



Ministry of the
Attorney General

Office of the Public Guardian and Trustee Charitable Property Program

The Evolution and Empowerment of Charities in Ontario from the Perspective of the PGT

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A decorative graphic consisting of overlapping colored squares (yellow, red, blue) and a black crosshair.

Introduction

- Over the past 20 years, the Office of the Public Guardian and Trustee (OPGT) has taken steps to empower charities and those holding charitable property to do their good work;
- We've made changes both to our processes and to the law itself.


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Charities and Not-for-profits

- Good Governance for each is based on the same principles and duties;
 - Know the Law
 - Know the Organizations Purposes
 - Know the By-Laws
 - Know your fiduciary duties

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Good Governance

- Underlying Principles of Good Governance
 - Fulfil your Fiduciary Duties
 - Always Act in the Best Interest of the Organization
 - Always Act within the Organization's Purposes

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Good Governance

- Good Governance Practices:
- Communication
 - Know when to talk
 - Know when to listen
- TRANSPARENCY
 - With Membership
 - With Board
- Documentation
 - Decisions
 - Rationale




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Charity Law



- Charity law is mostly judge-made.
- The Charities Accounting Act (CAA)
 - Unique to Ontario;
 - Allows the Attorney General, on the advice of the PGT, to make Regulations;
 - Provides an opportunity for improvements to the law to make it easier for charities and those holding charitable property to do their good work;
 - A non-charitable organization holding charitable property is a trustee under the CAA.

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PGT Process for Change

- The PGT looks at the law to find a good balance between assisting directors and trustees to be more efficient and effective, on one hand, and ensuring that charitable property is protected, on the other.
- This includes:
 - Listening to directors and trustees asking for change;
 - Reviewing the history of the rule and the purpose the rule serves;
 - Evaluating whether the purpose still necessary or whether there is a better way to serve that need;
 - Considering whether we can enhance the tools already available.

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Changes: 1997 - 2018



1. S.13 *Charities Accounting Act* (CAA), 1997
2. Wills reporting rule removed, 2000
3. Prudent Investor Rule, 2001
4. Update of Charities Incorporation Process/pre approved objects, 2001
5. Authorization to Indemnify, 2001
6. Combining Property Held for Restricted or Special Purposes, 2001
7. Charities can invest in land, 2009
8. Charitable Gifts Act repeal, 2009
9. Accumulations Act amended, 2009
10. Updated Reporting Requirements, 2014
11. Social Investments, 2017
12. Charity Law Prevails, 2017
13. Payments to Directors, 2018
14. Special Provisions, 2018

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Section 13 of the CAA , 1997

- Charities and others holding charitable funds sometimes require Court orders on non-adversarial matters which are settled in law, including;
 - Cy-pres Applications: Trust funds that can no longer be used for their original purpose;
 - Payments to directors, either as employees or for providing other services;
 - Trust agreement amendments in order to comply with CRA's Distribution Quota.

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Section 13 of the CAA , 1997

- The Court process can be adversarial, complex and expensive;
- Directors and trustees are compelled to spend charitable funds on legal fees and court costs in order to be compliant with the law.

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Section 13 of the CAA , 1997

- The 1997 amendment to the Charities Accounting Act added section 13.
- Unique legislation that allows a charity to obtain a Court order without a formal Court application;
- Used for matters on consent and already established in law;
- Efficient and cost saving for charitable matters.

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Wills reporting rule removed, 2000



- Prior to 1999, whenever a Will included a gift for charity, a copy of the Will had to be sent to the OPGT
- We received, reviewed and filed about 10,000 Wills a year
- We still receive over 100 per year, despite this change over 18 years ago

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Prudent Investor Rule incorporation in the CAA, 2001

- In 1998, the Prudent Investor Rule was brought into the Trustee Act
- This was a change from the previous law, which validated only specific types of investments'
- It was unclear for directors of incorporated charities, who are not trustees, whether the old rule, the new rule, or the common law rules applied

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Prudent Investor Rule incorporation in the CAA, 2001

- In 2001 the CAA was amended to include the Prudent Investor Rule into the CAA
- This applies to both directors and trustees and creates one legislative standard for the investment of charitable property

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Pre-Approved Objects, 2001

- Prior to 2001, the OPGT had to review the application of every charity incorporating in Ontario
- This was an onerous task for charities, as:
 - It involved an extra fee for the PGT's review
 - The charitable purposes, although PGT approved, may not have been approved by CRA
 - Purposes are legal statements and can be difficult to draft so the processing time was often extended as amendments were required


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Pre-Approved Objects, 2001

- In 2001, applications using 'pre-approved' objects no longer required OPGT review
- The OPGT worked with CRA to ensure that all 'pre-approved' objects met with CRA approval
- Charities are not required to draft purposes
- The PGT review fee is removed and application processing time is quicker


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Authorization to Indemnify, s. 2 of O. Reg. 4/01, 2001

- It was not clear whether charitable funds could properly be used to indemnify or purchase indemnity insurance for directors as it was for the benefit of the directors rather than the charity
- As the size and complexity of charities increased, so did the liability risk for directors

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Authorization to Indemnify, s. 2 of O. Reg. 4/01, 2001

- Ontario Regulation 4/01 (O. Reg 4/01) s.2 was introduced in 2001
- S. 2 authorizes directors to use charitable funds to provide indemnities to directors or purchase indemnity insurance
- S. 2 includes various safeguards to ensure the decision is made properly

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Combining Restricted Funds, s. 3 of O. Reg. 4/01, 2001

- Historically, trust property, such as restricted purpose gifts, had to be kept in separate Trust accounts
- Trust account had to be separate, both from the general fund and other trust accounts
- Many directors and trustees were unaware that the law technically prohibited combining these funds for investment purposes

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Combining Restricted Funds, s. 3 of O. Reg. 4/01, 2001

- Section 3 of O. Reg. 4/01 both clarified the law and allowed trust funds to be combined for investment purpose
- While a separate accounting for each fund is still required, the Regulation now allows the funds to be pooled for investment purposes

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Charitable Gifts Act Repealed, 2009

- Prior to 2009, the Charitable Gifts Act (CGA) prevented charities from owning more than 10% of any business
- Any gift of shares above 10% had to be sold within 7 years
- The charity also had to report annually to the OPGT during those 7 years


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Charitable Gifts Act Repealed, 2009

- The CGA was repealed in 2009
- At the same time, Section 4.1 was added to the *Charities Accounting Act* to allow the OPGT to request documentation with respect to businesses in which the charity has a 'substantial interest'

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Accumulations Act Provisions, 2009



- Prior to 2009, Charities were not allowed to accumulate any income for longer than 21 years
- This presented a problem for charities who wished to capitalize income to protect against inflation or were not able to distribute the entire income each year
- In 2009, the s. 4 of the *Accumulations Act* was added to exclude charitable trusts

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Charities can Invest in Land, 2009



- Until 2009, Section 8 of the Charities Accounting Act required that charities could only hold land if it was for 'actual use or occupation'
- Section 8 (2) allowed the PGT to vest the land in himself or herself under certain conditions
- This prohibited charities from renting out unused space and limited their ability to hold property that was not immediately needed for the charities actual use or occupation

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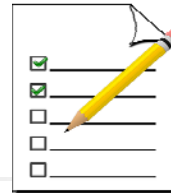
Charities can Invest in Land, 2009



- In 2009 Section 8 was amended and simply requires that all land be used for a charitable purpose
- The removal of the phrase 'actual use or occupation' allows charities to lease out land, as long as the proceeds are used to further their charitable purposes

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Updated Reporting Requirements, 2014



- The OPGT has reporting requirements pursuant to s.2 of the CAA
- OPGT developed simplified reporting requirements in 2014
- Once ONCA is place, information about charities incorporating in Ontario will be automatically forwarded to the OPGT

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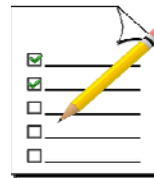
PGT Reporting Requirements



- Charities incorporated in Ontario must provide the PGT with any changes to:
 - Incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, Private Act)
 - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers.

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PGT Reporting Requirements



- Charities incorporated elsewhere must provide the PGT with:
 - A copy of the incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, constitution, trust deed etc.);
 - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers;
 - Any changes to the first two requirements.

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PGT Reporting Requirements

- Non-charitable not-for-profits and for-profit organizations holding charitable funds:
 - A copy of the trust deed, donor agreement or other document or under which the organization accepted or collected the funds;
 - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers;
 - Any changes to the first two requirements.

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Social Investments 2017

- A social investment is defined as property applied to further the purposes of the charity and achieve a financial return;
- Prior to the 2017 amendment to the CAA, it was unclear if provincial law allowed charities to make social investments.

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Social Investments 2017

- In late 2017, ss. 10.2 – 10.4 were added to the CAA to clarify the rules around social investments;
- The OPGT also publishes guidance on social investing. A copy is attached to this presentation.
- Too early to understand the impact on the charitable sector or the ways charities are utilizing the power
- Reasonableness and compliance is the key to any social investment

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Payments to Directors 2018

- Directors of charities have a duty to avoid acting in a conflict of interest and receiving a personal benefit from the charity without a Court order;
- However, at times remunerating a director for services can be in the best interest of the charity, as they:
 - Can offer services below market rates;
 - Have inside knowledge of the charity;
 - Provide needed expertise both as a director and a service provider, such that resigning from the Board is not the best solution.

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Payments to Directors 2018

- From 1997-2017 charities could apply to the OPGT for a Court order under s.13;
- Section 2.1 was added to O. Reg 4/01 in 2018 to create a simpler process for incorporated charities to be able to authorize payments to directors, despite the conflict.

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Payments to Directors 2018

- The Regulation
 - Makes the law around conflicts clearer and easier to access;
 - Makes compliance with the law easier for charities;
 - Includes Guidance to assist charities in using the Regulation.

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Special Provisions, 2018

- Changes to the *Corporations Act* lead to a reduction in the number of special provisions the OPGT required for charities incorporating in Ontario.
- Most notably, charities with the new provisions possess broader borrowing powers.

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Upcoming and Unfolding

- The Ontario Not-for-Profit Corporations Act, 2010;
 - New/updated rules for charities and other not-for-profits incorporated in Ontario;
 - The government anticipates it will come into force in 2020;
- Senate Special Committee on the Charitable Sector;

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New Tools for Directors and Trustees

- Running small businesses for income;
- Better investment opportunities for higher returns;
- Renting unused space in buildings owned by the charity;
- Social Investments authorized;
- Ability to utilize the talents of Board members;
- Court orders without going to Court.
- Simpler reporting
- Guidance to ensure compliance with the law

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What Hasn't Changed – Fiduciary & Other Duties

- The underlying duties of charities, directors and trustees remain in place. These duties include:
 - Be reasonable, prudent and judicious with the charitable property;
 - Use the charity's property only to carry out the charitable purposes;
 - Avoid Conflict-of-Interest situations or follow the law when there is a conflict;

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What Hasn't Changed – Fiduciary & Other Duties (cont'd)

- Act Gratuitously;
- Account for the charity's funds, act in person and make all major decisions;
- Invest according to the charity's incorporating documents or, if they do not contain provisions, according to the Trustee Act;
- When using any of these tools, ensure you are compliant with the law and making reasonable decisions.

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Contact Information



- **Office of the Public Guardian and Trustee
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www.attorneygeneral.jus.gov.on.ca/english/family/pgt

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Other Information

Brochures including this information
and other charitable matters at the
PGT's website:

[http://www.attorneygeneral.jus.gov.
on.ca/english/family/pgt/](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/)



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