

ONTARIO RELEASES REGULATION UNDER THE *CHARITIES ACCOUNTING ACT*

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The Public Guardian & Trustee of Ontario, through the Ministry of the Attorney General, filed the anticipated Regulation under Section 5.1 of the *Charities Accounting Act* on January 19th, 2001 as Regulation 04/01. It is expected that the Regulation will be published in the Ontario Gazette on February 3rd, 2001. The full text of the Regulation is set out at the end of this *Bulletin*.

The Regulation has been anticipated for almost three years, as a result of amendments to the *Charities Accounting Act* authorizing that Regulations could be adopted by the Attorney General permitting certain acts involving charitable property that would otherwise require the approval of the Superior Court of Justice.

Section 5.1 authorizes Regulations to be adopted permitting indemnification of directors and officers, and the purchase of directors and officers liability insurance by a charity. Section 5.1 also authorizes Regulations to allow the pooling of restricted funds held by a charity, as well as permitting directors to receive remuneration from the charity on which they serve as board members.

Although Regulation 04/01 permits charities to indemnify and/or purchase liability insurance for directors and officers under certain circumstances, as well as co-mingling special purpose trust funds, provided that certain records are maintained, the Regulation does not at this time permit directors of a charity to receive remuneration from a charity. The Public Guardian and Trustee has indicated that further Regulations dealing with remuneration of directors may be introduced in the future, but at the present time there is no remedial Regulation to provide relief from the common law rule in Ontario that directors of a charity have a trustee-like fiduciary obligation not to put themselves in a conflict of interest by receiving remuneration from the charity on which they serve as a director.

The omission in the Regulation to address the thorny issue of remuneration of directors will no doubt be a significant disappointment to many charities and their legal counsel who had hoped for remedial provisions to be included in the anticipated Regulation. As a result, it will be incumbent upon charities and their legal counsel to review the corporate by-laws of a charity to ensure that directors are not permitted to receive remuneration, other than out-of-pocket expenses, or alternatively to proceed to obtain a consent order permitting remuneration of directors in accordance with Section 12 of the *Charities Accounting Act*.

In relation to the authority given to a charity in the Regulations to indemnify and/or purchase directors and officers liability insurance, there are a number of mandatory considerations that a board of directors will need to consider before proceeding with indemnification of directors and officers on the purchase of liability insurance. The mandatory criteria and conditions that must be met are set out under Section 2 of the Regulations and should be carefully reviewed.

In relation to the authority in the Regulations permitting co-mingling of special purpose trust funds by a charity, the list of mandatory records that must be maintained by a charity in Section 3 of the Regulations will prove to be very onerous. When all of the applicable requirements are taken into account, a charity may very well decide that it may be simpler to maintain each special purpose trust fund in a separate account for investment purposes notwithstanding the possible lower rate of return for the overall portfolio. It will therefore be important for the board of directors of a charity to weigh the benefits to be realized from combining special purpose trust funds against the significant list of administrative and financial records that must be maintained in order to operate a pooled special purpose trust fund.

A more detailed commentary concerning the effects of these new Regulations will appear in the next issue of *Charity Law Update*.