



# Fact Sheet: Creating a Fund Agreement

*January 2022*

A fund agreement is an important part of the work within a community foundation. As an agreement between the donor and the community foundation it ensures that:

- The charitable gift is used to further the mission and charitable objects of the foundation and includes appropriate consideration of donor interests and objectives.
- There is clarification of the roles, responsibilities and expectations of both the foundation and the donor.
- The gift to the foundation is made in accordance with legal and fiduciary requirements and that the foundation policies are being adhered to.

Donors are encouraged to discuss their wishes with the community foundation if they have made a gift or are planning to leave a gift to the foundation as part of their estate plans. Having this conversation in advance and putting a fund agreement in place ensures that there is appropriate planning and that the gift remains relevant in the years ahead. The foundation should ensure that the donor and family have had an open conversation about the gift and everyone involved understands the nature and purpose of the fund. It is highly recommended the donor's advisor review the document as well so all have an understanding about the commitment of the gift. Care should be taken for the donor to understand the reasons for the clauses, the appropriate policies and how the agreement supports the charitable intent of the foundation.

## **Legal Advice**

While the attached template attempts to provide a good example of legal language, each foundation is encouraged to have their legal counsel review the agreement before board approval. These are binding legal contracts and the responsibility for fulfilling their purposes ultimately lies with the board.



## Changes to Agreements

Changes can be made with or without an amending clause if the gift has not yet been made. Once a gift is made, changes can only be made if there is a right to amend or variance clause in the agreement and within any defined limitations set out in that clause.

## Capital and Perpetuity

Traditionally, the capital of an endowment was held in perpetuity, with only the income earned from the capital available for distribution. The capital was preserved and invested to create a constant stream of cash flow for distributions for an infinite period. Having funds perpetually endowed can create challenges and complexities. The capital can be eroded overtime due to investment losses or simply not generating sufficient income due to inflation and low investment rates. It is recommended for the foundation to have flexibility and to allow for capital to be spent if necessary, both for distributions and to cover the foundation's fees. Many donors have expressed greater interest in the commitment to granting than to the presentation of capital, and some foundations wish to avoid tying their hands with a commitment to perpetual preservation.

The approach taken in this fund agreement states that the distributable amount is to be determined in accordance with the foundation's policies. In addition, it states that distributions can be made from both income and capital. This allows not only for distributions to be made from capital but also gives the foundation flexibility in determining how those distributions will be made in its policies. Some foundations will take the approach that distributions will ordinarily be made from income and, only in extraordinary circumstances, will they be made from capital. Other foundations may take a total return approach where a set percentage of the fund balance is distributed each year, irrespective of whether that amount comes from income or capital.

While this template permits distributions from capital, it includes a clause which says that it is the donor's wish that the fund be managed on a long-term basis. The purpose for this clause is to make it clear to both the foundation and the donor that the intention is that the fund will exist for the long term, even if the fund may not exist indefinitely. This intention is expressed as the donor's wish, which is non-binding but should be considered by the foundation when managing the fund. It is also intended to be a reflection of the donor's wish at the time the fund is established, to avoid the donor later putting pressure on the foundation to spend down the fund.

In addition, it is important that your foundation has a clear definition of what is the capital of the fund and shares that with donors. In this template, "capital" is defined by referring to the definition in the foundation's policies. By referring to the policies, this allows for the foundation to (i) change the definition over time, in case there are any legal developments on what constitutes capital; and (ii) ensure there is consistency amongst its funds. Alternatively, the foundation could define capital in the fund agreement.

Sample definitions of "capital" that can be used in the foundation's policies include:



- **Capital is contributions only:** “capital” means all contributions contributed to the fund, but does not include any income earned by the fund, including income that has been earned but not expended.
- **Capital includes unexpended income:** “capital” means all contributions contributed to the fund and includes income that has been earned but not expended.
- **Capital includes growth:** “capital” means all contributions contributed to the fund and the realized and unrealized capital gains therefrom, but does not include any income earned by the fund, including income that has been earned but not expended.
- **Capital includes unexpended income and growth:** “capital” means all contributions contributed to the fund and the realized, unrealized capital gains therefrom, and includes income that has been earned but not expended.

When selecting a definition for capital, the foundation should give consideration to whether “capital” includes realized or unrealized capital gains and capital income.

If a donor or foundation wishes to establish a fund in which the capital cannot be encroached upon, we recommend retaining legal advice.

### **Disbursement Quota**

The fund agreement includes a clause that says the foundation can make distributions in order to meet its disbursement quota obligations. This clause is included to confirm the foundation always has the flexibility to make disbursements in order to meet the disbursement quota. Note that the distribution clause included in the standard clauses is drafted to permit disbursements to be made from income and capital, which would allow the foundation to make sufficient distributions to meet the disbursement quota. Please see Community Foundations of Canada’s Fact Sheet: [Understanding the Disbursement Quota](#) for more information on the disbursement quota.

### **Enurement Clause**

The standard terms include an enurement clause. An enurement clause evidences the parties’ intention that the benefits and obligations of the agreement will apply to, in the case of the donor, the donor’s heirs and personal representatives, and in the case of all parties, their successors and permitted assigns. In the case of the donor, this allows the donor’s personal representative (e.g. attorney under power of attorney or executor) to step in the donor’s shoes and exercise any rights set out in the agreement. It also allows for either the donor or the foundation to assign their responsibilities under the agreement to another person, with the permission of the other party (for e.g. the foundation could assign the fund and their responsibilities under the agreement to another foundation with the donor’s consent). Further, it confirms that if the foundation were to do



a corporate reorganization, any entity that is the foundation's successor would continue to be bound by the agreement.

### Minimum Fund Level

Most community foundations have a minimum level of a gift in order to establish a fund. This ensures that the fund will be able to generate enough income to disburse a grant of a reasonable amount. If the donor's initial contribution is less than the minimum fund level, it is important to identify the minimum level in the fund agreement and clarify how the fund will be treated until it reaches the minimum and what will happen if it does not reach that level in a predetermined number of years. Once the fund reaches the minimum level it becomes 'active' and distributions can be made from the fund. In the template, before the fund becomes 'active', any earnings can be invested and the foundation can deduct expenses from the earnings or capital.

### Fund Types

Community foundations provide donors with several options as to the type of fund they wish to establish. Determining the type of fund is a discussion between the foundation and donor. There are unique clauses to some funds and they are outlined in the following template. It is recommended that the foundation's lawyer review agreements before board approval. The types of funds include:

- **Endowed Funds:** An endowed fund is typically a fund that is maintained by a foundation on a long term basis. The fund may be restricted (for a specific purpose) or unrestricted purpose (for any purpose permitted by the foundation's charitable purposes).
- **Flow-Through Fund:** A flow-through fund is a fund that is not intended to be held on a long-term basis. In this case, the fund can be fully distributed by the foundation and may be immediately distributed.
- **Spend Down Fund:** A spend-down fund is similar to a flow-through fund in that it is time limited. It may exist for a certain number of years before it is fully distributed or it may be distributed on a schedule, such as equal installments over a certain number of years.

If the template fund agreement is being used for a flow-through fund or a spend-down fund, the foundation may wish to not include certain of the standard terms or modify those terms, including the "Long-term Fund", "Investments" and "Administrative Expenses" clauses.

The template outlines the following components for a fund agreement:

- Establishing the Fund with the Initial Gift



- Acknowledging the Initial Contribution from the Donor
- Purpose
- Long-term Fund
- Capital
- Investments
- Administrative Expenses
- Distributions
- Disbursement Quota
- Recognition
- Charitable Receipting
- Reporting to Donor
- Amendment
- Enurement

Additional optional clauses are provided that address Advisors, Role of Advisors, Grants to Qualified Donees Purpose, Field of Interest Purpose, Student Awards Purpose, Designated Recipient Charities Purpose, and Minimum Fund Level.

### **Financial Management of Funds**

Where possible the template refers to the financial management policies of the foundation instead of providing the current details of the foundation's policies or practices. The benefit in referring to policies is that it allows for these to change over the years and ensures that the funds will always follow the current policies of the foundation, which can be updated to reflect development in the sector and applicable laws. It is important that the relevant policies be shared with donors at the time the fund agreement is being discussed and that they understand these can change. Policies that should be incorporated by reference into the fund agreement would generally include those pertaining to Financial Management Policies, Donor and Gift Management Policies, and Grant Management Policies. See [Community Foundations of Canada's Key Governance and Administration Policies Template Guide](#).



It is also advisable, for greater clarity, to confirm in the fund agreement that the capital may be encroached upon for fees or granting when there are insufficient earnings or when the foundation determines it to be necessary.

## Signatures

Who signs the fund agreement? On the donor's behalf it would be the donor(s). For the foundation, authority to sign on behalf of the foundation is determined in accordance with the foundation's by-laws and policies. If a corporate seal is required (which is relatively uncommon), the by-laws will indicate who can affix the seal.

This template fund agreement does not require the donor and the foundation to sign under seal. Sometimes fund agreements are signed under seal (often these are referred to as "deeds of gift"). If an agreement is signed under seal, it means that the parties intend for the agreement to create immediately binding obligations without any further steps required (i.e. there does not have to be consideration between the two parties for the agreement to be binding). At law, a gift is normally only completed when the gift has been delivered by the donor and accepted by the foundation. Signing an agreement documenting a gift under seal may make the agreement to make a gift binding before the gift has been fully completed (for e.g. pledges for future payments or where the property being gifted is not easily transferable).

Each province has its own rules about whether documents can be signed electronically rather than by 'wet ink' signatures. Generally, documents can be signed using electronic signatures, subject to limited exceptions. In Ontario under the *Electronic Commerce Act*, a contract will be deemed to be signed under seal if (i) signed with an electronic signature; and (ii) the document and the signature meet the "prescribed seal equivalency requirements" (which do not exist at the time of writing). If you intend to use electronic signatures and want the agreement to be signed under seal, we recommend obtaining legal advice on whether there are any requirements for using a 'wet ink' signature in your jurisdiction.

## Records Management

The foundation should keep both the originally signed document (if signed using "wet ink") and a soft copy of the signed agreement. The soft copy would be a PDF of the scanned originally signed agreement or electronically signed agreement and kept in the foundation's electronic files.

## How to Use the Template

The template fund agreement is made up of the following elements: standard clauses, optional clauses, and execution block. The standard clauses are the recommended clauses that should be included in all fund agreements (though they may be modified as per the notes in the clauses or by the optional clauses). The optional clauses are ones that the foundation may wish to include depending on the circumstances and the foundation's preference. The optional clauses should



either replace the standard clause they modify or they should be inserted where they logically flow in the agreement. The execution block will always be at the end of the agreement.

The foundation should customize the template fund agreement based on the foundation's customary styles, font, letterhead and form. The headings "standard clauses" and "optional clauses" should be removed. Further, instead of appearing in a chart, the sections are normally set out in sequentially numbered paragraphs in the agreement. While not necessary, the agreement may include headings for each section.

A template is useful for providing the building blocks for developing the foundation's fund agreement. Relying on a template has limitations as they do not contemplate all situations that may arise. If a foundation is working with a donor with a complicated gift, the foundation may need to have a legal review of the agreement in order to ensure the right information is included.

# ABC COMMUNITY FOUNDATION ENDOWED FUND TEMPLATE AGREEMENT

## Standard Clauses

<b>Initial Gift</b>	This Fund Agreement (the “ <b>Agreement</b> ”) is dated the [day] day of [month], 20___, between _____ (the “ <b>Donor</b> ”) and _____ (the “ <b>Foundation</b> ”). The Donor wishes to establish a fund known as the _____ Fund (the “ <b>Fund</b> ”) to be managed by the Foundation in accordance with this Agreement. The Donor intends to contribute \$____.____ as the initial contribution to constitute the Fund (the “ <b>Initial Contribution</b> ”).
<b>Acknowledgement</b>	The Foundation acknowledges receipt of the Initial Contribution from the Donor and agrees to hold such sum, together with any additional contributions to the Fund from any person, upon the terms and conditions set out in this Agreement.
<b>Purpose</b>	<p>The purpose of the Fund will be to support the charitable purposes and activities of the Foundation in force from time to time and to further charitable purposes and activities carried out by a recipient that may receive support from the Fund [<i>and, in particular, ...e.g. to support research in the field of cancer</i>] (the “<b>Purpose</b>”).</p> <p><i>[Note 1: This purpose does not limit support provided to other “qualified donees”. As of the time of writing, charities cannot make grants to non-qualified donees. However the rules may change and permit such grants in the future. The intention is to have language that is flexible so that if the rules change, the foundation will be able to make grants to non-qualified donees without revising its fund agreements.]</i></p> <p><i>[Note 2: This purpose uses the word “support” instead of grant”. Support is a broader concept than grants and permits other forms of assistance. For example, it would permit a program-related investment in a non-qualified donee.]</i></p> <p><i>[Note 3: See Additional Optional Clauses below for examples of other purpose clauses that can be used.]</i></p>
<b>Long-term Fund</b>	<p>It is the Donor’s wish that the Fund be managed by the Foundation on a long-term basis.</p> <p><i>[Note: In the case of a flow-through or spend down fund, the foundation should remove this clause.]</i></p>
<b>Capital</b>	The “ <b>Capital</b> ” of the Fund will be determined in accordance with the Foundation’s financial management policies and donor and gift management policies in force from time to time and as the same may be amended by the Foundation in its sole discretion (the “ <b>Policies</b> ”).



	<i>[Note: The foundation should adopt policies that define capital and whether it includes income earned but not expended and realized and unrealized capital gains.]</i>
<b>Investments</b>	The Fund will be managed and invested in accordance with the Policies.  <i>[Note: In the case of a flow-through or spend down fund, the foundation may wish to remove this clause.]</i>
<b>Administrative Expenses</b>	The Foundation may deduct or pay a proportion of its administrative expenses from the Fund in accordance with the Policies.  <i>[Note: In the case of a flow-through or spend down fund, the foundation may wish to replace this clause with one that has a set fee. For example, “The Foundation will charge an administrative fee of ____ per cent of the Fund.”]</i>
<b>Distributions</b>	The Foundation will determine the amount available for distributions annually (the “ <b>Annual Distributable Amount</b> ”) and make distributions from the Annual Distributable Amount according to the Policies. For greater certainty, the Foundation can make distributions from income or Capital or both in accordance with the Policies.
<b>Disbursement Quota</b>	Notwithstanding any other provision in this Agreement, the Foundation shall be permitted to make distributions from the Fund as necessary to meet the Foundation’s disbursement quota obligations under section 149.1 of the <i>Income Tax Act</i> (Canada), or any other disbursement obligation that may apply to Foundation from time to time.
<b>Recognition</b>	All distributions made from the Fund will be identified as coming from the Fund.
<b>Charitable Receipting</b>	The Foundation will issue official donation receipts for the eligible amount of gifts to the Fund in accordance with the <i>Income Tax Act</i> (Canada) and the Policies.
<b>Reporting to Donor</b>	The Foundation will provide the Donor <i>[and any other current advisor]</i> with a financial report on the Fund on an annual basis.  <i>[Note: Include “and any other current advisor” if there is the option for others to provide advice.]</i>
<b>Amendment</b>	This Agreement may be amended in the following ways: <ul style="list-style-type: none"> <li>● by mutual written agreement between the Foundation and the Donor; or</li> <li>● by the Foundation alone;</li> </ul>



	<p>provided that in no event will any such amendment derogate from the following:</p> <ul style="list-style-type: none"> <li>● the Foundation will manage the Fund in accordance with the Policies; and</li> <li>● the Fund will only be used to support charitable purposes and activities of the Foundation.</li> </ul> <p><i>[Note: The foundation may want to include the following optional clause that restricts the foundation’s ability to amend the Agreement to an amendment that is consistent with the Donor’s original intention at the time the Fund was established.]</i></p> <p>It is the Donor’s wish that if the Foundation amends this Agreement alone that any amendment will be consistent with the Donor’s original intent for establishing the Fund.</p>
<b>Enurement</b>	<p>This Agreement will enure to the benefit of and be binding on, in the case of the Donor, the Donor’s heirs and personal representatives, and, in the case of all parties, their successors and permitted assigns.</p>

**Optional Clauses**

<b>Appointment of Advisor</b>	<p>The Donor may provide advice to the Foundation on the distributions from the Fund.</p>
<b>Appointment of Successor Advisor</b>	<p>Upon the death, resignation, refusal, removal or inability to act of the Donor, the successor advisor will be: _____.</p> <p><i>Alternative Clause:</i></p> <p>The Donor may appoint, from time to time, in writing a successor advisor, whose appointment will become effective upon the death, resignation, refusal, removal or inability to act of the Donor.</p>
<b>Role of Advisor</b>	<p>The Foundation will seek advice from the current advisor with respect to the distributions from the Fund.</p> <p>The Donor understands and acknowledges that the Foundation has final authority regarding all such distributions and that distributions can only be made for the Purpose.</p> <p>In any year when no such advice is received by the Foundation or the advice received is not acceptable to the Foundation, the Foundation will make distributions from the Fund, with consideration</p>



	given to the Purpose and the pattern of giving established in prior years.
<b>Purpose: Qualified Donees</b>	<p>[<i>Note 1: This clause would replace the ‘Purpose’ clause above.</i>]</p> <p>The purpose of the Fund will be to support the charitable purposes and activities of the Foundation in force from time to time and the charitable purposes and activities of “qualified donees” under the <i>Income Tax Act</i> (Canada) that may receive grants from the Fund (the “<b>Purpose</b>”).</p> <p>[<i>Note 2: In this clause, the purpose is restricted to making grants to qualified donees.</i>]</p>
<b>Purpose: Field of Interest</b>	<p>[<i>Note: This clause would replace the ‘Purpose’ clause above.</i>]</p> <p>The purpose of the Fund will be to support the charitable purposes and activities of the Foundation in force from time to time and the charitable purposes and activities of “qualified donees” under the <i>Income Tax Act</i> (Canada) that may receive grants from the Fund and, in particular, [<i>...e.g. to support research in the field of cancer</i>] (the “<b>Purpose</b>”).</p>
<b>Purpose: Student Awards</b>	<p>[<i>Note: This clause would replace the ‘Purpose’ clause above.</i>]</p> <p>The purpose of the Fund will be to support the charitable purposes and activities of the Foundation and the charitable purposes and activities of “qualified donees” under the <i>Income Tax Act</i> (Canada) whose activities are within the purposes of the Foundation and, in particular, to provide a scholarship, bursary or award for [...] (the “<b>Purpose</b>”).</p> <p>All student award amounts will be paid to qualified donees for the benefit of the award recipient.</p>
<b>Purpose: Designated Recipient Charities</b>	<p>[<i>Note: This clause would replace the ‘Purpose’ clause above.</i>]</p> <p>The purpose of this Fund will be to support the charitable purposes and activities of the Foundation and the charitable purposes and activities of “qualified donees” under the <i>Income Tax Act</i> (Canada) whose activities are within the purposes of the Foundation and, in particular, to support the programs and services of XYZ Charity (the “<b>Purpose</b>”).</p> <p>[<i>Note If this clause is used for the Purpose, another optional clause the foundation may want to include is:</i>]</p> <p>The Donor recognizes that a particular purpose or pattern of grants may not be achievable in the future, particularly if XYZ Charity ceases to exist, winds down its operations or ceases to be a registered charity. Should this be the case, the Foundation shall</p>



	ensure that the distributions are applied in support of other qualified donees carrying out similar purposes.
<b>If Fund does not reach Minimum Fund Level</b>	<p>Until the total contributions to the Fund reach [ \$_____ ], there will be no Annual Distributable Amount. If the total contributions is less than [ \$_____ ] on the fifth anniversary of the date of the Agreement, the Fund will be folded and the funds and any earnings therefrom will become part of the Foundation's general funds.</p> <p><i>[Note: By limiting this clause to total contributions means that income earned from those contributions are not applied towards the minimum fund level.]</i></p>

IN WITNESS WHEREOF the Donor and the Foundation have executed this Fund Agreement by their duly authorized signatories as of the date first above written.

Donor:

For the Foundation:

\_\_\_\_\_

\_\_\_\_\_

Name:

Name and Title: *[of person empowered to sign for the foundation]*

\_\_\_\_\_

\_\_\_\_\_