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Directors of Ontario-Based Charities – Can They Be Compensated?

Historically, incorporated charities that operate in Ontario have not been permitted to compensate their directors directly or indirectly except in very limited circumstances. Those circumstances have recently been expanded by virtue of amendments to Regulation 4/01 to the *Charities Accounting Act (Regulation)* effective as of April 1, 2018 (**Amendments**).

The Office of the Public Guardian and Trustee of Ontario (PGT), which regulates charities that operate in Ontario, released a publication with respect to the Regulation in late May 2018 (**Guidance**). The Regulation requires that the Guidance be considered before authorizing a permitted payment to a director or a person connected to a director.

Despite the Amendments and the Guidance, the situations under which charitable directors may receive compensation are still significantly restricted.

General Rule: Directors Cannot Be Compensated

In Ontario, the general legal rule is that a corporate charity that operates in the province is prohibited from compensating its directors *directly* or *indirectly* for acting as a director

or for providing other services to the charity. This rule applies whether or not a charity is incorporated in Ontario or in another jurisdiction, and where a director provides other services at market (or even discounted) rates. Corporate charities that operate in Ontario are also prohibited from compensating those who are not at arm's length with one of their directors (such as a spouse or child of a director, or a business that the director owns) as this compensation could benefit the director indirectly.

Practically speaking, this restriction means that Ontario-based corporate charities are limited in terms of the contracts and transactions that they can enter into. For example, a corporate charity cannot:

- Employ one of its directors;
- Obtain legal or accounting services from the firm of one of its directors if the firm will be compensated for these services; or
- Enter into a contract with a company owned by the spouse of one of its directors if the company will receive any payment under the contract.

Court Orders

In order for an Ontario-based charity to compensate one of its directors or a person related to one of its directors for goods or services provided to the charity, the charity had to apply for a court order under section 13 of the *Charities Accounting Act* (**Section 13 Order**). A Section 13 Order cannot, however, be obtained to compensate a director for being a director of the charity. The consent of the PGT is required to obtain a Section 13 Order, which will only be given where the PGT determines that the payment would be in the best interests of the charity.

Section 13 Orders are generally limited in scope and typically only authorize payments for a particular contract or transaction. It is also not clear in what circumstances the PGT will authorize the compensation of a director of a charity, resulting in uncertainty for a charity when seeking to provide compensation to one of its directors for services provided to the charity. The requirement to get a Section 13 Order is also quite administratively burdensome and costly so instead, directors of charities often step down from their positions so that the charities can retain them in other capacities, resulting in the charities losing talented directors.

Permitted Payments

The Amendments allow a charity to make payments to its directors and those connected to them for “*goods, services or facilities*” provided to the charity if the conditions under the Regulation are met.

The Regulation contains extensive requirements which are generally aimed at ensuring that any payments made are in a charity’s best interests, payments are reasonable in proportion to the goods, services or facilities provided, conflicts of interest situations are avoided, and charities are transparent with their members and the public in regards to the payments.

The Guidance

The Guidance, which is set out in a question and answer format, generally explains how directors of a charity can ensure and demonstrate that payments to directors or those connected to them are made in accordance with the Regulation. For example, the Guidance:

- explains how to decide whether a payment is in the best interests of the charity;
- sets out factors to consider when determining whether a payment is “reasonable”;
- provides information about how charities must provide disclosure to their members regarding payments authorized by the Regulation; and
- sets out the documents and information that charities should keep to demonstrate that payments were authorized in accordance with the Regulations.

Payments Not Authorized by the Regulation

Notwithstanding the Amendments, certain types of payments to directors of charities are still not permitted, including payments:

- to a director for serving as a director or employee;
- for fundraising services or selling goods or services in order to fundraise; and
- made in connection with the purchase or sale of real estate.

A Section 13 Order still must be obtained in order for a charity to make any payments not permitted by the Amendments (other than payments to a director for serving as a director of a Ontario-based corporate charity which is still prohibited in all circumstances).

Conclusion

In addition to ensuring compliance with the Regulation and the Guidance, charities considering making payments to their directors or those connected to them must ensure that any such payments are authorized by the governing documents of the charity.

We would be happy to answer any questions that you may have regarding the compensation of directors of charities.