# The Public Guardian & Trustee & the Courts on the Limits of Fundraising in Ontario

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## The Public Guardian & Trustee & the Courts on the Limits of Fundraising in Ontario

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## Role of the Office of the Public Guardian and Trustee Charitable Property Program

- **Historically, the role of protecting property donated for charitable purposes rests with the Attorney General; in Ontario, this role has been assigned by statute to the Public Guardian and Trustee;**
- **The Charitable Property Program of the Office of the Public Guardian and Trustee (the "OPGT") monitors the use of charitable property in Ontario, to ensure protection of the public interest under the *Charities Accounting Act* and other statutes.**

- **The Office responds to complaints about the misuse of charitable property – using property for purposes outside of the charity's objects; use of excessive amounts for fundraising; or misappropriation of charitable property.**
- **Under the *Charities Accounting Act,* the Office can seek an order from the Ontario Superior Court of Justice compelling a charity to pass its accounts, this is a court audit of the charity's financial dealings.**

- **In Canada both the provincial and federal governments have responsibility in the area of charity law.**
- **Federally, Canada Customs and Revenue Agency (CCRA) focuses on tax law and tax principles to prevent abuses of the charitable donation tax credit system. If a charity wishes to issue tax receipts the charity must first register with CCRA.**
- **Provincially, the OPGT acts to monitor compliance with the laws relating to the proper use of charitable assets and to ensure that trustees and charitable corporations carry out their fiduciary responsibilities.**

**RECENT COURT CASES**

- The OPGT has recently concluded two court cases which have a major impact on fundraising by charities in Ontario.
- The two cases are The AIDS Society for Children (Ontario) ("AIDS Society"). The second case is The National Society for Abused Women and Children ("National Society").
- In both cases the charities entered into contracts with commercial fundraisers who conducted telephone as well as door-to-door campaigns. Fundraisers each charged from 75% – 80% of the gross receipts for their fundraising fees and expenses.

- In both cases the court:
  - "found the cost of fundraising campaigns were unreasonably high."
  - ordered repayment of funds by directors of the charities.
  - ordered certain of the commercial fundraising contracts be set aside and required repayment of funds by some of the commercial fundraisers.
  - and in one case the financial penalty was levied against the directors.

**The AIDS Society for Children (Ontario)**

**Facts**

- The AIDS Society for Children (Ontario) (the "Society") was an incorporated charity, operating in several cities in Ontario. The Society was also registered as a charity under the *Income Tax Act.* Its objects were to build hospices for children with AIDS.
- The OPGT received complaints about the operation of this charity, in particular that it was not using the funds it raised to carry out its charitable objects.

- The OPGT requested the charity to pass its accounts. When the charity did not pass its accounts the OPGT commenced court action under the *Charities Accounting Act*.
- The Society had hired two professional fundraisers to raise funds for the charity. The court also ordered the fundraisers to pass their accounts.
- A review of the accounts showed the followings funds collected from the public:
  The Society collected- $546,000,
  The fundraisers collected- $375,000,
  For a total amount of- $921,000.

- **The two fundraisers spent $296,000 on their fees and expenses being 80% and 76% of the funds they collected.**
- **The Society received from all sources $622,661.57 and all of this money was used for its fees and expenses. Nothing was spent on pursuing the charity's objects.**

**Judgment - May 25, 2001**

- **Before the court could deal with the actual passing of accounts a number of legal issues needed to be decided by the court.**
- **The court's decision on these legal issues was released on May 25, 2001.**

**1. This decision clarifies the responsibilities of charities, those who run charities and for-profit fundraisers in relation to fundraising appeals.**

**2. Charities and those who run charities are responsible to the public for all funds collected from the public. This accounting is of the gross amount of funds donated and not just the money that the charity actually receives.**

**3. This applies even if professional fundraisers are hired**

**4. A charity cannot avoid being accountable for all funds collected from the public by incorporating. Although incorporated charities and their directors are not trustees they still have fiduciary obligations and the court held this included accounting for money raised through fundraising**

**5. The fundraisers are not accountable to the public. However, fundraisers are agents of the charity and must account to the charity, for all money received, even if the canvassers are independent contractors and not employees of the fundraiser.**

**6. Although the courts have been reluctant to interfere with the right to contract, fundraising contracts can be set aside in certain circumstances based on public policy considerations or misrepresentation to the public. This could include contracts that provide for unreasonably high fundraising costs.**

**7. The court noted that the fundraising literature was silent on the issue of fundraising costs. While the court did not set out what were reasonable expenses, the court did find that expenses of 70% or greater were unreasonable.**

### Passing of Accounts Decision

- **The passing of accounts of The Society and of the Fundraisers hired by The Society took place on May 9, 2002.**
- **Although the charity, its directors and the commercial fundraisers were served, they did not participate in the actual passing.**
- **After reviewing the accounts of the charity and the directors, the court found that the fundraising expenses were unreasonable and as a result the court Ordered:**

**(a) The directors of the charity were to repay $736,915.71**

**(b) Two commercial fundraising contracts were to be set aside and judgment granted against one fundraiser for $162,327.78 and against the second fundraiser for $69,367.02**

**(c) A penalty of $50,000 was levied upon the directors of the charity.**

**(d) Funds currently held by the OPGT and any additional funds received as a result of this judgment were to be divided between two named charitable organizations. These two named charitable organizations had objects similar to those of the society.**

### National Society for Abused Women and Children

**<u>Background</u>**

- **The National Society was an incorporated charity. The National Society was also registered with Canada Customs and Revenue Agency as a registered charity. Its objects were to undertake public education, family support services, counseling, dissemination and publication of information about abused women and children and to assist shelters and related organizations for helping abused women and children.**

- **An article in the Toronto Star quoted one of the directors of the charity saying that despite having collected thousands of dollars, no funds had yet been spent on the charitable objects.**
- **The OPGT wrote to the charity requesting information on its financial operations.**

- **The OPGT subsequently received complaints from the public about the operation of this charity, raising concerns as to its fundraising expenses and its failure to carry out the services it claimed to offer.**
- **The OPGT requested the charity to pass its accounts. When the charity did not pass its accounts the OPGT commenced court action under the Charities Accounting Act.**
- **The National Society had entered into three separate fundraising contracts including one with a fundraiser owned by two of the directors of the charity. The court also ordered the fundraisers to pass their accounts.**

- **The accounts showed that The Society raised $904,987.44 but that only $1,365.00 was actually spent on its charitable objects. The Fundraisers charged between 75% to 80% of the gross receipts for fundraising expenses.**
- **The court was not prepared to approve The Society's accounts. The court felt that the whole operation was simply a scheme to raise money for the professional fundraisers.**
- **The court found that directors had received personal benefit for the expenses they claimed. The court also found that two directors who owned a fundraising organization were in a conflict of interest and breached their fiduciary duties as directors of the charity. As a result of the conflict of interest, they profited.**

- **The court ordered the directors of the charity to repay all monies received from The Society if demanded by the OPGT. The directors could submit proper documentation to support their claims if they had legitimate expenses.**
- **The two directors who owned the fundraising agency were required to pay back the profits earned by their agency.**

- **The court found that fundraisers receiving a share of 75% to 85% of the gross receipts (if known) "is bound to shock the conscience of any citizen. If any prospective donor knew the true facts, I doubt that a penny would be given. They claim to speak for a charity, but are careful not to reveal what the charity will receive. The main beneficiary is the collection agency. If not an outright fraud, it is clearly wrong."**
- **The court acknowledged that donors would expect the charities to have administrative costs but, in situations where the actual amount used for the charitable purpose is a fraction of 1% , it is clearly unconscionable.**

**Consequences of the Court Decisions**

**1. When a charity is involved in fundraising it needs to make sure that the costs are reasonable; that there is full accounting of all funds received and all expenses. Charities should be involved and oversee all fundraising even if it hires professional fundraisers.**

**2. In appropriate circumstances commercial fundraisers, as well as the charity, can be required to account for the gross receipts collected from donors on behalf of the charity.**

**3. Under the common law, fundraising costs must be reasonable. The 80/20 rule under the Income Tax Act provides some guidance as to what would be considered a reasonable proportion for costs. The disbursement quota provides that 80% of donated funds are to be applied to the charity's purposes. Fundraising and administrative costs are limited to 20% of the amount donated in the previous year. This provision only applies to funds which receive official tax receipts, allowing the donor to claim the donation on their Income Tax Return.**

**4. Failure to comply with the disbursement quota could result in the revocation of an organization's charitable registration.**

**5. If the court does set aside a fundraising contract it is possible that the court may hold trustees and directors as well as fundraisers responsible for unreasonable expenses. The court can also impose financial penalties payable personally by the directors of the charity.**

**6. It remains to be seen if in future courts will look at what information was disclosed to potential donors concerning fundraising costs, in determining whether or not to void the contract and look at the potential liability of charities and those who run charities for unreasonable or misleading fundraising costs.**

### Responding to the Court Decisions

**These tips will be of assistance to those who run charities as well as those who are hired to assist charities in conducting fundraising campaigns.**

**1. Know the constating documents. These are the documents that set up the charity such as a trust document, constitution or letters patent. These documents describe the objects the charity can undertake and set out the powers and any limitations on those powers.**

**2. Be knowledgeable about all aspects of the fundraising. Is the literature and statements made to potential donors informative and correct? If you are collecting funds for a restricted or special purpose ensure that the funds collected are used for that purpose. Ensure that no misrepresentations are being made to the public as to the amount of money that is actually going to the charitable purposes, and ensure that the costs of fundraising are reasonable. This means that a significant amount of the funds raised should be used for the charity's purposes.**

**3. If there is a fundraising campaign, have a plan. This should be a full detailed plan in writing.**

**4. Creating a plan and entering into agreements are not enough. You must continue to monitor and evaluate your plans and agreements.**

**5. When agents are hired, including agents to fundraise for a charity, have a written agreement, which clearly sets out the responsibilities and liabilities of all parties.**

**6. When agents are hired to do fundraising, special consideration should be given to the compensation payable to the agents. An organization should be hesitant to enter into any arrangement which provides for paying a commission on the funds raised. Any cost of fundraising needs to be reasonable and defendable by the charity.**

**7. If directors or trustees use agents i.e. for fundraising or investments, they remain responsible for the agents' actions. Therefore if your monitoring and evaluating shows actions are required, take appropriate and timely actions.**

**8. Document your deliberations and actions, not just the decisions. These will be particularly important if the fundraising campaign loses money.**

**9. Keep a complete record of the financial transactions. This must include the gross amount of funds received from the donors and all expenses for the fundraising campaign.**

**If you are a director or trustee of a charity know your duties, responsibilities and powers. Comply with your fiduciary responsibilities. You need to be actively involved in the charity's decision making process. You need to act in the best interest of the charity making sure the charity operates effectively and within the law. This includes using the charities assets only for the purposes (objects) that the charity is authorized to do.**

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