
21ST ANNUAL CHURCH & CHARITY LAW SEMINAR

Mississauga – November 13, 2014

Board Duties and Liabilities in Dealing with Charitable Property

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 Ministry of the
Attorney General

**Board Duties and Liabilities in
Dealing with Charitable Property**


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 Deputy Director of Legal Services
 Office of the Public Guardian and Trustee

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**Mandate of the Public Guardian
and Trustee**

- Plays a role in helping to protect charitable assets in Ontario;
- Affords advice and assistance to the courts; and
- Can take steps to ensure that charitable property is used for the charitable purposes intended by the donor


Fulfilling Mandate

PGT carries out its mandate by:

1. Reviewing Ontario applications for incorporation of charitable organizations and corporate-change documents;
2. Protecting charitable property in court proceedings; and
3. Acting on complaints regarding misapplication of charitable property or breach of fiduciary duties of directors or trustees

Fiduciary Duties of Trustees/Directors

- Many of the complaints received by the PGT centre on the alleged failure of Trustees or Directors to properly fulfill their fiduciary obligations;
- Details on Fiduciary Duties of trustees or directors found in Charities Brochure #3 at the PGT's website:
<http://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/>

Status of Directors

- The directors stand in a fiduciary relationship to the Society and are therefore required to act in such a way as to support and further the objects of the Society...
- The directors of the Society stand in the same relationship to the public as does the Society, it is a fiduciary relationship
Public Guardian and Trustee v. The Aids Society for Children et al., [2001] O.J. No. 2170 (Sup. Crt.)

Know Your Fiduciary Duties

- Fiduciary duties of Directors/Trustees of a charity include the duty to:
- a. Carry out the charitable purposes;
 - b. Maintain accounts and records;
 - c. Not place one's personal interests in conflict, or in an appearance of conflict, with the charity;
 - d. Act gratuitously;
 - e. Manage and protect the charity's property;
 - f. Invest surplus funds;
 - g. Act reasonably and prudently;

Carrying Out the Charitable Purposes

- Directors/Trustees should know the governing documents
 - These are the documents that set up the charity such as a trust document, constitution or letters patent
 - They describe the objects the charity can undertake and set out the powers and any limitations on those powers
- Know if there are any restricted or special purpose trust funds/property
 - Know what restrictions apply
 - Keep detailed records, showing that restricted funds are held separately and how they are applied and retain any documentation which establishes the trust


Carrying Out the Charitable Purposes

- Society has a fundamental interest in ensuring that monies from the general public for which deductions create a loss in tax revenue will go to benefit the intended beneficiary


Public Guardian and Trustee v. The Aids Society for Children et al., [2001] O.J. No. 2170 (Sup. Ct.)

Maintaining Records & Accounts


- Keep full and complete financial records and make sure the records set out any special or restricted purpose trust funds
- Keep your corporate records accurate and up to date (including registers of members, directors & officers) Resignations of directors should be in writing. Keep corporate information filings up-to-date
- Document deliberations and actions not just decisions
- Follow the financial reporting requirements of the governing legislation (either the Ontario Corporations Act, the Canada Not-for-Profit Corporations Act or, when it becomes law, the Ontario Not-for-Profit Corporations Act

 **Conflict of Interest**


- A Director/Trustee cannot personally benefit from their position;
- A personal benefit can be to the Director directly (such as a commercial contract w/ the charity) or to a member of the Director's family (such as a summer job for Director's child)
- A conflict of interest occurs when the Director's personal interests interfere, or appear to interfere, with their duties to the charity
- Directors should avoid situations of conflict or the appearance of conflict can undermine confidence in the fiduciary's ability to act in accordance with his or her duty of loyalty and honesty owed to the charity

 **Remuneration of Directors**


- "it is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."
- *Bray v. Ford* [1896] A.C. 44

 **Remuneration of Directors**


- Ontario law prohibits payments of remuneration to Directors for providing other services without a Court order.
- The OPGT offers a cost-effective process of obtaining a Court order on consent in certain circumstances, see "*How to get a Court Order on a Charitable Matter Without Going to Court*" at <http://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/charities/>

 **Invest Surplus Funds**


If the charity has special purpose trust funds or other funds not needed for current expenses, there is an obligation to invest those funds. Charities must comply with the obligations of the *Trustee Act* including having an investment plan.

 **Duty to be Reasonable, Prudent and Judicious**


- Handle property with skill, care and diligence of a prudent person;
- Be actively involved in the charity's decision making process;
- Act in the best interests of the charity making sure the charity operates effectively and within the law;

 **Duties with Respect to Fundraising**

- Fundraising costs must be reasonable in relation to the amount raised;
- Directors and Trustees are responsible to account for all the donated funds, including the gross amounts raised by commercial fundraisers;
- Any funds raised for a special purpose must be used for that purpose

 **Board Member Liabilities**


- Repayment of misused charitable funds;
- Liability to personally pay legal costs;
- Repayment of profits;
- Fine under the *Charities Accounting Act*;
- Removal from the Board and prohibition from being on other Boards;
- Criminal prosecution;

 **Avoiding Governance Problems**


Encourage directors/trustees to be open and transparent, whenever possible

- Members should be informed and involved
- Many complaints come from members who are unable to get information about decisions or finances from the board of directors
- Problems may arise if one director is permitted to control or dominate the charity


Have a clear vision of what you are doing

 **Comply with requirements of the *Corporations Act*, your letters patent or constitution, and by-laws**

- Members of a charity have rights under the *Corporations Act* and Directors are responsible to them for the decisions made;
- Consider establishing a by-law that provides for the removal of directors who are not complying with their obligations
- Members and donors may complain to the OPGT


 **OPGT Complaints**

- Authority: *Charities Accounting Act*
- Underlying Objectives
 - Compliance with charities law
 - Preservation of charitable property
- Emphasis
 - Education
 - Corrective rather than Punitive


 **Areas of Investigation**

The Public Guardian and Trustee can inquire into allegations that:


- charitable property is not being used for the purposes for which it is intended;
- those responsible for the administration of charitable property are in breach of their fiduciary duties;
- The charity and/or its directors are not complying with legislative requirements

 **Responding to a PGT Inquiry**

1. Provide information when requested: Section 2 of the *Charities Accounting Act* requires the charity to provide requested information to the PGT
2. Charities are entitled to obtain professional advice, such as from a lawyer or accountant, before forwarding information
 - It is important to keep the PGT advised of the charity's actions;
 - An extension of the time maybe granted for valid reasons

 **Responding to a PGT Inquiry**

- 3. If seeking the assistance of professionals, the charity should continue to gather all relevant information to avoid unnecessary delays in responding
- 4. Silence, vague, defensive answers and inconsistent information will cause closer review and scrutiny:
 - An organized, comprehensive response that provides context when needed, will help our office to better understand the charity's rationale
 - The more factors that cause concern, the greater the chance there will be a requirement for a court audit

 **Responding to a PGT Inquiry**

- 5. T3010's are reviewed to obtain information but also to see if they are current and match the information received from the charity
- 6. If mistakes have been made by the charity, it is helpful to indicate what remedial action has been taken or is planned

 **Contact Information**

- Office of the Public Guardian and Trustee
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Toronto, ON M5G 2M6
- Tel: (416) 326-1963 or in Ontario
toll free at 1-800-366-0335

Internet:
www.attorneygeneral.jus.gov.on.ca/english/family/pgt

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