

## ONTARIO PGT ALLOWS ACCESS TO RESTRICTED CHARITABLE PURPOSE FUNDS

*By Ryan M. Prendergast\**

### A. INTRODUCTION

Many charities in Ontario are experiencing economic hardships as a result of the COVID-19 pandemic. In light of the difficulties faced by charities, the Office of the Public Guardian and Trustee for Ontario (“PGT”) released a temporary guidance, entitled *Accessing Restricted Purpose Trust Funds Prior to Obtaining a Court Order During the COVID19 Pandemic* (the “Temporary Guidance”),<sup>1</sup> on March 30, 2020, to provide certain relief to charities in danger of closing. Under the Temporary Guidance, the PGT will permit such charities to access the income and capital of their restricted purpose trust funds and to use these funds where necessary to continue their day-to-day operations without the need to first obtain a court order. Subsequently, the PGT provided additional clarity to its Temporary Guidance by releasing a question and answer document entitled *Q&A’s re: PGT Temporary Guidance on Accessing Restricted Purpose Funds* (the “Q&As”)<sup>2</sup> on April 20, 2020. This *Bulletin* provides a brief summary of the PGT’s Temporary Guidance and Q&As. These measures are only applicable to charities in Ontario.

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<sup>1</sup> Office of the Public Guardian and Trustee, *Accessing Restricted Purpose Trust Funds Prior to Obtaining a Court Order During the COVID19 Pandemic*, (30 March 2020) online: <<http://www.carters.ca/pub/bulletin/charity/2020/covid/PGT-Statement-re-Accessing-Restricted-Funds.pdf>> [“Temporary Guidance”].

<sup>2</sup> Office of the Public Guardian and Trustee, *Q&A’s re: PGT Temporary Guidance on Accessing Restricted Purpose Funds*, (20 April 2020) online: <<http://www.carters.ca/pub/bulletin/charity/2020/covid/Q&A-for-PGT-Guidance-on-Accessing-Restricted-Purpose-Funds.pdf>>.

## **B. WHAT ARE RESTRICTED PURPOSE TRUST FUNDS**

Restricted purpose trust funds are often also referred to as “donor-restricted trust funds”, “charitable purpose trusts”, “restricted charitable purpose trusts”, “restricted funds”, “special purpose funds”, as well as “endowment funds.” Generally speaking, restricted purpose trust funds are established when a donor expresses the intention for property that is donated to a charity to be held by the recipient charity for a specific charitable purpose. In this regard, the Temporary Guidance indicates that restricted purpose trust funds include “the income and capital of perpetual endowment funds, and the income and capital of trust funds held for a restricted charitable purpose.”

## **C. OVERVIEW OF TEMPORARY GUIDANCE**

As mentioned above, the Temporary Guidance provides relief for charities that are in danger of closing by allowing them to access and use the income and capital of restricted purpose trust funds to continue their day-to-day operations without first obtaining a court order permitting them to do so. This is significant, insofar as it permits charities to access funds that they would otherwise be precluded from accessing. However, the Temporary Guidance places a number of conditions on charities that wish to access restricted purpose trust funds.

In this regard, charities must first be “in danger of closing” unless they can access the funds, and accessing such funds must be a last resort. The Temporary Guidance indicates that this includes being in danger of “becoming insolvent or filing for bankruptcy or receivership.” The Q&As further indicate that charities need not “be on the verge of turning off the lights and locking its doors”, but rather that they can foresee an inability to pay their bills due to a significant drop in income. In this regard, the Q&As state that charities should first examine their financial situation, which includes access to reserve and non-restricted funds, as well as government funding. Where charities still foresee closing in 30 to 60 days without other funding, they would be considered to be in danger of closing. However, the Q&As explicitly state that the PGT “[does] not expect staff lay-offs or selling assets prior to accessing the funds, however, temporarily halting programs and any other cost cutting measures (short of laying off staff) that are not pandemic response related is expected.”

To access funds, charities are first required to notify the PGT in writing. Charities should provide their name and address; the name of the perpetual endowment fund or other restricted purpose trust fund; and the name, address and telephone number of a contact person for the organization. Notification should be

provided via email to [cynthia.spencer@ontario.ca](mailto:cynthia.spencer@ontario.ca). While the PGT's approval or consent is not required prior to a charity accessing its restricted purpose trust funds, if the PGT subsequently disagrees with a charity's decision to do so, the Q&As state that the PGT "will look at the reasonableness of the decision and the good faith of the directors at the time and decide what measures to take at that point." The PGT's response may vary, and the Q&A says that it could include "requiring the charity to replace the funds, finding the directors in breach, [and/or] requesting removal of directors (in cases of bad faith)". The PGT has indicated that its counsel is available to discuss matters with directors or the charity's counsel if the charity is unsure.

Further, all board members of the charity must approve the decision to access and use the restricted purpose trust funds. The decision should be documented contemporaneously for purposes of a subsequent application under the *Charities Accounting Act*. In this regard, it is particularly important to note that the Temporary Guidance requires all charities that are permitted to access their restricted purpose trust funds to subsequently apply for an order approving the encroachment under section 13 of the *Charities Accounting Act* within a "reasonable time" after the COVID-19 pandemic has subsided. As such, while a court order or section 13 application is not required prior to accessing the funds on a temporary basis during the pandemic, a section 13 application will be required in a reasonable period of time after the pandemic "has subsided" for charities that access such funds.

The Temporary Guidance indicates that the amounts charities can access should be reasonable given the charity's circumstances. Once restricted charitable purpose trust funds are accessed, those funds may only be used to cover operating expenses, such as salaries, building expenses, and utilities, as well as the charity's other contractual obligations, and only to the extent as is necessary for the charity to remain solvent. Additionally, charities whose purposes allow them to provide services in response to the COVID-19 pandemic may use the funds for those services as well. However, such charities must still meet the requirement of being in danger of closing before they can access those funds. Further, funds may not be used to assist programs that are not pandemic-responsive programs. Additionally, the funds cannot be transferred to other organizations, except where doing so is in compliance with previously existing contractual obligations as noted in the Temporary Guidance.

Charities are also required to keep an accounting of the use of their accessed funds. While accessing funds can be structured as a loan if the charity wishes to repay the funds in the future, the Q&As indicate that

there is no requirement for charities to repay or replenish the restricted charitable purpose funds. The Temporary Guidance also indicates that where a charity finds that it is necessary to sell stocks, bonds or other securities, that sale will be considered reasonable if the sale was to an arm's-length third party on the open market, even if such sale results in a loss of capital.

Finally, the Q&As indicate that in order for charities administering restricted charitable purpose funds for the benefit of another charity to use the Temporary Guidance, the trustee charity would be required to contact the PGT. Further, the onus would be on the trustee charity to review the beneficiary charity's circumstances and to satisfy itself that the above-noted criteria have been met. In such circumstances, all directors of both the trustee and beneficiary charity would be required to provide consent.

## D. CONCLUSION

The Temporary Guidance provides very helpful relief to charities in Ontario with restricted charitable trust funds that are struggling to survive in the wake of the COVID-19 pandemic. Charities that are in danger of closing may wish to review the Temporary Guidance to determine whether they are eligible for relief. However, charities that want to take advantage of the relief under the Temporary Guidance should bear in mind that although a court order or application under section 13 of the *Charities Accounting Act* is not necessary prior to accessing the funds, this requirement must be fulfilled within a reasonable period of time after the COVID-19 pandemic has subsided and the charity will be expected to show compliance with the requirements of the Temporary Guidance in accessing restricted funds. As such, the charity should consider consulting with their legal counsel before deciding to seek the relief afforded by the Temporary Guidance and accompanying Q&As.