plus capital appreciation) and the effects of inflation strongly suggests that equities should be included in any non-profit portfolio to provide for future growth. Directors are now faced with the need to balance current and future needs. If the organization needs to grow its capital to keep pace with inflation, yet invests only in money markets and spends the annual income, the directors could potentially be held liable for this failure.

So how do they protect themselves? In British Columbia, Alberta and other provinces that have a legal list for trustee investments, the first step is to ensure that documents such as articles of incorporation, bylaws, or trust indentures specifically allow for investments outside the Trustee Act, and that they meet the prudent investor standard.

Organizations in Ontario, Quebec, Yukon and Northwest Territories and other provinces that have a prudent investor standard can immediately begin to focus on developing proper investment strategies.

In doing so, a board has two choices. It can manage the money itself, often with assistance from a broker or investment adviser. Otherwise, it can have the portfolio professionally managed by an investment counsellor.

I have been involved with the management of non-profit portfolios for close to a decade, both as a volunteer and professionally as a portfolio manager and consultant, and I would never agree to serve on a board that chose the first option. As a director, there is little upside to this and a lot of personal risk.

Directors should insist that their investments are professionally managed with a proper policy statement and performance reporting. There are two options, depending on the size of the portfolio. If the investment assets are less than \$1-million the best solution is some type of managed account program, or balanced pooled or mutual fund. These are available from brokers and planners, and there is a wide variety of managed programs with a wide range in fees, so investors can shop carefully.

For assets in excess of \$1-million, directors should go directly to counselling firms. These companies may be less numerous, but it is well worth the effort since professional management can be had at a lower fee rate. All of the banks have investment counsel subsidiaries, and there are dozens of high-quality independently owned firms.

Source: Rodgers, K. (2000, March 23). Volunteer directors given new task: Legislation is making them more accountable for their investment decisions. Globe and Mail. www.rodgersinvestmentconsulting.com/Article3.asp

Appendix D

Endnotes

¹ Deloitte & Touche. The effective not-for-profit board: Governance of not-for-profit organizations.

² BoardSource. (1996, Revised). Ten basic responsibilities of nonprofit boards.
www.boardsource.org

³ Panel on Accountability and Governance in the Voluntary Sector. (1999, February). Building on strength: Improving governance and accountability in Canada's voluntary sector, final report, p. 11.

⁴ Panel on Accountability and Governance in the Voluntary Sector. (1999, February). Building on strength: Improving governance and accountability in Canada's voluntary sector, final report.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ BoardSource. (1997). The legal obligations of nonprofit boards: A guidebook for board members. Washington, DC: Author. www.boardsource.org

¹² Charities Bureau. Right from the start: Guidelines for not-for-profit board members.
www.oag.state.ny.us/charities/booklets/not_for_profit_booklet.pdf

¹³ BoardSource. (1997). The legal obligations of nonprofit boards: A guidebook for board members. Washington, DC: Author. www.boardsource.org

¹⁴ Charities Bureau. Right from the start: Guidelines for not-for-profit board members.
www.oag.state.ny.us/charities/booklets/not_for_profit_booklet.pdf

¹⁵ BoardSource. (1997). The legal obligations of nonprofit boards: A guidebook for board members. Washington, DC: Author. www.boardsource.org

¹⁶ Myles, R. W., & Linehan, D. Director's and officer's liability: Non-profit organizations in the 90's.

¹⁷ Panel on Accountability and Governance in the Voluntary Sector. (1999, February). Building on strength: Improving governance and accountability in Canada's voluntary sector, final report.

¹⁸ Myles, R. W., & Linehan, D. Director's and officer's liability: Non-profit organizations in the 90's.

¹⁹ Ibid.

²⁰ BoardSource. (1997). The legal obligations of nonprofit boards: A guidebook for board members. Washington, DC: Author. www.boardsource.org

²¹ VON Canada. (1999, March 27). VON Canada guidelines for branch bylaws, p. 21.

²² BoardSource. (1997). The legal obligations of nonprofit boards: A guidebook for board members. Washington, DC: Author. www.boardsource.org

²³ VON Canada. (1999, March 27). VON Canada guidelines for branch bylaws, p. 21.

²⁴ www.investorwords.com

²⁵ Panel on Accountability and Governance in the Voluntary Sector. (1999, February). Building on strength: Improving governance and accountability in Canada's voluntary sector, final report, p. 23.

²⁶ Panel on Accountability and Governance in the Voluntary Sector. (1999, February). Building on strength: Improving governance and accountability in Canada's voluntary sector, final report.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Rodgers, K. (2000, March 23). Volunteer directors given new task: Legislation is making them more accountable for their investment decisions. Globe and Mail. www.rodgersinvestmentconsulting.com/Article3.asp