

Investment Powers

A Comparison of Jurisdictions for Charitable Organizations

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Nobel Peace Prize winner and Boston University professor Elie Wiesel delivered the opening keynote speech at the Canadian Legal Conference held in Calgary in August 2007¹. Among other things, he spoke about the work of his foundation, The Elie Wiesel Foundation for Humanity, Inc. Who would have thought that a short time later Professor Wiesel's foundation, governed by an independent board of directors, would be issuing financial statements for the year ending 2008 containing the following paragraph in the Independent Auditors report:

“As described in Note 4 to the financial statements, in December 2008, management determined that it was the victim of an apparent Ponzi scheme (the “Madoff Scheme”). The financial statements have been modified to record estimated losses of \$13,382,163 after the \$500,000 expected to be recovered from the Securities Investor Protection Act (“SIPA”) resulting from the Madoff Scheme; however, the actual final losses have not yet been determined.”²

According to these financial statements the assets of the foundation were drained. Little did we know in the heyday of 2007 what was around the corner for the world of investments. Events that may have been unthinkable for a charity, such as what happened to Elie Wiesel's Foundation, would become a reality. The form 990 that was filed in 2007 as required by an Organization Exempt from Income Tax show that this foundation had a board of directors made up of CEOs of some major corporations³.

The undesirable results of the Madoff type of scheme and the market meltdown that precipitated the discovery of it should give those who belong to or advise boards of charities or other not-for-profit entities across Canada all the more reason to thoroughly become familiar with, and understand the legal requirements of a board member when it comes to investments. The market meltdown of 2008 could happen again or fraudsters could prevail upon charities to the same end as the Madoff scheme. Lawyers need to be prepared. No one wants their name associated with the total loss of charitable assets under their watch.

The purpose of this paper is to act as a general guide for any practitioner who sits on a board of directors or trustees of a charitable or not-for-profit organization or who may be called upon to advise such an entity as to what can be done with its investable assets. The law in this area is not as clear as one would, at first, think. Many lawyers sit as volunteers on boards or consider doing pro bono legal work for their neighbourhood clubs and associations. This might be thought of as an obvious place to give "off the top" advice in casual conversation. It is much better, however, to be at least a little bit prepared when board members turn to each other around the boardroom table (and then look directly at the token lawyer) and ask "Are there any laws about what we can or cannot do about investing the funds of our organization?"

The term "organization" is used in this paper for simplicity purposes. All charities and not-for-profit entities are indeed organizations of one form or another. However, the answer to the question about what form of organization are we dealing with usually holds a clue to answer the question posed about investing the funds of the organization. The answer to this question, as it is to so many areas of law, is "it depends" on the answer to some other queries. In random order these are some of the other questions that should come to mind.

- Is the organization a corporate entity of some sort?
- Is the organization created by a trust?
- Is the organization an unincorporated club or association?
- What province's laws govern the organization?
- Is the organization a registered charity under the Income Tax Act?
- Are there laws that govern the source of these assets?
- Did the assets come from gaming or other special types of fundraising?
- Did the assets come from a donor and if so did the donor put any stipulations on how the funds should be invested?
- Is there something in the constating documents of the organization that restricts how the funds of the organization are to be handled?
- Are the funds intended to be an endowment of some sort?

- Will the funds need to be paid out in short order or can they be invested for the longer term?
- Is there some sort of investment policy statement in place for the organization that deals with how its funds can be invested?
- Is there any reason to believe that the organization should practice socially responsible or mission based investing where its funds are concerned?

As is often the case, the answers to these questions posed, show more about what one does not know than what one knows. Unless the organization has had a longstanding relationship with an investment advisor who has spent time to ask and seek the answer to these questions, turning to the person who has traditionally given advice to or handled the financial affairs of the organization will not be helpful. Unless they are specialists in the area, most investment advisors are generally not specifically trained to invest the funds of not-for-profit organizations. They rely on the organization client themselves to direct investment decisions. Do not assume that those in the investment industry are any savvier about not-for-profit investment powers than the average board member sitting around the meeting table that is called upon to make decisions about the investments of the organization.

It is helpful to put a framework around a process that will help either discover the answer to better advise the organization or to realize when more specific expertise in this area is needed. Appendix "A" contains a simplistic decision making matrix that leads to various factors that should be considered when trying to find out what are important considerations for anyone trying to decide what investment powers apply to different types of organizations. It portrays a general outline of the discussion that follows.

What type of organization is it?

Trust

The law of charity has its roots in the law of trust. Some of the oldest and largest charitable organizations in Canada are trusts. Quite simply, a trust that has charity as its object would have been created by a trust deed, indenture or similar document. The law of trusts would apply to the trustees as they do what they have been entrusted to do as would any constraints put on them or powers given to them by the trust document. One would then look there for the powers that have

been given to the trustees to deal with the funds of the organization. Often these documents are quite specific. However if they are not, then trustees' powers are governed by the trustee legislation that applies to them in each province. These are discussed below. Many of these statutes have been revised recently as a result of the Uniform Law Conference of Canada work on trustee powers⁴. More provinces have now adopted the "prudent investor rule" as was recommended by that work to govern the way trustees can invest the money that is in their care. Previously the only way to invest, if the governing trust document was silent, was to invest funds into what was referred to as a "legal list" of investments contained in the trustee legislation that itemized the exact kinds of investments that trustees could invest in.

Suffice it to say that if the organization is a trust, before giving any advice to them as to how they can invest their funds one needs to be certain as to what their trust document provides or, failing that, what the relevant trustee legislation says in their jurisdiction as to whether they must follow the prudent investor rules or must stay within the confines of a legal list of investments.⁵ Some trusts that are in existence today that are the charitable types may be caught in between and either the old or the new regimes may apply to them. One should also check the grandfathering provisions of each of the relevant provincial trustee acts to see how it applies to any given organization. If the organization must follow a legal list of investments then the applicable ones are clearly itemized in the legislation. If the prudent investor rule applies, a qualified investment professional should be consulted to craft a portfolio of investments that will meet this standard.

b) Created by legislation

It is advisable to become familiar with the organization's framework and documents that created it before any advice can be given. If the organization has been created by a federal or provincial statute then look to that statute for the investment powers if they are not contained in the documents that have created the organization. Even though it is not consistent across the country, there are a few provincial statutes that specifically affect investment powers of an organization if the organization has not separately dealt with investment powers in their incorporating or governing documents. These statutes will be outlined below.

Relevant legislation dealing with investment powers

Whether an organization is a trust or one created pursuant to a statute it is advisable to know what legislation might govern its investment powers. Following is a summary discussion of sections of legislation in each Canadian jurisdiction that may impact a board of directors, trustees or other similar governing body as they consider investments of the organization.

British Columbia

The investment powers of trustees in British Columbia are now in line with what is commonly referred to as the "prudent investor" rule, where a trustee is expected to treat the funds of the trust with the same care as he or she would treat his or her own funds. The relevant sections of their *Trustee Act*⁶ are as follows:

15.1 (1) A trustee may invest property in any form of property or security in which a prudent investor might invest, including a security issued by an investment fund as defined in the Securities Act.

(2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the trust.

(3) Without limiting subsection (1), a trustee may invest trust property in a common trust fund managed by a trust company, whether or not the trust company is a co-trustee.

15.2 In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

15.3 A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances.

21 (1) The powers conferred by this Act relating to trustee investments are in addition to the powers conferred by any instrument creating the trust.

(2) Nothing in this Act relating to trustee investments authorizes a trustee to do anything the trustee is in express terms forbidden to do or to omit to do anything the trustee is in express terms directed to do by the instrument creating the trust.

While some jurisdictions (notably Alberta) are silent as to any investment powers of any entities that do not bring themselves under the trustee legislation, the treatment of this issue for not-for-profit organizations in British Columbia has some certainty in their *Society Act*⁷.

32 (1) The funds and property of a society must be used and dealt with only for its purposes in accordance with its bylaws.

(2) A society that has and exercises powers within the scope of section 14 must adhere to prudent standards as defined in section 136 (1) of the Financial Institutions Act in investing its funds.

(3) A society to which subsection (2) does not apply may invest its funds in investments authorized by its constitution or bylaws, but if that investment is not authorized, the

society must invest its funds only as permitted under the provisions of the Trustee Act respecting the investment of trust property by a trustee.

Section 14 refers to a society that is formed with consent of the Financial Institutions Commission that has something to do with insurance as its purpose.

It is clear in British Columbia that if the document creating or governing the organization is silent as to investments, if it is a trust then the prudent investor provisions of the trustee legislation will prevail. Furthermore if the charitable organization is a society created by legislation then trustee legislation will also prevail when it comes to investments.

Alberta

Alberta has also adopted the prudent investor rule in its dealings with trustees and investments.

The relevant provisions of their *Trustee Act*⁸ are as follows:

3(1) A trustee may invest trust funds in any kind of property if the investment is made in accordance with this section.

(2) A trustee must invest trust funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.

(3) A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.

(4) A trustee who has invested trust funds in property may exercise for the benefit of the trust any right or power that a person who was both the legal and beneficial owner of the trust's interest in the property could exercise.

(5) Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, insofar as they are relevant to the circumstances of the trust:

(a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;

(b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;

(c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the need to maintain a balance that is appropriate to the circumstances of the trust between

(i) risk,

(ii) expected total return from income and the appreciation of capital,

(iii) liquidity, and

(iv) regularity of income;

(f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

(g) the role of different investments or courses of action in the trust portfolio;

(h) the costs, such as commissions and fees, of investment decisions or strategies;

(i) the expected tax consequences of investment decisions or strategies.

4(1) A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 3 could reasonably have made or adopted.

(2) A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

A not-for-profit organization in Alberta has two options to bring itself under legislation as a legal entity; by becoming a society or a company. The relevant provisions of the *Societies Act*⁹ are as follows:

14 From the date of the certificate of incorporation, the subscribers to the application and the other persons that from time to time become members of the society are a corporation and have all the powers, rights and immunities vested by law in a corporation.

17(2) The funds and property of the society shall be used and dealt with for its legitimate objects only and in accordance with its bylaws.

There is no mention of investment powers. The relevant sections of the *Companies Act*¹⁰ are contained in Part 9 outlining provisions applying to companies with objects other than the acquisition of gain and are as follows:

200(1) When an association has been or is about to be formed as a limited company, if it proves to the Registrar that it is formed for the purpose of promoting art, science, religion, charity or any other useful object, and that it is the intention of the association to apply the profits, if any, or any other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association, the Registrar may direct the association to be registered with limited liability without the addition of the word "limited" to its name and the association may be registered accordingly.

(2) On registration the association shall enjoy all the privileges conferred and be subject to the obligations imposed by this Act on limited companies, with the exception that none of the provisions of this Act that require a limited company to use the word "limited" as a part of its name or to publish its name apply to an association so registered.

Neither of these legislative options for not-for-profit organizations in Alberta provides any specific guidance about investment powers nor do they bring the organization under the prudent investor type of rule provided for in the trustee legislation outlined above. In Alberta, if the not-for-profit organization is incorporated as a society or a company with objects other than the acquisition of gain, the legislation is silent as to any specific investment powers and there is

nothing to bring this type of organization under or to lead it to the legislation for trustees. Therefore the organization's own governing documents should be relied on and should be drafted in such a way that there are no doubts as to what the investment powers are.

Saskatchewan

In Saskatchewan, the *Trustee Act*¹¹, in force since January 1, 2010, also codifies the prudent investor rule for trustees as follows:

25 In investing trust property, a trustee shall exercise the care, skill, diligence and judgment that a reasonable and prudent investor would exercise in making investments.

26 A trustee shall diversify the investment of trust property to an extent that is appropriate having regard to:

- (a) the terms on which the trust property is held; and
- (b) general economic and investment market conditions.

29(1) A trustee may obtain advice respecting the investment of trust property.

(2) A trustee is not in breach of trust for relying on advice obtained pursuant to subsection (1) if a reasonable and prudent investor would rely on the advice in comparable circumstances.

The relevant sections of the *Non-profit Corporations Act*¹² are as follows:

28 A charitable corporation owns absolutely any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

29(1) Subject to section 30, the limitations contained in any gift and the articles, a charitable corporation may invest its funds only in shares, debentures, bonds, mortgages or other financial instruments in which trustees are by law permitted to invest.

(2) Subject to the limitations contained in any gift and the articles or bylaws, a membership corporation may invest its funds as its directors think fit.

The legislation that governs a trust or a not-for-profit organization in Saskatchewan contains very clear provisions about when funds are considered to be held in trust and gives specific guidance that the directors are only limited to the powers that constrain them in preexisting documents that pertain to their own organization.

Manitoba

The prudent investor or person rule is also found in Manitoba but it is interesting to note that it is found in both the legislation governing trustees and that governing not-for-profit organizations

that are organized as corporations without share capital. The succinct provisions in the *Trustee Act*¹³ are as follows:

68(1) Subject to any express provision of the law or of the will or other instrument creating the trust or defining the duties and powers of the trustee, and subject to subsection (2), a trustee may invest in any kind of property, real, personal or mixed.

68(2) Subject to any express provision of the will or other instrument creating the trust, in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.

Those organizations that are without share capital will be governed by the investment standards found in this specific provision of the *Corporations Act*¹⁴:

329.3 The directors of a corporation shall establish and the corporation shall adhere to investment and lending policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments and loans to avoid undue risk of loss and obtain a reasonable return.

In Manitoba, if the organization is a trust the prudent person rule applies if the governing document is silent. If the organization is a corporate body then it is mandatory that one invest like a prudent person would.

Ontario

The trustee legislation in Ontario is very comprehensive as far as investment powers go. The relevant provisions of their *Trustee Act*¹⁵ are as follows:

27. (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest.

(5) A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

- (6) A trustee must diversify the investment of trust property to an extent that is appropriate to,
 - (a) the requirements of the trust; and
 - (b) general economic and investment market conditions.
- (7) A trustee may obtain advice in relation to the investment of trust property.
- (8) It is not a breach of trust for a trustee to rely on advice obtained under subsection (7) if a prudent investor would rely on the advice under comparable circumstances.
- (9) This section and section 27.1 do not authorize or require a trustee to act in a manner that is inconsistent with the terms of the trust.
- (10) For the purposes of subsection (9), the constating documents of a corporation that is deemed to be a trustee under subsection 1 (2) of the Charities Accounting Act form part of the terms of the trust.

The last sub paragraph reproduced above refers to the fact that in Ontario a trustee environment is forced upon that provincesø charity minded organizations. The relevant provisions of the *Charities Accounting Act*¹⁶ are as follows:

- 1 (2) Any corporation incorporated for a religious, educational, charitable or public purpose shall be deemed to be a trustee within the meaning of this Act, its instrument of incorporation shall be deemed to be an instrument in writing within the meaning of this Act, and any real or personal property acquired by it shall be deemed to be property within the meaning of this Act.
- 10.1 Sections 27 to 31 of the Trustee Act apply to,
 - (a) an executor or trustee referred to in subsection 1 (1);
 - (b) a corporation that is deemed to be a trustee under subsection 1 (2);

In Ontario there is no doubt that if one is a trustee of a trust or a director of an incorporated charitable organization one is subject to the prudent person rule when it comes to investments, unless the trust deed or constating documents state otherwise.

Quebec

The prudent investor type of rules that we have referred to in legislation in other provinces are codified in detail in Quebec for those who look after the property of others, such as those who are entrusted with charitable funds to use for the benefit of others. The provisions that deal with the types of investment powers we are concerned with are codified in Book Four (property), Title Seven (administration of the property of others) of the *Civil Code of Québec*¹⁷ as follows:

- 1304. An administrator is bound to invest the sums of money under his administration in accordance with the rules of this Title relating to presumed sound investments. He may likewise change any investment made before he took office or that he has made himself.
- 1339. Investments in the following are presumed sound:

- (1) titles of ownership in an immovable;
- (2) bonds or other evidences of indebtedness issued or guaranteed by Québec, Canada or a province of Canada, the United States of America or any of its member states, the International Bank for Reconstruction and Development, a municipality or a school board in Canada, or a fabrique in Québec;
- (3) bonds or other evidences of indebtedness issued by a legal person which operates a public service in Canada and which is entitled to impose a tariff for such service;
- (4) bonds or other evidences of indebtedness secured by an undertaking, towards a trustee, of Québec, Canada or a province of Canada, to pay sufficient subsidies to meet the interest and the capital on the maturity of each;
- (5) bonds or other evidences of indebtedness of a company in the following cases:
 - (a) they are secured by a hypothec ranking first on an immovable, or by securities presumed to be sound investments;
 - (b) they are secured by a hypothec ranking first on equipment and the company has regularly serviced the interest on its borrowings during the last 10 financial years;
 - (c) they are issued by a company whose common or preferred shares are presumed sound investments;
- (6) bonds or other evidences of indebtedness issued by a loan society incorporated by a statute of Québec or authorized to do business in Québec under the Loan and Investment Societies Act, provided it has been specially approved by the Government and its ordinary operations in Québec consist in making loans to municipalities or school boards and to fabriques or loans secured by hypothec ranking first on immovables situated in Québec;
- (7) debts secured by hypothec on immovables in Québec:
 - (a) if payment of the capital and interest is guaranteed or secured by Québec, Canada or a province of Canada;
 - (b) if the amount of the debt is not more than 80% of the value of the immovable property securing payment of the debt after deduction of the other debts secured by the same immovable and ranking equally with or before the debt;
 - (c) if the amount of the debt that exceeds 80% of the value of the immovable by which it is secured, after deduction of the other debts secured by the same immovable and ranking equally with or before the debt, is guaranteed or secured by Québec, Canada or a province of Canada, the Central Mortgage and Housing Corporation, the Société d'habitation du Québec or a hypothec insurance policy issued by a company holding a permit under the Act respecting insurance;
- (8) fully paid preferred shares issued by a company whose common shares are presumed sound investments or which, during the last five financial years, has distributed the stipulated dividend on all its preferred shares;
- (9) common shares issued by a company that for three years has been meeting the timely disclosure requirements defined in the Securities Act to such extent as they are listed by a stock exchange recognized for that purpose by the Government on the recommendation of the Autorité des marchés financiers, and when the market capitalization of the company, not considering preferred shares or blocks of shares of 10% or more, is higher than the amount so fixed by the Government;

(10) securities of an investment fund or of a private trust, provided that 60% of its portfolio consists of investments presumed sound and that the fund or trust has fulfilled in the last three years the continuous disclosure requirements specified in the Securities Act. 1340. The administrator decides on the investments to make according to the yield and the anticipated capital gain; so far as possible, he works toward a diversified portfolio producing fixed income and variable revenues in the proportion suggested by the prevailing economic conditions.

He may not, however, acquire more than 5% of the shares of the same company nor acquire shares, bonds or other evidences of indebtedness of a legal person or limited partnership which has failed to pay the prescribed dividends on its shares or interest on its bonds or other securities, nor grant a loan to that legal person or partnership.

1341. An administrator may deposit the sums of money entrusted to him in or with a bank, a savings and credit union or any other financial institution, if the deposit is repayable on demand or on 30 days' notice.

He may also deposit the sums of money for a longer term if repayment of the deposit is fully guaranteed by the Autorité des marchés financiers; otherwise, he may not do so except with the authorization of the court and on the conditions it determines.

1342. An administrator may maintain the existing investments upon his taking office even if they are not presumed sound investments.

The administrator may also hold securities which, following the reorganization, winding-up or amalgamation of a legal person, replace securities he held.

1343. An administrator who acts in accordance with this section is presumed to act prudently.

An administrator who makes an investment he is not authorized to make is, by that very fact and without further proof of fault, liable for any loss resulting from it.

If however, the organization is more formally incorporated in Quebec as having no share capital the provisions in the *Companies Act*¹⁸, are as follows:

31. The company may acquire and hold movable and immovable property, may sell and alienate such property, both movable and immovable, and hypothecate the latter, and shall forthwith become and be vested with all property and rights, movable and immovable, held for it up to the date of the letters patent and with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking.

Additional powers.

Subject to the provisions of the preceding paragraph and without restricting their application, and saving express exclusion in the letters patent or supplementary letters patent, the company may:

(m) invest the available funds of the company in any manner which it may consider to be in its interests;

In Quebec it seems that if an organization is simply an entity in a position of trust one will have to invest in a way that is presumed sound but if an organization is a corporation the investments may be in the best interests of the company.

New Brunswick

The prudent investor prevails for trusts in New Brunswick. The *Trustees Act*¹⁹ provides:

2 Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining his powers and duties, he may invest trust money in any kind of property, real, personal or mixed, but in so doing, he shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others.

2.1(1) When acting in accordance with section 2, a trustee may

(a) obtain and rely on the advice of another person in relation to the investment of trust money under that section, and

(b) delegate to another person his or her authority to make investments under that section.

2.1(2) A trustee who delegates his or her authority under paragraph (1)(b) shall exercise the judgment and care described in section 2 in

(a) selecting the delegate,

(b) establishing the terms of the authority delegated, and

(c) monitoring the performance of the delegate.

In New Brunswick a not-for-profit organization can incorporate under, be subject to the *Companies Act*²⁰ and ask to be treated like a trust pursuant as follows:

14(1) A company to which this Act applies shall have, as incidental and ancillary to its powers, power to

(x) invest and deal with the money of the company not immediately required in such manner as may be determined;

18(1) In any application for the incorporation of a company for charitable, philanthropic, temperance, religious, social, political, literary, educational, athletic or other like purposes or for the purpose of promoting economic development, or for the incorporation of a project company, the application may, notwithstanding anything contained in this Act, ask for the embodying in the letters patent, which in such case shall be therein inserted, that the company shall hold all property both real and personal, and the profits and income arising therefrom, acquired by it by purchase, gift, bequest or otherwise in trust for the objects and purposes for which the company may be incorporated, and that no dividends shall be declared or paid on any capital stock of the company.

In New Brunswick therefore, a trustee is subject to the prudent investor rule unless otherwise provided. A not-for-profit corporation may also find that it holds property in trust if it has asked for this to be provided for in their application to incorporate, otherwise it can invest using other self determined criteria.

Newfoundland

The prudent investor rule in Newfoundland is also contained in their *Trustee Act*²¹ as follows:

3. (1) Unless otherwise directed by the terms of the trust, a trustee may invest trust funds in any property and in investing trust funds shall exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances.

(2) A trustee shall consider the following factors when investing trust funds, in addition to others that are relevant to the circumstances:

- (a) general economic conditions;
- (b) the possible effect of inflation and deflation;
- (c) the expected tax consequences of investment decisions or strategies;
- (d) the role of each investment within the trust portfolio;
- (e) the expected total return from income and the appreciation of capital;
- (f) other resources of the beneficiaries;
- (g) the need for liquidity, regular income and preservation or appreciation of capital; and
- (h) the special relationship or value of an asset to the purposes of the trust or to a beneficiary.

The not-for-profit organization can incorporate in Newfoundland using the provisions of Part XXI of their *Corporations Act*²² for corporations without share capital and their investment powers are as follows:

203. (1) A director and officer of a corporation in exercising his or her powers and discharging his or her duties shall

(a) act honestly and in good faith with 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) A director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and a unanimous shareholder agreement.

(3) A provision in a contract, the articles, the by-laws or a resolution does not relieve a director or officer from the duty to act in accordance with this Act or the regulations or relieve the director or officer from liability for a breach of this Act or the regulations.

In New Brunswick, a trustee and a director of a not-for-profit corporation has to act prudently under their legislation.

Prince Edward Island

In Prince Edward Island a trustee is governed by detailed prudent investor provisions in the *Trustee Act*²³ as follows:

2. (1) A trustee may invest trust property in any form of property or security in which a prudent investor might invest, including a security issued by a mutual fund as defined in the Securities Act.

(2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the trust.

(3) A trustee may have regard to the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

- (a) general economic conditions;
- (b) the possible effect of inflation or deflation;
- (c) the expected tax consequences of investment decisions or strategies;
- (d) the role that each investment or course of action plays within the overall trust portfolio;
- (e) the expected total return from income and the appreciation of capital;
- (f) other resources of the beneficiaries;
- (g) needs for liquidity, regularity of income and preservation or appreciation of capital;
- (h) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

3. In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

3.1 A trustee must diversify the investment of trust property to an extent that is appropriate having regard to

- (a) the requirements of the trust; and
- (b) general economic and investment market conditions.

3.2 A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.

3.3 A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust property may take into account the overall performance of the investments.

3.4 (1) A trustee may obtain advice in relation to the investment of trust property.

(2) It is not a breach of trust for a trustee to rely upon advice obtained under subsection (1) if a prudent investor would rely upon the advice under comparable circumstances. .

If one creates a not-for-profit corporation it will be governed by Part II of the *Companies Act*²⁴, and certain sections which affect investments generally affect those of Part II corporations as follows:

89. The Minister may by letters patent grant a charter to any three or more persons constituting such persons and others who have become subscribers to the memorandum of agreement hereinafter mentioned, and who thereafter become members of the corporation thereby created, a body corporate and politic, without share capital, for the purpose of carrying on in Prince Edward Island, without pecuniary gain to its members, objects of a patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.

15. (1) Every company incorporated under this Act shall have as ancillary and incidental to the purposes or objects set forth in the letters patent or supplementary letters patent the

following powers unless such powers or any of them are expressly excluded by the letters patent or supplementary letters patent, namely

(v) to invest and deal with the moneys of the company not immediately required in such manner as may be determined;

There is no specific mention of the need to invest prudently. It should be noted that by virtue of the *Charities Act*²⁵, the government of PEI does have oversight into the workings of charities that are not registered as charities under the Income Tax Act (Canada) but there is nothing specific about the investment powers of the directors other than they have to keep certain funds in a separate account and the government has wide powers of inspection and overview of their activities.

Nova Scotia

In Nova Scotia, trustees are given specific guidance as to what they may invest in and what factors they may consider but trustees must also use the prudent investor rule to guide them as outlined in the following provisions of their *Trustee Act*²⁶:

3 (1) A trustee may invest trust property in any form of property or security in which a prudent investor might invest, including a security issued by a mutual fund as defined in the Securities Act.

(2) Subsection (1) does not authorize a trustee to invest in a manner that is inconsistent with the trust.

(3) A trustee may have regard to the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

(a) general economic conditions;

(b) the possible effect of inflation or deflation;

(c) the expected tax consequences of investment decisions or strategies;

(d) the role that each investment or course of action plays within the overall trust portfolio;

(e) the expected total return from income and the appreciation of capital;

(f) other resources of the beneficiaries;

(g) needs for liquidity, regularity of income and preservation or appreciation of capital;

(h) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

3A In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

3B A trustee must diversify the investment of trust property to an extent that is appropriate having regard to

(a) the requirements of the trust; and

(b) general economic and investment market conditions.

3C A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy

for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.

3D A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust property may take into account the overall performance of the investments

3E (1) A trustee may obtain advice in relation to the investment of trust property.

(2) It is not a breach of trust for a trustee to rely upon advice obtained under subsection

(1) if a prudent investor would rely upon the advice under comparable circumstances.

Nova Scotia also has societies legislation similar to other jurisdictions but its legislation is silent as to specific investment powers and refers back to general corporate law or the documents of the society for guidance on any powers that the directors may have. The only relevant sections of the *Societies Act*²⁷ that would help determine powers to invest are as follows:

10 In addition to the powers by law vested in a corporation or body corporate and politic, a society may

(h) do all such other acts and things as are incidental or conducive to or consequential upon the exercise of its powers or the attainment of its objects.

(2) The directors of a society may exercise any powers of the society not required by this Act or the by-laws to be exercised by the members of the society at a general meeting.

In Nova Scotia one has the prudent person requirement for a trust but for a society one will have to look elsewhere for investment powers.

Yukon, NWT and Nunavut

The prudent person rule is evident in the *Trustee Act*²⁸ in the Yukon which provides as follows:

2(1) Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining the trustee's powers and duties, the trustee may invest trust money in any kind of property, real, personal, or mixed, but in so doing, the trustee shall exercise the judgment and care that a person of prudence, discretion, and intelligence would exercise as a trustee of the property of others.

Similar wording is found in of the *Trustee Act*²⁹ of the Northwest Territories and Nunavut³⁰ as follows:

2. Unless otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining the duties and powers of the trustee, (a) subject to paragraph (b), a trustee is authorized to invest in every kind of property, real, personal or mixed; and

(b) in investing money for the benefit of another person, a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise as a trustee of the property of others.

All three Territories have legislation to enable not-for-profit organizations to incorporate. The relevant *Societies Act*³¹ provision in the Yukon is as follows:

11(1) On the issuance of the certificate of incorporation the members of the society are established as a corporation.

(2) A society has all the rights, powers, and privileges of an individual.

The power provisions in NWT *Societies Act*³² and Nunavut³³ are follows;

4 (2) On and after the date of issue of the certificate of incorporation of a society, the subscribers to the application and any other persons who become members of the society, are a corporation under the name set out in the certificate of incorporation and have all the powers, rights and immunities vested by law in a corporation.

In the territories one has the prudent person requirement for investing for a trust but there is nothing specific to guide a society created by legislation, other than to know that the society would have the capacity of an individual in the Yukon and that of a corporation in the NWT and Nunavut. This may be helpful for some organization issues but not for investment powers.

Canada

Charities that want to incorporate federally now do so under Part II of the *Canada Corporations Act*³⁴, and the relevant reference to investment powers is as follows:

16. (1) A company may, as ancillary and incidental to the objects set out in its letters patent or supplementary letters patent, exercise any or all of the following powers, namely the power:

(v) to invest and deal with the moneys of the company not immediately required in such manner as may from time to time be determined;

There is no restriction unless it is self imposed and no real guidance on investment powers. New legislation introduced by the Government of Canada, which has precipitated the topic of this panel where this paper is being presented, will create a new *Canada Not-for-profit Corporations Act*³⁵ that is not yet in force, that contains the following provision:

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

(a) act honestly and in good faith with 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.

This will no doubt have an impact on how directors' investment powers are perceived.

The above was meant to be a summary of the obvious sections of statutes that purport to deal with investment powers of not-for-profit organizations. There may be other provisions contained in legislation relevant to an organization that might not have an obvious connection to the task of investing funds but may still be applicable. As we have seen, some jurisdictions, in their not-for-profit sections of the relevant companies or corporations acts that also creates "without share capital" entities; specifically refer to other parts of the legislation as being applicable to these latter types of entities. This has the effect of making standards that are generally applicable to "for profit" entities apply to those that are not-for-profit. This is usually so unless the not-for-profit organization has altered this in their governing documents. Many of these contain provisions that specifically deal with investment powers. There may be other specific legislation in jurisdictions that is narrow and applies only to certain types of not-for-profit organizations but may still impact investment powers of the directors.

The lesson to be learned here is that if an organization is a trust or a creature of legislation then an exhaustive search of the legislation in the governing jurisdiction should be done to be sure of exactly what can and cannot be done with the funds that an organization has been "entrusted" with.

Unincorporated

If the organization has not been created pursuant to federal or provincial legislation or any kind of trust document then it probably looks more like a club or a loose association of people who have come together for a common purpose. This could be anything from the local curling club to a national group of people who hold conferences on a common topic. In such a case the individuals themselves would be responsible for their actions and decisions as there would be no other separate legal entity created. In the absence of any written agreement among these individuals as to what to do with excess funds, it would be difficult to give any guidance on a collective basis. However, because of the very basic nature of this type of relationship it is unlikely that this type of organization would have substantial excess funds to invest. If they did, the type of advice that they need is perhaps not only advice on how to invest their funds but also

advice on how to reorganize themselves into a more structured form of legal entity, one that better protects its members and leaders from personal responsibility for the funds of their organization, such as it is.

2. Is the organization registered as a charity under the Income Tax Act?

If the organization has been granted charitable status under the *Income Tax Act*³⁶, then one also needs to be aware of certain provisions of that Act. An organization must spend so much of its funds on its charitable purposes every year. Anyone who advises a charity on how it can invest its money must be aware of these requirements so the funds are invested in such a way that there are sufficient liquid funds available every year to meet this disbursement quota. Furthermore, one has to know, not only if the organization is registered as a charity but consider whether it is simply a charitable organization or a public foundation or perhaps a private foundation (all these are defined in s. 149.1(1)) because each of these types of entities must calculate the disbursement quota differently. Although it is beyond the scope of this paper, if the organization is classified as a private foundation then there are further restraints on investments, called the excess business holding rules, that one should also be aware of.

It surely is a fine art to craft an investment portfolio that not only efficiently exercises the right kind of powers given to the organization but, if it is a registered charity, actually is invested to allow for disbursement of funds in accordance with some very complicated formula created by a federal statute that even the most sophisticated of charities sometimes have trouble understanding. To advise this type of organization as to what to do with their funds must surely invoke the most complicated answer to the question of what can be done with excess funds.

The Government of Canada in its Budget 2010 proposes to reform the disbursement quota for fiscal years that end on or after March 4, 2010³⁷. Specifically, Budget 2010 proposes to repeal the charitable expenditure rule; modify the capital accumulation rule; and strengthen related anti-avoidance rules for charities. This will be a relief for anyone trying to advise charities of their spending requirements and investment policy in the future.

What was the source of the funds?

Donor

If the funds that are the subject of the investment came from a donor then it is wise to check the paper trail to see if the donor made the giving of funds upon any kind of trust or subject to any contractual obligations on the part of the organization. This type of situation is no doubt what they have considered in Saskatchewan when they enacted the aforementioned provision of their *Non-Profit Corporations Act*³⁸:

28. A charitable corporation owns absolutely any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

Gaming

Many jurisdictions allow charitable or not-for-profit organizations to raise funds under very restrictive gambling legislation³⁹. The relevant legislation must be checked as well as the application and permits to see if there is any restriction keeping or investing of these funds.

Are there other constraints specific to this organization?

Besides the potential regulatory and legislated constraints on certain organizations when it comes to investing their assets, there may be internal constraints as well. In recent years for example, many organizations have realized that they have clout and can impact social change that is consistent with their objects by placing their funds where it will have the most overall benefit. This is social or ethical or mission based investing⁴⁰. A search among the records of the organization should be done to see if any kind of policy along these lines has been adopted and if so it should be reviewed and adhered to.

The records of the organization may also reveal that those who run the organization, whether it is a board or a group of other leaders, have in the past deliberated and dealt with issues that involve investments. A search may reveal a document that is referred to as an investment policy statement. In that case the organization has made some effort at some point to deal with the issue of what it feels it can invest its funds in. Regard should be had to the existence of any such document and the organization should still review it on a regular basis to insure investment policy is not off side in any way.

The potential for future reform

In an ideal world, as far as legal advice is concerned, there would be certainty. The next best thing perhaps would be uniformity across Canada and that is one thing that the Canadian Bar Association, Charities and Not-for-profit section intends to seek in this topic area. It is desirable to have uniform laws that apply to charities across Canada when it comes to their investment powers in a similar manner to what was recommended for trustees in the recommendation for a *Uniform Trustee Investment Act*⁴¹.

There are trends that we can see today that show us the need for reform. A couple of these trends are discussed below. No doubt there are more.

1. Growth - there are hundreds of thousands of charities, foundations, societies and not-for-profit organizations that are operating every day. Many of them are amassing large donor and asset bases. This means more and more investment decisions will have to be made in the future.
2. Need for governance ó no charity or board member wants to be embarrassed publicly or sued for improperly investing an organization's funds so there is a huge push to put proper procedures and policies in place to decrease the chances of this happening.

Summary and conclusion

Before advising a charitable or not-for-profit organization how it can invest its funds ask a few questions:

1. What type of organization is it? Is it a trust or created pursuant to legislation?
2. Is the organization registered as a charity under the Income Tax Act?
3. Where did the funds come from?
4. Are there other constraints specific to this organization about its assets?

The answers to these questions should lead to advice given with more certainty.

For the policy makers, this is a tricky area for public policy and law reform. The voluntary or third sector as it is sometimes referred to is a huge part of our Canadian economy and some would say the backbone of our social service safety net. If we put too many constraints, rules and regulation on what charitable or not-for-profit organizations can and cannot do with their

funds, some of the excellent volunteers that currently serve these organizations may be turned off and the whole system will be jeopardized. On the other hand however, if broad based education of our volunteers is possible and certainty of regulation in this area is brought in, perhaps through the work of the Uniform Law Conference of Canada, then maybe more individuals might be attracted to these volunteer roles, feeling more secure in the knowledge that the answer to the question "What can we do with our funds?" is answered with certainty no matter which part of Canada or how the charity or not-for-profit entity is set up. After all, the less time these organizations spend deliberating about their excess funds the more time they can spend on what they do best – charitable work that is meant to benefit the community as a whole. That is a laudable goal.

¹ <http://www.cba.org/CBA/calgary2007/main/>

² http://www.eliewieselfoundation.org/CM_Images/000/40/ELIEWIESEL%20123108%20Final%2011309%20pdf.pdf

³ http://www.eliewieselfoundation.org/CM_Images/000/30/2007%20Form%20990.pdf

⁴ *Uniform Trustee Investment Act*, Uniform Law Conference of Canada, 1997

⁵ For an excellent summary of the relevant sections of the Trustee Acts in Canada see: Godel, Linda J. "Investment Powers for Charities across Canada", Toronto: Gowlings, September 2003. and Godel, Linda J. "Inter-Provincial Investments Powers for Charities", "What's New and What's Coming", Second National Symposium on Charity Law, Canadian Bar Association, Toronto, April 14, 2004.

⁶ *Trustee Act*, R.S.B.C. 1996, c. 464, as amended.

⁷ *Society Act*, RSBC 1996, C. 433, as amended.

⁸ *Trustee Act*, R.S.A. 2000, c. T-8, as amended.

⁹ *Societies Act*, R.S.A. 2000, c. S-14, as amended.

¹⁰ *Companies Act*, R.S.A. 2000, c. C-21, as amended.

¹¹ *The Trustee Act*, 2009, S.S. 2009, c. T-23.01, as amended.

¹² *Non-profit Corporations Act*, 1995, S.S. 1995, c. N-4.2, as amended.

¹³ *Trustee Act*, C.C.S.M. c. T160, as amended.

¹⁴ *Corporations Act*, C.C.S.M. c. C225, as amended.

¹⁵ *Trustee Act*, R.S.O. 1990, c. T.23, as amended.

¹⁶ *Charities Accounting Act*, R.S.O. 1990, c. C.10, as amended.

¹⁷ *Civil Code of Québec*, S.Q. 1991, c. 64, as amended.

¹⁸ *Companies Act*, R.S.Q. 1991, c.C.38, as amended.

¹⁹ *Trustees Act*, R.S.N.B. 1973, c. T-15, as amended.

²⁰ *Companies Act*, R.S.N.B. 1973, c. C-13, as amended.

²¹ *Trustee Act*, R.S.N.L. 1990, c. T-10, as amended.

²² *Corporations Act*, R.S.N.L. 1990, c. C-36, as amended.

²³ *Trustee Act*, R.S.P.E.I. 1988, c. T-8, as amended.

²⁴ *Companies Act*, R.S.P.E.I. 1988, c. C-14.

²⁵ *Charities Act*, R.S.P.E.I. 1988, c. C-4.

²⁶ *Trustee Act*, R.S.N.S. 1989, c. 479, as amended.

²⁷ *Societies Act*, R.S.N.S. 1989, c. 435, as amended.

²⁸ *Trustee Act*, R.S.Y. 2002, c. 223.

²⁹ *Trustee Act*, R.S.N.W.T. 1988, c. T-8.

³⁰ *Trustee Act*, R.S.N.W.T. (Nu.) 1988, c. T-8.

³¹ *Societies Act*, R.S.Y. 2002, c. 206.

³² *Societies Act*, R.S.N.W.T. 1988, c. S-11.

³³ *Societies Act*, R.S.N.W.T. (Nu.) 1988, c. S-11.

³⁴ *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended.

³⁵ *Bill C-4, An Act respecting not-for-profit corporations and certain other corporations*, 2nd Sess., 40th Parl., 2009, (assented to 23rd June, 2009). S.C. 2009, C. 23.

³⁶ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) s. 149.1.

³⁷ <http://www.budget.gc.ca/2010/plan/anx5-eng.html#personal>

³⁸ *Non-profit Corporations Act*, 1995, S.S. 1995, c. N-4.2, as amended.

³⁹ See for example the *Alberta Gaming and Liquor Act*, R.S.A. 2000, c. G-1, as amended.

⁴⁰ For an excellent discussion of this topic see Jantzi, Michael "Investing in Change Mission-Based Investing for Foundations, Endowments and NGOs, Canadian Council for International Cooperation, 2003.

⁴¹ *ibid.*