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WHY DO DIRECTORS GET INTO TROUBLE? THE PERSPECTIVE FROM THE PGT


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**Office of the
Public Guardian and Trustee
Charitable Property Program**


**Why Do Directors Get Into
Trouble?**
The Perspective 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.


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 **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.


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 **Charities**


- Most charities are filled with good people striving to do good work;
- They work hard to relieve poverty, education, live their religion, and many other activities beneficial to the community;




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 **Charities**

Unfortunately, even the best intentions don't shield charities from trouble



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 **What Trouble Looks Like**

- Breaches fall into three main categories:
 - internal governance;
 - use of charitable property;
 - conflict of interest.

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Internal Governance

- Dissension within the Board
- Disenfranchised Membership
- Employee relationships



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Charitable Purposes & Work

- Misapplication of Funds
- Miscommunication with Donors
- Fundraising Irregularities
- Failure to protect the charity's interests



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Conflict of Interest

- Remuneration of Directors
- Personal Benefit to Directors



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How to Avoid Trouble



"I'm the weird accident that only happens when someone's not paying attention. I'll just wait over here."

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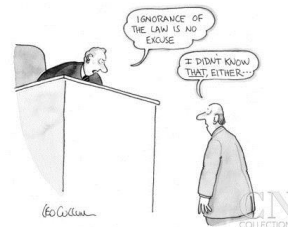
How to Avoid Trouble

1. KNOWLEDGE
 - Know the Law
 - Know the Charity's Purposes
 - Know the By-Laws
 - Know your fiduciary duties
 - A list of Fiduciary Duties is Appendix A to this PPT.



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Don't Forget:




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How to Avoid Trouble

2. Process – how the Charity works

- Communication
 - Know when to talk
 - Know when to listen
- TRANSPARENCY
 - With Membership
 - With Board
- Documentation
 - Decisions
 - Rationale




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How to Avoid Trouble

3. Underlying Principles


- Your Fiduciary Duties
- Always Act in the Best Interest of the Charity
- Don't confuse being Charitable and meeting your duties



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How to Avoid Trouble

4. Warning Signs




- Is one person running the show?
- Are Board members being ignored or shut down?
- Is the Board showing loyalty or preference to a person or idea rather than the Charity as a whole?
- "How would I feel if this situation were shared on Facebook, trending on twitter, or in the newspaper?"
- Has fundraising, or some other incidental, become the end rather than the means?
- Does it sound too good to be true?

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When Issues Aren't Resolved

Individuals and groups can take one or more steps if their concerns are not address:



- Complaints to the Board
- Complaints to the Membership
- Complaints to the Media
- Complaints to the PGT
- Applications to Court



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When Issues Aren't Resolved

- Cost Consequences
- Reputation
- Volunteers
- Donations

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What the Court Has Said



I can think of no problem less suited for a courtroom and the adversary system than an internal disagreement amongst members of a religious denomination.

Palmer v. Marmon
1978 CarswellOnt 717, [1978] 2 A.C.W.S. 246,
32 O.R. (2d) 417

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What the Court Has Said

The [Charity] is a place of compassion and tenderness, of community spirit, of dedication and charity. It is arguably the last place one would expect to find a derisive and costly power struggle for stewardship of a group of volunteers and charitable programs. Yet we are faced with exactly that: an epic struggle for control of the Board of Directors. This struggle has been very costly to the [Charity]. It has been depressingly expensive financially and, perhaps more profoundly, has tarnished the reputation of the [Charity] in the community.

Alaimo v. Di Maio
2008 CarswellOnt 3729, [2008] O.J. No. 3570, 171 A.C.W.S. (3d) 784

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What the Court Has Said

The vigour with which the litigation is being conducted has not been curbed by the fact that the objects and work of the corporate parties are religious in nature. There appear to be no significant doctrinal differences between the parties and, although the contest has many of the dominant characteristics of a turf war, the evidence leaves me in no doubt that personality clashes have exacerbated, if they have not created, the essential problem.

Asian Outreach Canada v. Hutchinson
1999 CarswellOnt 1794, [1999] O.J. No. 2060, 28 E.T.R. (2d) 275, 88 A.C.W.S. (3d) 1076

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What the Court Has Said

It is not the policy of the *Corporations Act* that courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. If members, such as those of the [Charity], are incapable of governing the corporation, they should take a hard look in their collective mirrors and do one of three things: (i) reform their ways, which the current members seem incapable of doing; (ii) step aside and let new members who are unencumbered with the baggage of past factionalism take over the running of the corporation; or, (iii) wind-up the corporation, with the different factions parting company and setting up their own temples.

There was no winner in this litigation. However, there was a loser – the Centre, because it's directors were not prepared to put the corporation's best interests before their own factional purposes.

Singh v. Sandhu
2013 ONSC 3230, 2013 CarswellOnt 7398, 16 B.L.R. (5th) 194, 229 A.C.W.S. (3d) 22

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OPGT 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;
- charitable property is being held in breach of legislation.


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Steps of Investigation

- Request information from the charity.
- Review information received.
- Request clarification from the charity or require charity to take certain actions.
- If information not received or organization does not take required action. OPGT may require a Court Audit
- Court Audit – (Passing of Accounts). In a court audit, a charity is required to file its accounts in estate form with the court and the OPGT. The accounts are then reviewed to determine if funds have been misapplied. The OPGT can require a charity to pass its accounts under s. 3 of the Charities Accounting Act

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Responding to the PGT

- It is important to keep the OPGT advised of the charity's actions. An extension of the time may be granted for valid reasons.
- An organized, comprehensive response that provides context when needed, will help our office to better understand the charity's rationale.
- Silence, vague, defensive answers and inconsistent information will cause closer review and scrutiny.
- The philosophy of the OPGT in reviewing complaints about charitable organizations is to work with charities to correct errors and to avoid problems in the future.

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Responding to the PGT

- Section 2 of the *Charities Accounting Act* requires the charity to provide requested information to the OPGT;
- Charities are entitled to obtain professional advice, such as from a lawyer or accountant, before forwarding the information;
- Even if while seeking the assistance of professionals, the charity should continue to gather all relevant information to avoid unnecessary delays in responding;

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Contact Information




- Office of the Public Guardian and Trustee**
Charitable Property Program
595 Bay Street, Suite 800
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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Appendix A Fiduciary Duties



- Duties on Appointment**
 - Know the purpose of the charity
 - Review past administration to correct any problems
- Duty to be Reasonable, Prudent and Judicious**
 - Handle property with skill, care and diligence of a prudent person

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Fiduciary Duties



- Duty to Carry Out the Charitable Purpose**
 - Property must be used for the charitable purposes and not for any other purpose, even if that purpose is charitable;
 - Charitable purposes (or objects) are found in the Letters Patent or Trust Document;
 - Restricted Purpose funds must be used for that purpose only.

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Fiduciary Duties



- Duty to Avoid Conflict-of-Interest Situations**
 - Occur when a director has a personal interest in the result of a decision made by the charity. The interests of the charity must be paramount;
 - Directors and trustees must avoid both an actual conflict and the appearance of conflict;
 - To avoid even an appearance of conflict, trustees and directors should not transact business or accept any personal benefit from the charity.

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Fiduciary Duties

- Duty to Act Gratuitously**
 - A director or trustee cannot be paid to act as a director or trustee;
 - Nor can they be paid for working in any other capacity for the charity without Court approval;
 - Reimbursement of reasonable expenses is acceptable.

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Fiduciary Duties



■ Duty to Account

- Ensure that proper accounts are maintained and that supporting documentation is saved;
- Accounting includes gross receipts from 3rd party fundraisers;
- Ensure that the charity is compliant with financial reporting requirements of their legislation (Ontario Corporations Act or the Canada Not-for-Profit Act; and, when enacted, the Ontario Not-for-Profit Act)

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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/>

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