
OPGT RELEASES GUIDANCE ON PAYMENTS TO DIRECTORS

*By Ryan M. Prendergast **

A. INTRODUCTION

Amendments to Ontario Regulation 4/01¹ (the “Regulation”) to the *Charities Accounting Act*² (the “CAA”) came into force on April 1, 2018, providing relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them. As a result, in the circumstances outlined in s. 2.1 of the Regulation, charitable corporations are now permitted to make certain authorized payments to directors and related persons without first obtaining a s. 13 consent order under the CAA to permit such payments.

Included in the amendments to the Regulation is a requirement under s. 2.1(6)(c) for charitable corporations to consider any guidance respecting payments when approving such payments to directors or connected persons. In this regard, the Office of the Public Guardian and Trustee (the “OPGT”) published a guidance, “Payments to Directors & Connected Persons”³ (the “Guidance”), in late May, 2018. The Guidance is set out as 19 sections that elaborate upon s. 2.1 of the Regulation in a “frequently asked questions” format, with most sections answering a specific question and clarifying certain sections of the Regulation. This *Charity & NFP Law Bulletin* discusses and summarizes the Guidance, and

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¹ *Approved Acts of Directors and Trustees*, Ontario Regulation 4/01.

² RSO 1990, c C.10.

³ Ministry of the Attorney General, *Payments to Directors & Connected Persons*, online: Office of the Public Guardian and Trustee <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization_of_payments.html>.

provides a summary of what charitable corporations are required to do in order to comply with the Regulation and the Guidance.

B. GENERAL OVERVIEW

Although the term “charitable corporation” does not appear in the Regulation, the Guidance makes frequent reference to the term and uses it in place of “corporate trustee,” which is used throughout the CAA and Regulation. In this regard, the Guidance defines a charitable corporation as being any non-share capital corporation operating in Ontario, whether it be a registered charity or another organization that has exclusively charitable purposes. As such, the Guidance confirms that trustees of charitable trusts or unincorporated charitable organizations are not permitted to pay trustees under the Regulation which is only applicable to “corporate trustees”, *i.e.*, a corporation deemed by s. 1(2) of the CAA to be a trustee. In addition, the Guidance also clarifies that the Regulation has application to charitable corporations “operating” in Ontario, even if they are not incorporated in Ontario.

The Guidance states that the Regulation permits “payments for most goods, services and facilities, provided all the requirements are met.” Further, the Guidance explicitly states that the Regulation does not permit directors to be remunerated for services provided in their capacity as a director or employee, or for fundraising or real property transactions. For payments not authorized by the Regulation, a s. 13 court order under the CCA through the OPGT would still be required, if applicable. As an example, the Guidance clarifies that the Regulation is not applicable to a religious leader who, in addition to being an employee, sits on the board of directors of a religious organization that is a charitable corporation, and in such cases a court order would be required. Additionally, the Guidance states that the Regulation does not permit payments that are prohibited by the charitable corporation’s governing documents or by any other legislation applicable to the corporation, or any rules of professional conduct applicable to the director. In this regard, charitable corporations wishing to make use of the Regulation will still need to review their governing documents to determine if their by-laws, letters patent, or articles of incorporation otherwise prohibit such payments.

C. CONDITIONS FOR AUTHORIZING PAYMENTS

The Guidance outlines the conditions required under ss. 2.1(5) - (7) for remuneration to be authorized and elaborates upon the requirements. In accordance with s. 2.1(7), the Guidance clarifies that in order for a

charitable corporation's board to authorize payments, it must have at least five directors, four of whom are eligible to vote on the payment to the director or connected person. Directors either receiving a payment or who are otherwise connected to the person receiving the payment, as well as any other person connected to such a director, would not be eligible to vote. In total, no more than 20% of the number of voting directors may receive remuneration.

To authorize remuneration, the board must believe at the time of authorization that the payment would be in the charitable corporation's best interests. In this regard, directors must be able to demonstrate that the arrangement is both beneficial to the charitable corporation and that there is an advantage to the charitable corporation using a director or connected person rather than an unrelated third party. The Guidance provides five factors for the board to consider prior to authorizing a payment including, for example, the experience and qualifications of the director or connected person, and any adverse impacts on the charitable corporation.

Boards must also consider whether the authorized amount is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided. The Guidance provides a list of factors for the board to consider in this regard, such as the market price for similar goods, services or facilities and the quality of them. Where the cost of a service is large and the charitable corporation does not have information on market prices, they may obtain quotes from suppliers. As a general rule, as the payment increases, so does the burden on charitable corporations to demonstrate that they considered the market price.

The Regulation also states that any payments must not result in the charitable corporation's debts and liabilities exceeding the value of its charitable property, and must not render the charitable corporation insolvent. Further, all directors and connected persons must agree in writing to a maximum amount that the charitable corporation can pay for the goods, services or facilities. Where these are provided by a connected person, that connected person must also agree in writing to the maximum amount. The Guidance clarifies that the maximum amount is "the total amount that the charitable corporation has agreed to pay for provision of the goods, services or facilities," although the total amount paid at the end of the contract may be less than the maximum amount. However, the Guidance also allows for the

agreement setting the maximum amount to be amended to authorize a payment above the original amount. To do so, the charitable corporation must again satisfy ss. 2.1(5) – (10) of the Regulation.

D. RECORD KEEPING AND ANCILLARY REQUIREMENTS

If charities and their advisors are to have one take away to remember from the Guidance, it's that the Guidance states that charitable corporations are advised to keep records of everything related to compliance with the Regulation, including a copy of the agreement and approvals, and fully document the decision-making process, including market research, supplier quotes, the fact that the board reviewed the Guidance, and the rationale for the decision. As such, while the Regulation eases the regulatory burden on charitable corporations that wish to make certain payments to directors or persons related to them, charities will need to be careful to maintain records of complying with the Regulation and Guidance. While directors that do not comply with the Regulation may be considered in breach of their fiduciary duties, and may ultimately be liable to re-pay funds, the Guidance states that complaints about alleged improper payments can ordinarily be answered where the charitable corporation is able to show, through good recordkeeping, that it complied with the Regulation.

For greater transparency between directors and members of charitable corporations, the Regulation requires authorized payments that have been made to be disclosed to the charitable corporation's members at its annual members meeting and in its financial statements. While the Regulation is silent on the type of information to be disclosed and the manner of disclosure, the Guidance states that disclosure should "meet relevant accounting practices." Further, it outlines the OPGT's guidelines for disclosure within financial statements which, among other things, require the information to be placed in the financial statement's notes, the director in question to be named, and the nature of the transaction to be mentioned in broad terms.

The Guidance also states that the requirements for authorizing payment are reduced in instances where a payment is being made by one charitable corporation to either a not-for-profit corporation or a for-profit corporation wholly owned by the charitable corporation, as long as the payment does not benefit the director who is connected to the corporation. In such instances, the only requirements that must be met are that the payment cannot be made for fundraising services or transactions related to the purchase or sale

of real property, it must be made with the charitable corporation's best interests in mind, and the authorized amount must be reasonable for the charitable corporation to pay for the goods, services or facilities.

E. CONCLUSION

While the amendments to the Regulation brought into force beneficial changes that now ease the process for charitable corporations to authorize certain payments to their directors, a number of requirements must be met. The Guidance provides a degree of clarity on the Regulation's requirements, and in particular the record keeping requirements related to the Regulation. As charitable corporations are required by the Regulation to consider the Guidance when approving payments to directors or connected persons, those directors and connected persons should review and become familiar with the Guidance in addition to the Regulation prior to contemplating authorizing certain payments.



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