

2017 OLTA GATHERING

Good Governance – Beyond the Basics Canadian Land Trust Standards and Practices Revision

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A. GOOD GOVERNANCE – BEYOND THE BASICS

1. Conflict of Interest

- It is critically important that Directors/Trustees understand and avoid conflicts of interest – why?
- Directors must discharge the standard of care applicable to them in their capacity as a fiduciary and adhere to the rules of fiduciary conduct
- One of the most important policies for an organization to develop and continually review



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- *Canada Not-for-Profit Corporations Act* standard of care:
 - In exercising powers and discharging duties to the corporation, every director and officer 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



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- In addition to discharging the standard of care, directors must abide by the rules of fiduciary conduct:
 - Act in the best interest of the corporation
 - Good faith
 - Honesty
 - Confidentiality
 - Obedience/board solidarity
 - Avoid conflict
- Conflict of Interest principles arise from fiduciary duties, in particular from the duty to act exclusively for the benefit or in the best interest of the corporation
- General rule: a person acting in a fiduciary capacity may not place himself or herself in a position where duty and interest conflict



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What is a Conflict of Interest (COI)?

“a *conflict of interest* arises when “*insiders*” are in a position, or perceived to be in a position, to benefit financially (or create a benefit to a family member or other organization with which they are associated) by virtue of their position within the non-profit organization.”

Definition in current Canadian Land Trust Standards and Practices.



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Types of Conflict of Interest:

- **Real or Actual**
 - A director is in a situation where his/her duties to the corporation can be influenced by his/her private or personal interests
- **Apparent or Perceived**
 - A director is in a situation where his/her duties to the corporation appear to be influenced by his/her private or personal interests
- **Potential or Foreseeable**
 - A director is in a situation where his/her duties to the corporation may be influenced in the future by his/her private or personal interests



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Other Types:

Pecuniary (Financial) Interest: personal financial interest

Appropriation of Corporate Opportunity / Misuse of Confidential Information: using position or information made available because of fiduciary role for improper purpose / personal benefit

Conflict of Duties: A director who owes fiduciary duties to multiple organizations may be faced with a situation where he or she cannot discharge his/her fiduciary duties to each organization simultaneously

- No prohibition at law on serving as fiduciary of more than one organization
- In many cases duties can be discharged effectively
- but increased risk of conflict



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Statutory Framework – CNCA

- **CNCA – s. 141:** requires a director or officer to disclose a conflict in respect of any material contract/transaction or proposed contract/transaction,
- Director cannot:
 - (a) attend any part of a meeting of directors during which the contract/transaction is discussed; and
 - (b) vote on any resolution to approve the contract/transaction.
- Disclosure = “safe harbour” (contract/transaction not voidable; director may get benefit)
- Members may “cure” conflict by resolution to approve
- Continuing obligation of disclosure



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Standard 4: Conflicts of Interest

- *The land trust has policies and procedures to avoid or manage real or perceived conflicts of interest.*

Practices

A. Dealing with Conflicts of Interest

1. Adopt a **written conflict of interest policy** that addresses, for all insiders, how conflicts are identified and avoided or managed
2. Document the disclosure and management of actual and potential conflicts
3. When engaging in any transaction with an insider,
 - a. Follow the conflict of interest policy
 - b. Contemporaneously document that there is no private benefit



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B. Payments to Board Members

1. **Do not financially compensate board members for board service**, except for reimbursement of expenses
2. If, in limited circumstances and not in Ontario without approval of the Public Guardian and Trustee, the land trust compensates a board member for professional services that would otherwise be contracted out,
 - a. Document the circumstances surrounding the decision to do so
 - b. Document how the land trust uses appropriate comparability data to determine the amount to be paid and to confirm that there is no private inurement
 - c. Do not compensate the board's presiding officer or treasurer for professional services
3. Do not provide loans to directors, officers or trustees



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C. Land and Conservation Easement Transactions with Insiders

1. When engaging in land and conservation easement transactions with insiders,
 - a. Follow all transaction policies and procedures
 - b. For purchases from and sales of property to insiders, obtain an independent appraisal by a qualified appraiser to justify the purchase or sales price



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Practical Considerations

Conflicts are Factual: fact-driven analysis; changes each time

Consequences of Non-Disclosure of Conflicts: Director potentially breaching the trust imposed on him/her. Insurance/indemnity implications. Reputational harm.

Key Take Aways:

- Ensure the policy and procedures sufficiently cover the COI issues you are likely to encounter
- Create a culture where directors are comfortable taking responsibility to self-declare
- Don't forget to use common sense



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2. Succession Planning

Standard 3: Board Accountability

Land trust boards act ethically in conducting the affairs of the organization and carry out their legal and financial responsibilities as required by law.

- **3B3:** Have a board development process that includes procedures for recruiting and training board members

Standard 7: Human Resources

- *Land trusts have sufficient skilled personnel to carry out their programs, whether volunteers, staff and/or consultants/contractors.*
- **7D1:** Develop a written process or plan to provide for continuity in the leadership and management of the land trust's functions



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- Imagine Canada has Standards that include succession planning as follows:
 - A6: The board annually discusses the succession plan for the most senior staff position in the organization.
 - A22: The board has a process to annually review plans for succession to the positions of board chair and committee chairs.
 - A23: The board has a process to annually consider development opportunities for potential board chairs and committee chairs.



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- Ultimately, succession planning is a matter of proper risk management – a number of recent examples in the land trust community of important staff or director changes have put the very existence of the land trust at risk.
- An opportunity to have thoughtful and forward looking conversation:
 - what competencies and expertise are required of the senior staff person, is there a talent management program to fill any gaps
 - how can a board be expected to hire a new senior staff if they don't understand what's actually required to lead and manage the organization?
 - More than asking the question – what will we do if you are hit by a bus?
 - From a board succession perspective, looking at terms, skills matrix, recruitment, etc.



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- Important to have a written policy that is review annually
- Some sources:
 - [Building Leaderful Organizations: Succession Planning for Non-profits](#) by the Annie E. Casey Foundation at <http://www.aecf.org/resources/building-leaderful-organizations/>
 - [Managing a Leadership Transition](#) by Executive Transitions: A Program of Compass Point Nonprofit Services at http://hrcouncil.ca/docs/Key_interventions.pdf has a useful checklist of specific steps during and between transitions.



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3. Financial Reporting

Standard 7: Financial Oversight

- *Land trusts are responsible and accountable for how they manage their finances and assets.*

Practices

A. Fiscal Health

1. Develop an **annual budget** that reflects the land trust's annual programs and activities
2. Develop and implement a strategy to address any deficit-spending trends
3. Assess the nature and variability of revenue and seek to **diversify funding** sources
4. Build and maintain sufficient **operating reserves** to sustain operations
5. Build and maintain dedicated or restricted funds sufficient to cover the **long-term costs of stewarding and defending** the land trust's land and conservation easements



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B. Financial Records

1. Keep financial records in accordance with Generally Accepted Accounting Principles (GAAP)

C. External Financial Evaluation

1. Obtain an annual financial audit, review or compilation by an independent certified public accountant or a qualified accounting professional, in a manner appropriate for the scale of the land trust in a manner appropriate for the scale of the organization and consistent with federal and/or provincial law.



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D. Written Internal Controls

1. Establish written internal controls and accounting procedures, including segregation of duties, in a form appropriate for the scale of the land trust, to prevent the misuse or loss of funds

E. Risk Management and Insurance

1. Routinely assess and manage risks so that they do not jeopardize the land trust's financial health and its ability to carry out its mission and legal responsibilities
2. Carry general liability, directors and officers liability, property and other insurance, all as appropriate to the land trust's risk exposure or as required by law



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B. CANADIAN LAND TRUST STANDARDS AND PRACTICES REVISION

- Revision process will be undertaken by the CLTA pursuant to the license agreement it currently has with the LTA
- Largely voluntary exercise with some administrative support from N.C.C.
- Detailed review will be conducted by an Expert Committee – call for applications will be issued soon
- The revision process is divided into the following 6 steps:



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1. Crosswalk

- The CLTA has prepared a crosswalk comparison of the 2017 U.S. S&P and the 2005 CLT S&P to identify key changes and the revised practices potentially requiring editing for the Canadian context
- <https://cltstandardspracticesrevision.files.wordpress.com/2017/07/clt-sp-crosswalk.pdf>

2. Preliminary consultation

- Posting of preliminary recommendations for the adoption of the revised 2017 U.S S&P or their modification to reflect Canada's context for input by land trust community
- Online consultation until **November 30th, 2017**
- https://www.surveymonkey.com/r/SP_preliminary_consultation



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3. Detailed review

- Detailed review of practices requiring modifications will be undertaken by experts in the areas requiring changes
- Expert Committee will be tasked to propose revised language suitable for the Canadian context in keeping with the spirit of the 2017 revised U.S. version
- Call for applications to be issued in early November
- Report expected by end of January 2018

4. Second consultation

- The revised language proposed by the experts will be open for online consultation to ensure language is applicable, comprehensive and realistic.
- Results will be integrated into a final draft
- <https://cltstandardspracticesrevision.ca/provide-your-input/>



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5. Consultation with US LTA

- The final draft will be reviewed and discussed with the U.S. LTA to ensure the Canadian revisions are consistent with the S&P license.

6. Release of the revised CLT S&P.



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C. CHARITY LAW UPDATE

1. Federal Budget 2017

- Budget 2017 was tabled on March 22, 2017 and legislation to implement certain portions of Budget 2017, Bill C-44, received Royal Assent on June 22, 2017.
- Budget 2017 contained several measures intended to protect gifts of ecologically sensitive land under the ecological gifts program, and repealed the “additional” deduction available to corporations that donate medicine to eligible registered charities
- Expiry of First-Time Donor's Super Credit (2017)



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2. Political Activities

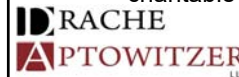
- Following lengthy and comprehensive consultations, on May 4, 2017, the Report of the Consultation Panel on the Political Activities of Charities was published
- It states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for sweeping changes to the current administrative and legislative framework governing “political activities” by charities



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- Four recommendations:
 1. Revise CRA's administrative position and policy to enable charities to fully participate in public policy dialogue and development
 2. Implement changes to CRA's administration of ITA provisions governing charities related to compliance and audits, appeals, and communication and collaboration
 3. Amend the ITA by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy development, provided that it is subordinate to and furthers their charitable purposes
 4. Modernize the legislative framework governing the charitable sector



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- Following release of the report, remaining audits and appeals were suspended
- CRA committed to providing a formal response to the Consultation Panel's recommendations by the end of June 2017 – no word yet



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3. Charities Modernization Project (CHAMP)

- The 2014 Federal Budget provided the Charities Directorate with \$23 million to modernize its IT systems over a five year period:
 - [Form T2050, Application to Register a Charity under the Income Tax Act](#), will be replaced by a new online application for registration, effective fall 2018
 - Registered charities will be able to file their annual returns, T3010s, online through the CRA's My Business Account - sign up now to access My Business Account in order to be ready for online filing when it becomes available in late 2018
 - Charities Listings will be improved to help Canadians make informed choices about charitable giving



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4. Update on Ontario *Not-for-Profit Corporations Act*

- On September 14, the Ontario government introduced Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, amending three important statutes affecting the nonprofit sector:
 - Ontario *Corporations Act*
 - Ontario *Not-for-Profit Corporations Act, 2010*
 - *Charities Accounting Act*



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Ontario *Corporations Act* (OCA)

- Amendments have been proposed to existing statute that add some important modern provisions:
 - meetings of members may be held by telephonic or electronic means
 - corporations are given the capacity, rights, powers and privileges of a natural person
 - the duties and standard of care of the directors and officers are clarified
 - members may remove a director from office by majority vote, rather than two-thirds vote.
 - a person may be a director even though he or she is not a member (requires consent in writing of the person to be a director).

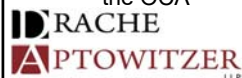


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Ontario *Not-for-Profit Corporations Act* (ONCA)

- Bill 154 contains all the enabling legislation needed for the ONCA to come into force (potentially as early as January 2020) and some important improvements:
 - Existing provisions regarding membership classes will not be proclaimed, permitting organizations to retain classes of non-voting members
 - Proxies will be optional
 - Organizations will be able to specify fewer than 21 days for distribution of financial statements before annual meeting
 - New subsection 115 (10) preserves certain rights in respect of a body corporate, with or without share capital, after it is continued under the ONCA and is intended to clarify the status of certain religious organizations under the OCA



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Charities Accounting Act (CAA)

- Changes have been proposed to permit charities to make social investments to forward its purposes and receive a financial return
 - A response to report released in June 2016, *Ontario's Social Enterprise Strategy: 2016-2021*
 - CAA applies to all charities in Ontario and provides that provisions of the *Trustee Act*, dealing with investment powers by trustees, apply to directors holding property for charitable purposes.
 - The amendments would permit “social investments” and exclude the application of the *Trustee Act* (with minor exceptions) with regard to “social investments”



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4. Ontario Corporations Now Required to Keep Records of Land Ownership

- On December 10, 2016, certain provisions of Bill 144, *Budget Measures Act, 2015* came into force, creating new record keeping obligations for Ontario corporations
- Ontario corporations are now required to maintain a register of ownership interests in land in Ontario at its registered office which includes the date of acquisition, date of disposition, and a copy of any deed or similar documents that contain the municipal address, the registry or land titled division and the property identifier number, the legal description, and the assessment roll number
- Two years to comply



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QUESTIONS??

THANK YOU!

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