

Remuneration of Directors of Charities in Ontario: What is Allowed & What's Not

**By Esther S.J. Oh, B.A., LL.B &
Urshita Grover, H.B.Sc., J.D.**

estheroh@carters.ca

ugrover@carters.ca

1-877-942-0001



Carters Annual Charity & Not-for-Profit Law Webinar

November 14, 2024

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Orangeville • Ottawa • Toronto
www.carters.ca Toll Free: 1-877-942-0001

Overview of Presentation

- A** Setting the Context
- B** Overview of Key Requirements in the Regulation
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A. Setting the Context

- Prior to the amendment of Regulation 4/01 under the *Charities Accounting Act* (“CAA”) (Ontario) (the “Regulation”) in April 2018, directors of registered charities could not receive direct or indirect remuneration from the charity, unless authorized by a court order or a consent order under section 13 of the CAA approved by the Public Guardian and Trustee (“PGT”)
 - According to case law principles (i.e. common law), directors of registered charities cannot receive direct or indirect remuneration from the charity they are serving, unless authorized by court order
 - This prohibition, however, does not prevent directors of charities from being reimbursed their reasonable out-of-pocket expenses
- Shortly after the Regulation was amended, the PGT released a guidance document to the Regulation in May 2018, *Payments to Directors & Connected Persons* (the “Guidance”)
- Common law continues to apply, but there are more options available under the Regulation and the Guidance to authorize payments to a director (or a person connected to a director) without obtaining a court order or section 13 consent order
 - All applicable requirements in the Regulation and Guidance must first be met



- While most charities are aware of the Regulation and Guidance, there is not always a clear understanding of the steps to be taken in order to comply with legal requirements
- This presentation provides a brief overview of some of the key requirements outlined in the Regulation, including:
 - What payments are allowed
 - What payments are not allowed
 - Considerations to be reviewed by a charity’s board before approving a payment in accordance with the Regulation
 - Overview of other requirements in the Regulation and Guidance
- The second part of this presentation will review fictitious fact scenarios (inspired by real-life examples) in order to help guide charities and their boards
 - In reviewing the case studies, reference will be made to requirements in the Regulation and the Guidance, as appropriate
- Additional resource materials (including links to the Regulation and the Guidance) are provided on the last slide for further information

B. Overview of Key Requirements in the Regulation

1. Application to incorporated charities

- The Regulation states a “corporate trustee” may “...make payments from the charitable property acquired by it to any of the following persons, for goods, services or facilities provided to it” in accordance with the Regulation:
 1. A director of the corporate trustee
 2. A person connected to a director of the corporate trustee
- This means the Regulation cannot be used to pay trustees of charitable trusts or non-incorporated charitable organizations
 - The Guidance uses the terminology of “charitable corporations” (instead of “corporate trustee”)
 - For purposes of this presentation, we use the term “charity” to describe an incorporated charity
- While the members of the governing board for a charity may be called different terminology (e.g. elders, council members, stewards, governors or another term), this presentation uses “directors” to describe the governing board



2. Who is a “person connected to a director” under the Regulation?



1. A spouse, child, parent, grandparent or sibling of the director (“Family Member”);
 - The Guidance uses broader wording which suggests other family members (other than the ones listed) might be included in this definition, as follows: “Family members, including: spouse, child, parent, grandparent or sibling of the director”
 2. Employer of the director or of a Family Member of the director;
 3. A corporation with share capital, if, singly or jointly, the director or a Family Member of a director beneficially owns, controls or has direction over more than 5% of the corporation’s shares;
 4. A corporation without share capital, if singly or jointly, the director or a Family Member of a director beneficially owns, controls or has direction over more than 20% of the outstanding voting membership interests of the corporation;
 5. A corporation with or without share capital for which the director or a Family Member acts as director or officer;
 6. A partnership in which the director or Family Member is a partner, or in which a corporation that is connected to the director is a partner;
 7. A partner in a partnership in which the director or Family Member is a partner, or in which a corporation that is connected to the director is a partner
- This presentation and the Guidance uses “Connected Person” to describe the above
 - The Regulation uses “person connected to a director”

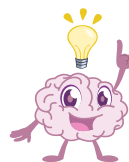
3. What payments are “not” permitted under the Regulation?

- The Regulation does “not” authorize any of the following:
 - “Remuneration or other direct or indirect payment for services provided by a director as a director or employee” of the charity
 - “Direct or indirect payment for providing fundraising services or for selling goods or services for fundraising purposes”
 - “Direct or indirect payment made in connection to the purchase or sale of real property”
- This means directors of a charity cannot be paid for the following:
 - Payment to serve as a director
 - Payment to serve as an employee of the charity (while a director)
 - Payment for fundraising services and goods/services relating to fundraising
 - Payments involving the purchase or sale of real property



4. Considerations to be reviewed by the charity’s board before approving a payment

- Payments made under the Regulation:
 - “Must be made with a view to the [charity’s] best interests”;
 - “Must be in an amount that is reasonable for the [charity] to pay for the goods, services or facilities that are provided”;
 - “Must not result in the amount of the [charity’s] debts and liabilities exceeding the charitable property’s value, or render the [charity] insolvent”; and
 - Must not exceed the maximum amount set out in an agreement to be paid for the goods, services or facilities to be provided (see next slide)
- In practice, most charities review the first and second bullet points above, but normally omit to consider the last bullet point
 - The third bullet point is often not relevant
- The board’s consideration of all applicable requirements should be documented in board minutes as evidence of the board’s due diligence



5. Steps to be taken before authorizing a payment

- If a charity’s board of directors decides it would like to authorize payment for goods, services or facilities under the Regulation, the following steps must first be taken:
 - Every director of the charity must agree in writing to a maximum amount that the charity can pay for the goods, services or facilities
 - If the goods, services or facilities are to be provided by a Connected Person that person must also agree in writing to the maximum amount;
 - Payment cannot exceed the maximum amount in the agreement, unless the agreement has been amended
 - Every director of the charity (excluding the director to receive the payment and the director connected to the Connected Person) must agree in writing that he or she is “satisfied that the payment is being made in accordance with the requirements, and within the restrictions, of the Regulation”; and
 - The board must have considered any additional requirements set out in the Guidance
- The above steps are commonly omitted by charities



6. Other requirements that apply under the Regulation

- There must be at least 4 directors on the board (excluding the director to receive the payment / the director connected to the Connected Person, as applicable)
- The total number of persons receiving payment under the Regulation must not exceed 20% of the number of directors on the board (excluding the director to receive the payment / the director connected to the Connected Person, as applicable)
- The director (who is to receive the payment from the charity and the director connected to the Connected Person, as applicable) must not attend or participate in the board discussion regarding the proposed payment and must not vote on the matter
 - This should clearly be documented in the board minutes of the charity



- The board must ensure that information regarding the payments to a director and/or a Connected Person in a given year is:
 - Noted in the charity's financial statements for that year, and
 - Placed before its members at an annual meeting of the members
- If a charity proceeds with the proposed payment to a director or a Connected Person, it is important to maintain proper documentation showing the board's due diligence steps to comply with the Regulation and Guidance
- Directors who fail to comply with the requirements in the Regulation and the Guidance could be found in breach of their fiduciary duties and could even be found liable to repay the funds on a joint and several basis
- Reference should be made to section 12 of the Guidance for examples of the types of documentation to be kept by a charity

C. Additional Considerations

- There may be other requirements / restrictions on payments to a director of a charity, including from the following:
 - General corporate legislation (such as the *Canada Not-for-Profit Corporations Act* or the *Ontario Not-for-Profit Corporations Act*)
 - The charity's governing documents, or
 - Canada Revenue Agency, Charities Directorate
- Comments are not provided concerning the above, as these are beyond the scope of this presentation
- Charities may obtain professional advice for specific questions that may arise

D. Case Studies

Case Study #1

A director of a registered charity has a long history with the charity, and dedicates significant amounts of time serving the charity. The director also has specialized skills and knowledge which the charity uniquely needs. The board feels it would be in the best interests of the charity to hire this individual as a paid employee, but at the same time the board does not want to lose this person as a valued board member. If the board approves the decision by majority resolution, can this director become a paid employee of the charity?

Commentary

- The Regulation states as follows:
 - “2.1(4) This section does not authorize any of the following:
 1. Remuneration or other direct or indirect payment for services provided by a director as a director or employee of the corporate trustee, as the case may be, in that capacity...
- Approval by a court order or section 13 consent order will be required to authorize this proposed arrangement
- Alternatively, the director may resign from the board

Case Study #2

A director's sibling owns a small restaurant that is incorporated and wholly owned by the director's sibling. The director's sibling wants to provide meals on a weekly basis to support the charity's programs to assist individuals experiencing food insecurity. The director's sibling only wants to be reimbursed for the cost of the food (which is far below fair market value for the actual meals being provided). The board feels this would be in the best interest of the charity. Is this permitted under the Regulation and the Guidance?

Commentary

- Under subsection 2.1(3) of the Regulation, “persons connected to a director” includes the following:
 - A corporation with share capital, if owned, controlled or there is direction over more than 5% of the corporation's shares by a Family Member of a director
 - This situation involves a proposed payment to a Connected Person
 - The board must review the applicable requirements in the Regulation and the Guidance to determine whether or not this is permitted
- There are a number of different considerations from the Regulation and the Guidance to be reviewed, which are listed on the following slides:

- a) Determination of best interest of the charity (section 8 of the Guidance)
 - The board must first carry out a detailed analysis of the background facts to determine whether or not the proposed payment is in the best interest of the charity, including:
 - The good, service or facility would be beneficial to the charity
 - There is a contemplated advantage to the charity in using the services of the director or Connected Person over hiring someone else to provide the services
 - In this case study, the restaurant (owned by the director's sibling) has offered to provide services at less than fair market value. This is a financial advantage
 - Other requirements would need to be reviewed, including whether the charity can afford the cost of the goods, services or facilities without any adverse impact on its activities
- b) Agreement documenting maximum payment amount and other requirements in Guidance (see sections 7, 9 and 10 of the Guidance)
 - If the charity's board determines that the proposed arrangement is in the charity's best interests, the board will need to determine a payment amount that is "reasonable" by reviewing several considerations, including the following:
 - The market price for similar goods, services or facilities in similar circumstances;
 - The value to the charity of the goods, services or facilities

- Then, every director of the charity and the Connected Person must agree in writing to the maximum payment amount
- Every director who voted on the matter must agree in writing that he or she is satisfied that "...the payment is being made in accordance with the requirements, and within the restrictions, of the Regulation"
- The board must review and consider whether any other requirements apply under the Guidance
- c) Requirement for amendments to the agreement, if applicable
 - Once the maximum amount set out in that initial agreement has been fully paid, an amendment to the agreement will need to be entered for any other payments
- d) Requirement involving number of directors voting on a proposed payment
 - The charity must have 4 or more directors eligible to vote on the payment to the person connected to the director
 - The minutes of the board meeting(s) should record the fact that the conflicted director left the room and was not present for the discussion and vote on the matter

Case Study #3

A director has some land that he/she wants to donate to the charity. The location of the land is ideal to support the charity's expansion of charitable programs. The director does not want to receive any payment of the land, but only wants enough money to pay for costs to remove the director's heavy equipment from the property to the director's home. The board believes this is in the best interest of the charity. Can the charity pay the director a small payment to cover the director's requested costs?

Commentary

- The Regulation states that it does not authorize any of the following (see subsection 2.1(4)):
 - “3. Direct or indirect payment made in connection to the purchase or sale of real property.”
- Approval by a court order or section 13 consent order will be required to authorize this proposed payment
- Given the small payment amount being requested by the director, this is not likely a practical or cost-effective solution



Case Study #4

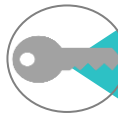
The CEO (a paid employee of a charity) has a daughter who has the educational and professional experience which the charity uniquely needs for the next phase of its charitable programs. The board believes this is in the best interest of the charity to hire her. Can the CEO's daughter become a paid employee of the charity?

Commentary

- The Regulation and the Guidance apply to the proposed payments to directors of charities (and Connected Persons)
 - The CEO is not a director of the charity and therefore no common law prohibitions apply
 - Since the CEO normally attends and participates at board meetings, the CEO should leave the room and refrain from participating in board discussions concerning the proposed employment of the CEO's daughter.
 - This should be recorded in the minutes of the board meeting



E. Key Takeaways



The Regulation provides more options to authorize payments to a director or Connected Person without obtaining a court order or s. 13 consent order



To review whether its possible to make a payment under the Regulation, a charity should first review whether the recipient of a proposed payment is a director or Connected Person



Next, a charity should consider whether the nature of the proposed payment is one permitted under the Regulation / Guidance



If the proposed payment is permitted under the Regulation / Guidance, a charity must carefully ensure whether all the requirements in the Regulation / Guidance been met and documented



When in doubt, charities should seek legal advice

F. Resource Materials

- For additional information, reference can be made to the following:
 - Ontario Regulation 4/01 under the *Charities Accounting Act* (Ontario)
<https://www.ontario.ca/laws/regulation/010004>
 - Office of the Public Guardian and Trustee, *Payments to Directors & Connected Persons* (last updated August 1, 2021)
https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization_of_payments.html
 - Ryan M. Prendergast, “Remuneration of Directors of Charities: What’s New?” (May 30, 2018) <https://www.carters.ca/pub/webinar/2018/Remuneration-of-Directors-of-Charities-2018-05-30.pdf>
 - Ryan M. Prendergast, “OPGT Releases Guidance on Payments to Directors” *Charity & NFP Law Bulletin No. 421* (May 31, 2018)
<https://www.carters.ca/pub/bulletin/charity/2018/chylb421.pdf>



[Esther S.J. Oh](#), B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management. Ms. Oh has written articles for *The Lawyer's Daily*, www.carters.ca and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual Charity & Not-for-Profit Law Seminars and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.

Contact information: estheroh@carters.ca
1-877-942-0001



[Urshita Grover](#), H.B.Sc., J.D. – Urshita was called to the Ontario Bar in June 2020 after completing her articles with Carters. Urshita worked as a research intern for a diversity and inclusion firm. Urshita has volunteered with Pro Bono Students Canada, and was an Executive Member of the U of T Law First Generation Network. Urshita was able to gain considerable experience in both corporate commercial law as well as civil litigation. Building on this background, Urshita is able to integrate her wide range of experience into a diverse and practical approach to the practice of charity and not-for-profit law for her clients.

Contact information: ugrover@carters.ca
1-877-942-0001

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