

Ministry of the Attorney General

# Payments to Directors & Connected Persons

Published with respect to the Charities Accounting Act

ONTARIO REGULATION 4/01 Section 2.1 “Authorization to Pay”

April 1, 2018

This Guidance provides general information and is not intended to be a substitute for legal advice. For legal advice, charities should consult their legal advisor.

This Guidance is dated and subject to amendment. To ensure access to the most recent edition, please visit the PGT webpage at:

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities/>

Ontario 



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# Introduction

Ontario Regulation 4.01 under the *Charities Accounting Act* (the Regulation), allows charitable corporations<sup>[1]</sup> operating in Ontario to compensate directors and persons connected to them, without a court order, provided specific requirements are met.

Before this Regulation, directors were prohibited from receiving any payment or other personal benefit from a charitable corporation without a court order<sup>[2]</sup>. This applied even if the goods or services were provided at less than fair market rates. Under the Regulation, a court order is no longer necessary for certain payments, provided the requirements of the Regulation are met.

If a charitable corporation wishes to make a payment which is not authorized under the Regulation, a court order is required. In cases where all parties consent, a Court order may be obtained through an application to the Office of the Public Guardian and Trustee under s.13 of the *Charities Accounting Act* (see section 17, below).

This guidance and the process for approving certain payments to directors under section 2.1 of the Regulation do not apply to the purchase of indemnity insurance. For the purchase of indemnity insurance, see section 2 of the Regulation here:

<https://www.ontario.ca/laws/regulation/010004Reg.4/01>.

The Regulation does not apply to reimbursement of reasonable expenses of a director. Generally, expenses can be reimbursed if they were incurred to carry out the charitable purposes, the amount is reasonable, and proper receipts are provided.

**Subsection (6)(c) of the Regulation requires charitable corporations to consider this guidance when approving payments to directors or connected persons.**

# What payments can and cannot be made under this regulation?

## The short answer

The Regulation can be used to authorize payments for most goods, services and facilities, provided all the requirements are met. It does not authorize payments for services provided by a director in their capacity as a director or employee, or for fundraising or real property transactions.

## A more detailed answer

Examples of goods, services and facilities that may be provided by a director or connected person include, but are not limited to:

- The delivery of a lecture;
- Occasional professional services and consultations, except where prohibited by statute or rules of professional conduct;
- A piece of research;
- A contract to provide maintenance work;
- Rental of space.

The Regulation does not authorize a charitable corporation to:

- Make payments for services provided by a director in their capacity as a director. Directors of charities have a duty to act gratuitously. This means they are not permitted to be paid for their services as a director; or
- Pay directors or connected persons as employees, or for fundraising services or real property transactions. The charitable corporation would require a Court order to make such payments to a director or connected person.

## What is a conflict of interest and why is it important?

A conflict of interest arises when a director has a personal interest in the result of a decision made by the charitable corporation. Directors of charities have a fiduciary duty to avoid both a conflict of interest and the appearance of a conflict of interest. Directors must always make decisions in the interests of the charitable corporation and not allow their personal interests or preferences to affect their conduct and decisions.

Payment from a charitable corporation to a director or a connected person for goods, services, or facilities represents a personal benefit to the director and places them in a conflict of interest. The Court has allowed payments only in situations where, at the time the decision is made, it is in the best interest of the charitable corporation. The Regulation is intended to provide the necessary approval without having to obtain a Court order.

## What is a 'charitable corporation'?

A charitable corporation for the purposes of this guidance is any non-share capital (not-for-profit) corporation operating in Ontario that is a registered charity or has exclusively charitable purposes. It does not include trustees of charitable trusts or non-incorporated charitable organizations and, therefore, those organizations cannot use the Regulation to pay trustees. The Regulation uses the term 'corporate trustee' to be consistent with other provisions within the *Charities Accounting Act*. Within this guidance, 'charitable corporation' is used in place of 'corporate trustee'.

## What is a 'connected person'?

A 'connected person' is a 'person connected to a director' of the charitable corporation. The Regulation identifies the following individuals and businesses as 'connected persons':

1. Family members, including: spouse, child, parent, grandparent or sibling of the director;
2. The employer of the director or of a family member;
3. A corporation with share capital, if, singly or jointly, the director or a family member beneficially owns, controls or has direction over more than 5 per cent of the corporation's shares;
4. A corporation without share capital, if singly or jointly, the director or a family member beneficially owns, controls or has direction over more than 20 per cent 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 a family member is a partner, or in which a corporation described in paragraph 3, 4 or 5 is a partner;
7. A partner in a partnership described in paragraph 6.



## Who may use this Regulation?

The Regulation may be used by charitable corporations that have four or more directors who are eligible to vote on the payment to the director connected person. This means that charitable corporations must have at least five directors, four of whom are eligible to vote on the matter. See #13, 'Who is eligible to participate in the meeting and vote on the matter?' below for further information on who can make the decision to make a payment.

The Regulation cannot authorize payments that are otherwise prohibited by the charitable corporation's governing documents<sup>[3]</sup>. Directors of the charitable corporation should review the governing documents prior to authorizing a payment.

In addition, the Regulation cannot authorize payments that are otherwise prohibited by statutes applicable to the charitable corporation or rules professional of conduct applicable to the director. For example, s.95 (1) of the *Corporations Act* and 180(2) of the *Canada-Not-for-Profit Corporations Act*, each prohibit a director from serving as an auditor for the charitable corporation.

If the charitable corporation is a registered charity, directors may wish to review the rules regarding their particular situation with the Canada Revenue Agency, as the applicable requirements under the *Income Tax Act* may differ.

## What conditions must be met before authorizing a payment or paying a director or connected person?

- At the time the payment is authorized, the board must believe that it is in the charitable corporation's best interests (see #8 below);
- The payment must be in an amount that is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided (see #9 below);
- The payment must not result in the amount of the charitable corporation's debts and liabilities exceeding the charitable property's value, or render the charitable corporation insolvent;
- Every director of the charitable corporation and, when applicable, the connected person, must agree in writing to a maximum amount that can be paid by the charitable corporation for the goods, services or facilities (see #10 below);
- If the goods, services or facilities are to be provided by a connected person to a director, that person must also agree in writing to the maximum amount;
- Every director of the charitable corporation, other than the director providing the goods, services or facilities or the director to whom the person providing the goods, services or facilities is connected, as the case may be, 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 payment cannot exceed the maximum amount indicated within the agreement, unless the agreement has been amended (see #11 below); and,
- The board of directors must consider any guidance respecting payments made under this section that is issued by the Public Guardian and Trustee and published on a Government of Ontario website.

## How do directors decide that the payment is in the best interest of the charitable corporation?

Before making a payment, the board of directors must believe that the arrangement is in the best interests of the charitable corporation. The directors must be able to show that:

- The good, service or facility is would be beneficial to the charitable corporation;
- There is a contemplated advantage to the charitable corporation in using one of its directors or a connected person instead of someone else. This may involve a financial advantage, or there may be other advantages, such as the experience of the director or their knowledge of the charity.

The board of directors should consider the following:

- Is the director or connected person sufficiently experienced and skilled or qualified to provide the good or service?
- Is there likely to be an adverse impact on the charitable corporation's reputation or levels of support and funding?
- Can the charitable corporation afford the cost of the goods, services or facilities without any adverse impact on its activities?
- Would the director's or connected person's inside knowledge of the charitable corporation and its working environment be beneficial to the charitable corporation? A Board may decide that for less - or no more - than the market price, it can use the skills of a director or connected person who knows the specific requirements of the charitable corporation, and is competent to do the work in question; and,
- If there is no benefit from obtaining the good, service or facility from the director or connected person (that is, no financial or other benefit), the charitable corporation should obtain the good, service or facility from an independent party.

## What constitutes a 'reasonable' payment?

When considering whether a payment is reasonable, charitable corporations should consider:

- The market price for similar goods, services or facilities in similar circumstances;
- The value to the charitable corporation of the goods, services or facilities provided by the director or connected person;
- The quality of the goods, services or facilities and the reliability of the supplier;
- Costs that may have been previously paid by the charitable corporation in obtaining those goods, services or facilities;
- The implications for the reputation of the charitable corporation with its donors, funders, members and supporters, and with the general public.

Other factors to consider:

- When the charitable corporation does not have information on the market price for services, they may obtain quotations from other suppliers, unless the amounts involved are minor. Proper records should be kept of these, and of any other information used in making comparisons. Generally, the higher the payment, the more the charitable corporation needs to be able to show they have considered the market price;
- Where the charitable corporation has a policy on procurement and purchasing, the charitable corporation should ensure it complies with its terms when authorizing payments to a director or connected person;
- Charitable corporations should ensure a proper record is kept of the basis for their decision, including why the level of payment is considered reasonable – which should include reference to payments in similar situations.

## What is the maximum amount?

The 'maximum amount' is the total amount that the charitable corporation has agreed to pay for provision of the goods, services or facilities. The total amount paid at the end of the contract may be less than the maximum amount; for example, if the contract includes an hourly rate and the actual hours required to fulfil the contract were less than anticipated.

## Can the agreement be amended?

Yes, however, in order to authorize a payment above the maximum amount within the original agreement, the charitable corporation must again satisfy the requirements under subsections (5) – (10) of the Regulation.

## How does the Board show compliance with the requirements?

In addition to maintaining a copy of the agreement and the required approvals, the Board should fully document the decision making process, including market research, review of this guidance, and the rationale for its decision.

## Who is not eligible to participate in the meeting and vote on the matter?

The following individuals are not eligible to participate in the meeting and vote on the matter:

1. any director receiving a payment;
2. any director connected to the person receiving the payment;
3. any person connected to the director in (a) or (b) above.

The Regulation requires the charitable corporation to have at least four eligible voters in order to authorize the payment. It is important that the Board ensures that the ineligible director and any connected person are excluded from the meeting. Any meetings which require the director, or the connected person, to be in attendance should be completed prior to the meeting where the final discussion and decision of the eligible directors is to take place.

## How many directors or connected persons can be paid at any one time?

The total number of persons receiving payment under the Regulation must not exceed 20% of the number of voting directors serving on the Board.



# Is financial disclosure required?

## The short answer

Yes, the Regulation requires disclosure of the payment to the members of the charitable corporation, both at the annual members meeting and within the annual financial statements. The Regulation does not specify what information is to be disclosed or in what manner, however, disclosure should meet relevant accounting practices.

## In more detail

Financial disclosure is necessary to ensure transparency between the directors and the membership. The membership, which is usually responsible to elect directors, is best positioned to hold them accountable for the administration of the charitable corporation.

The PGT guidelines with respect to disclosure within the financial statements are:

- The information should appear in the notes to the financial statements;
- The director in question should be named;
- If someone connected to a director contracts with the charitable corporation, it is not necessary to name the connected person, i.e., the notes could say, a party connected to the named director;
- The nature of the business transaction should be mentioned in broad terms, i.e., whether it is for a good, service, or facility that was provided; and,
- It is not necessary to specify the amount paid to the director or the connected person.

Examples:

- The corporation contracted with [name of Director], a director of the corporation, for services provided to the corporation;
- The corporation contracted with a person connected to [name of Director], a director of the charitable corporation, for the purchase of goods;
- The corporation contracted with a company connected to [name of Director], a director of the corporation, for the use of facilities.

# Are there any circumstances in which some of the requirements may be waived?

## The short answer

Yes, if the charitable corporation is making a payment to another not-for-profit corporation or a for-profit corporation that it wholly owns **and** the payment does not benefit the director who is connected to the corporation, the requirements are reduced.

## A more detailed answer

Most of the requirements are waived, including the necessity of having at least 4 directors who are eligible to vote. The only requirements to be met are:

- The payment cannot be made for fundraising services or transactions related to the purchase or sale of real property;
- The payment must be made with a view to the charitable corporation's best interests; and,
- The payment must be in an amount that is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided.

As an example:

ABC Foundation (the Foundation) is a charitable corporation established for the purposes of raising, maintaining and disbursing funds for the benefit of ABC Charity (the Charity). The Chief Administrator of the Charity serves as a director of the Foundation by virtue of occupying the office of Chief Administrator.

In order to minimize costs, the Foundation wishes to contract with the Charity for office space and certain administrative services. As the Charity is the employer of a director of the Foundation, the Charity is a 'connected person' to that director.

Normally, in order for the Charity to contract with the Foundation, all of the requirements of the Regulation would need to be fulfilled. However, as the Foundation is a charitable corporation and no benefit would be received by the Chief Administrator/Director as a result of the transaction, the Regulation relieves the Foundation of some of the requirements.

In this example, the directors would need to ensure that the payment was made in the best interest of the Foundation and was reasonable, but the other requirements need not be met.

# What if a charitable corporation wants to authorize a payment but cannot meet the requirements?

## The short answer

If a court order would have been required before this Regulation was made, and the payment is not authorized under the Regulation, the charitable corporation would still require a court order to make the payment.

## A more detailed answer

The Regulation does not establish new restrictions on the ability of directors to receive a personal benefit under Ontario common-law. Rather, it provides a mechanism to allow charitable corporations to provide a benefit that would have required a court order before the Regulation. In situations where the requirements of the Regulation cannot be met, the charitable corporation would still need a Court order to make the payment.

As an example, in some religious organizations, it is important for the religious leader to also sit on the board of directors. The Regulation would not apply to this situation as the religious leader is an employee of the charitable corporation. In this circumstance, a court order would be required to pay the religious leader.

Where the common law requires a court order to make a payment and where the Regulation does not authorize the payment, a court order may, in certain circumstances, be issued under s.13 of the *Charities Accounting Act*. For more information on s.13 orders, please see the OPGT's publication "How to get a Court Order on a Charitable matter Without Going to Court", available on the OPGT's webpage. See #19 "Further Information", below, for the web-page address.

## **What is the risk for Directors who make payments to a director without complying with the requirements of the Regulation?**

Directors of charitable corporations who fail to comply with the requirements in the Regulation could be in breach of their fiduciary duties and possibly liable to re-pay funds. Complaints about payments to a director or a person connected to a director would ordinarily be answered if the charitable corporation can show that it complied with the Regulation.

## Further Information

Ontario statute law can be found at: <https://www.ontario.ca/laws>

Federal statute law can be found at: <http://laws-lois.justice.gc.ca/eng/acts/l.html>

For the most recent version of this Guidance, or for more information on charitable matters in Ontario, please visit the OPGT's webpage at:

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities/>

You can also contact the Charitable Property Program of the Office of the Public Guardian and Trustee at:

### Charitable Property Program

595 Bay Street, Suite 800, Toronto, ON, M5G 2M6

Tel.: (416) 326-1963 (please leave a message)

Toll-free: 1-800-366-0335 and then press 1, 3, 7

Fax: (416) 326-1969

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[1] A charitable corporation refers to a charity incorporated under the Ontario *Corporations Act*, the *Canada Not-for-Profit Corporations Act*, or some other provincial corporate legislation. The term is distinct from the Canada Revenue Agency's use of the terms charitable organization or foundation under the *Income Tax Act*.

[2] *Re Public Trustee and Toronto Humane Society et al.*, [1987] O.J. No. 534, 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, 27 E.T.R. 40, 4 A.C.W.S. (3d) 446.

[3] For the purposes of the Guidance, governing documents includes Articles of Incorporation, Articles of Continuance, Articles of Amendment, Letter's Patent, Supplementary Letter's Patent, or the special Act creating the charitable corporation, and the corporation's by-laws.

