**Changes in Ontario to Director Remuneration – New Rules for Charities**

On April 1, 2018, Ontario *Regulation 112/18* came into effect amending O. Reg. 4/01 (Approved Acts of Executors and Trustees, hereinafter “Regulation”) *[[1]](#endnote-1)* under the *Charities Accounting Act* (the “CAA”). The new provisions modify the existing Ontario common law rule that prohibited a charity from making payments to a director (or any person related to him/her) for any reason (other than reimbursement of expenses) without first obtaining a court order.

Prior to this land trusts had been faced with a strict prohibition on payments to directors even for services unrelated to their duties as a director. While some might have contemplated seeking an order pursuant to section 13 of the C*harities Accounting Act* for relief from the prohibition, most considered the process too laborious and/or expensive to warrant seeking relief. Now, subsection 2.1(2) of the Regulation authorizes the Board to make payments to directors, and “persons connected to directors[[2]](#endnote-2), provided that certain requirements are met and subject to certain limitations.

In order to authorize and make such a payment without first obtaining a court order, the Board must satisfy itself that the following conditions (subsection 2.1(4)) have been met:

* the transaction must be made with a diligent view to the land trust’s best interests;
* the amount of the payment must be reasonable for the goods, services or facilities provided and cannot exceed the amount expressly authorized by the Board; and
* the payment must not cause the land trust’s liabilities to exceed the value of its charitable property, or cause the land trust to become insolvent.

And further,

* the land trust must have at least four independent voting directors (not including the one receiving payment) (subsection 2.1(7) and the total number of directors receiving payment must not exceed 20% of the voting directors (subsection 2.1(9));
* the director (or person connected to the director) receiving the payment cannot participate in or attend deliberations regarding the proposed transaction, nor vote on it (subsection 2.1(8);
* the directors (including the director receiving the payment) must unanimously agree in writing on the maximum amount of the payment (paragraph 2.1(6)(a));
* the directors (excluding the director receiving the payment) must unanimously agree in writing that the regulation’s conditions have been satisfied (paragraph 2.1(6)(b);
* the Board must consider any guidance issued by the Public Guardian and Trustee (paragraph 2.1(6)(c); and
* the information regarding payments to directors or persons connected to directors must be noted in land trust’s records and financial statements for the annual meeting (subsection 2.1(10).

The Regulation continues to prohibit payments for services provided as a director (no *honoraria*, the duty to act gratuitously remains) or an employee of the charity, payments for fundraising services and payments in connection with the purchase or sale of real estate (subsection 2.1(4)).

The office of the Ontario Public Guardian and Trustee (OPGT) has published detailed guidance on the Regulation, *Guidance on Payments to Directors & Connected Persons* (this is currently available at: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization_of_payments.html>).

The guidance provides examples of goods, services and facilities that may be provided by a director or connected person: delivery of a lecture, occasional professional services and consultations (except where prohibited by statute or rules of professional conduct), research, contracted maintenance work (not as an employee), and rental of space. The guidance provides helpful explanations of key terms and lists factors that should be taken into consideration when determining whether a payment is in the best interests of the charity and what constitutes a “reasonable” payment.

And finally, the guidance also reminds directors that failure to comply with the requirements in the Regulation could be considered a breach of their fiduciary duties and could possibly lead to liability for re-payment of the unauthorized funds.

Unfortunately for land trusts, no guidance has been provided regarding the prohibition of direct or indirect payments made “in connection to the purchase or sale of real property.” It is recommended that legal guidance and/or consultation with the office of the Public Guardian and Trustee (OPGT) be sought if it seems that this prohibition might apply.

Because land trusts are required by the Regulation to consider the guidance when approving payments to directors or connected persons, land trusts should review and become familiar with the Regulation and the OPGT Guidance if they are contemplating such payments.

1. For the current text of O.Reg.4/01 see <https://www.ontario.ca/laws/regulation/010004>. [↑](#endnote-ref-1)
2. See subsection 2.1(3) for a definition of “person connected to a director”. [↑](#endnote-ref-2)