

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*.

DISCLAIMER:

This Legal Update is provided as an information service to our clients and is a summary of legal matters. It is not meant to be a legal opinion. Readers are cautioned not to act on information provided herein without seeking specific legal advice with respect to their unique circumstances. Comments and suggestions are welcome.

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REGULATION MADE UNDER THE *CHARITIES ACCOUNTING ACT*

APPROVED ACTS OF EXECUTORS AND TRUSTEES

Ontario Regulation 04/01

Filed: Jan. 17, 2001

Gazette: Feb. 3, 2001 (proposed)

APPROVAL OF SPECIFIED ACTS

1. (1) The acts authorized by this Regulation that would otherwise require the approval of the Superior Court of Justice in the exercise of its inherent jurisdiction in charitable matters shall be treated, for all purposes, as though they had been so approved.

(2) Subsection (1) does not constitute authorization of an act that conflicts with one of the following in a particular case:

1. The will or the instrument in writing relating to the property.
2. A court order relating to the will or instrument or relating to the property.

(3) An executor or trustee must maintain records demonstrating that he, she or it has complied with the requirements of this Regulation when engaging in an act that is authorized under subsection (1).

(4) An executor or trustee is not required by virtue of this Regulation to give any indemnity or to make any payment.

AUTHORIZATION TO INDEMNIFY

2. (1) In the circumstances and subject to the restrictions set out in this section, an executor or trustee and, if the executor or trustee is a corporation, each director or officer of the corporation may be indemnified for personal liability arising from their acts or omissions in performing their duties as executor, trustee, director or officer.

(2) An executor, trustee, director or officer cannot be indemnified for liability that relates to their failure to act honestly and in good faith in performing their duties.

(3) In the circumstances and subject to the restrictions set out in this section, insurance may be purchased to indemnify the executor, trustee, director or officer for the personal liability described in subsection (1).

(4) The terms of the indemnity or insurance policy must not impair a person's right to bring an action against the executor, trustee, director or officer.

(5) The executor or trustee or, if the executor or trustee is a corporation, the board of directors of the corporation shall consider the following factors before giving an indemnity or

purchasing insurance:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

(6) The purchase of insurance must not, at the time of the purchase, unduly impair the carrying out of the religious, educational, charitable or public purpose for which the executor or trustee holds the property.

(7) No indemnity shall be paid or insurance purchased if doing so would result in the amount of the debts and liabilities exceeding the value of the property or, if the executor or trustee is a corporation, render the corporation insolvent.

(8) The indemnity may be paid or the insurance purchased from the property to which the personal liability relates and not from any other charitable property.

(9) If the executor, trustee, director or officer is deceased, the indemnity or the proceeds of the insurance may be paid to his or her estate.

COMBINING PROPERTY HELD FOR RESTRICTED OR SPECIAL PURPOSES

3. (1) In this section,

“contributed property” means, in respect of an individual property, additional property that is added to, and forms part of, a pre-existing individual property.

(2) In the circumstances and subject to the restrictions described in this section, an executor or trustee may combine property received by the executor or trustee for a restricted or special purpose with other property received by the executor or trustee for another restricted or special purpose and may hold the combined property in one account in a financial institution or invest it as if it were a single property.

(3) The property may be combined only if it advances the administration and management of each of the individual properties to do so.

(4) All gains, losses, income and expenses must be allocated rateably, on a fair and reasonable basis, to the individual properties in accordance with generally accepted accounting principles.

(5) The executor or trustee must maintain the following records for each of the individual properties, in addition to such other records as may be required by law:

1. The value of the individual property immediately before it becomes part of the combined property, and the date on which it becomes part of the combined property.
2. The value of any portion of the individual property that does not become part of the combined property.
3. The source and the value of contributed property relating to an individual property, and the date on which the contributed property is received.
4. The value of the contributed property immediately before it becomes part of the combined property, and the date on which it becomes part of the combined property.
5. The amount of the revenue received by the combined property that is allocated to the individual property, and the date of each allocation.
6. The amount of the expenses paid from the combined property that are allocated to the individual property, and the date of each allocation.
7. The value of all distributions from the combined property made for the purposes of the individual property, and the purpose and date of each distribution.

(6) The executor or trustee must maintain the following-records for the combined property, in addition to such other records as may be required by law:

1. The value of each individual property that becomes part of the combined property, and the date on which it becomes part of the combined property.
2. The value of contributed property that becomes part of the combined property, the date on which it becomes part of the combined property, and details of the individual property to which the contributed property relates.
3. The amount of the revenue received by the combined property, the amount allocated to each individual property and the date of each allocation.
4. The amount of the expenses paid from the combined property, the amount allocated to each individual property and the date of each allocation.
5. The value of all distributions from the combined property made for the purposes of an individual property and the purpose and date of each distribution.