



August 29, 2017

Nicholas Hedley
Deputy Director and Deputy Public Guardian and Trustee
Office of the Public Guardian and Trustee
595 Bay St., Suite 800
Toronto, ON M5G 2M6

Dear Mr. Hedley,

**Re: Proposed Regulation under the *Charities Accounting Act* regarding the
Compensation of Directors of Charities (the “Proposed Regulation”)¹**

The Ontario Bar Association (“OBA”) appreciates the opportunity to make this submission to the Office of the Public Guardian and Trustee in respect of the compensation of directors of charities under the *Charities Accounting Act*.²

The OBA is the largest voluntary legal organization in the province, representing over 16,000 lawyers, judges, law professors and students in Ontario. This submission has been developed primarily by the OBA’s Charity and Not-for-Profit Law Executive, with input from the OBA’s Trusts and Estates Law and Business Law sections. OBA members participating in this consultation include lawyers who represent the widest possible range of charitable and other not for profit organizations, advising boards, management and membership groups on corporate, tax, fund-raising and other regulatory issues, and who have worked with the provincial and federal governments on legislative reform affecting the sector.

The OBA supports the adoption of the Proposed Regulation, and we offer the following suggestions that are intended to assist in its understanding and interpretation, recognizing the importance of protecting the public interest in charitable property.

Independent Contractors

The Proposed Regulation does not address the situation where a director of a charity is working as an independent contractor, rather than as an employee, for an organization that is receiving a payment from the charity. While directors of a charity who are employees or partners of a law firm make the law firm a connected person under paragraphs 2.1(3)2 and 2.1(3)7 of the Proposed Regulation, there is no similar provision for legal counsel who are independent contractors of the firm. A similar situation applies in other industries that hire independent contractors.

¹ Regulatory Proposal 17-MAG008, available online at <http://www.ontariocanada.com/registry/view.do?postingId=24430&language=en>

² R.S.O. 1990, c. C-10.

Please confirm in the guidance that a payment from a charity to an organization that hires the director of a charity as an independent contractor is not prohibited by law, and therefore does not need relief under the Proposed Regulation. In the alternative, please add a provision to capture the person hiring the independent contractor as a connected person.

Unintended Situations: Operating Charity and its Foundation

We note that the Proposed Regulation does not permit payments made by a foundation to an operating charity, which controls the foundation where the CEO/employee of the operating charity sits on the board of the foundation. Typically the remuneration of the CEO/employee of the operating charity is not in any way dependent upon payments received from the foundation.

This is a common practice in certain segments of the non-profit sector. For example, the CEO of a hospital is often a director of the hospital foundation. It would be helpful for the guidance to confirm that this situation is not prohibited by the law.

Guidance

Section 2.1(6)(c) of the Proposed Regulation states that the board must consider any guidance issued by the Public Guardian and Trustee. As you can appreciate, it is difficult to comment on this requirement without seeing the guidance or at least knowing what it will address. We would appreciate the ability to review the guidance and provide comments before it is released.

The Proposed Regulation appears to catch more payments than were restricted under the common law. It would be helpful for the guidance to confirm that the Proposed Regulation does not prohibit any new actions, but rather it offers a relieving procedure for situations that are already prohibited under the law. It would also be useful to confirm that the approval provisions are not meant to be onerous, and are based on existing case law in this area.

We have attached our comments on what should be included in the guidance as a schedule to this letter.

Non-Participation in Deliberations

Section 41(5) of the Ontario *Not-for-Profit Corporations Act* (the “ONCA”) and section 141(5) of the *Canada Not-for-profit Corporations Act* (the “CNCA”) permit a conflicted director to vote in relation to a contract or transaction for indemnity or insurance. We suggest that this exception should be included in the Proposed Regulation, or that the guidance should confirm that directors insurance and indemnities are not prohibited by law.

Pastors and Other Employees

While employees are excluded from the Proposed Regulations by virtue of section 2.1(3), we believe that it is important to recognize that for many religious organisations, particularly those involving ministers and pastors of independent churches, there are often doctrinal requirements in place that the minister or pastor of those churches must be a member of the controlling board

in his or her role as the spiritual head of the church, whether as an elder or in some other capacity. As such, in recognition of the special situation involving spiritual leaders who are paid employees of religious organisations in Ontario, we feel that consideration should be given to extending the application of the Proposed Regulations to paid spiritual leaders of religious organizations (whether incorporated or not) where there are doctrinal requirements in place requiring the spiritual leaders of those organizations to be a member of its controlling board. A provision of this sort would significantly reduce the need for orders under s.13 of the *Charities Accounting Act*.

If it is not possible to address this issue within the framework of the current draft of the Proposed Regulations, we would request that it be considered as part of future amendments to the Proposed Regulations.

Conclusion

Once again, we would like to thank the Office of the Public Guardian and Trustee for the opportunity to provide feedback on the Proposed Regulation. We invite you to consider the foregoing and would be happy to discuss this matter with you further.

Yours truly,



Victoria Prince, Chair
OBA Charity and Not-for-Profit Law Section

SCHEDULE: OBA Comments on Proposed Guidance

Section 2.1(6)(c) of the Proposed Regulation states that the board must consider any guidance issued by the Public Guardian and Trustee. It would be helpful to have guidance on the following issues:

General

The guidance should confirm that the Proposed Regulation does not prohibit any new actions. Instead, the Proposed Regulation offers a relieving procedure for situations that are otherwise already prohibited under the law.

Therefore, some situations may not require relief such as:

- a payment from a charity to an entity that hires a director of a charity as an independent contractor is not prohibited; and
- a payment made by a foundation to an operating charity which controls the foundation where the CEO/employee of the operating charity sits on the board of the foundation is not prohibited.

What is Reasonable?

Section 2.1(5)(b) of the Proposed Regulation states the amount must be reasonable for the corporation to pay for goods, services or facilities that are provided. Section 2.1(6)(b) of the Proposed Regulation states that every director must agree in writing that the payment is made in accordance with the requirements of the Proposed Regulation.

It would also be useful to confirm that these provisions are not meant to be overly onerous. It is our understanding from you that the provisions are based on the language in the existing caselaw of in this area of what is reasonable.

For example, we are concerned that the directors will insist on multiple source bids or legal opinions in order to demonstrate what is reasonable. While in some circumstances, this may make sense, it should not result in further costs for charities or their advisors. It would be more expensive for charities to have to hire one lawyer to provide an opinion that it can, in fact, hire another lawyer or firm. Requiring lawyers to bid on work they will not ultimately receive will, over time, result in lawyers declining to bid on such work.

It would be useful for the guidance to note that:

- What is reasonable is a business decision, not a legal decision.
- A charity does not need to hire one law firm to provide an opinion that another law firm's quote is reasonable.

- A reasonable amount need not be the lowest price in the market and a charity should consider other factors such as market conditions, expertise and the level of service in determining what is reasonable.
- A charity is not required to get multiple source bids in order to determine what is reasonable.

Maximum Amount

With respect to section 2.1 (6)(a) of the Proposed Regulation, setting a maximum amount can be difficult where the scope of work is not clear or where new issues arise during the course of providing the work. For example, the scope of legal services often evolves over time. For instance, a charity could hire a lawyer after working through the process outlined in the Proposed Regulation, but once the lawyer starts working on the project, additional information comes to light which impacts the fees. The lawyer would have already done some work and be entitled to be compensated for that work but could not continue without the charity going through the process set out in the Proposed Regulation again. This additional requirement could significantly delay the completion of the work which could be problematic, especially for time sensitive matters.

We propose that a maximum amount could be set in different ways. For example, a maximum amount could be set per project, or a maximum billable rate for legal services, or a maximum amount for specific goods, or a maximum amount for services per year. The guidance could set out these options and could provide that a charity can designate one or more persons on behalf of the charity (other than the director providing the services, or the directors to whom the person providing the services is connected) to authorize work as needed within the set maximum amount.

Disclosure requirements

Section 2.1(10) of the Proposed Regulation requires the directors to ensure information respecting payments made under this section are noted in the corporation's financial statements and placed before the members at the annual meeting. Legal services can involve confidential matters, such as employee terminations for sexual harassment or financial misconduct. This disclosure requirement might also induce corporate charities to limit or reduce the size of their memberships.

Based on the meeting of our respective representatives, we understand that this disclosure requirement is not intended to be more onerous than the disclosure requirements under current accounting standards. Clarification in the guidance regarding the expected level of disclosure would be useful.

Non-Deliberations

The guidance should confirm that directors insurance and indemnities are not prohibited by law and therefore, does not require relief from this section.

The guidance should draw attention to the discrepancies between corporate law and the requirements of section 2.1(8) of the Proposed Regulation. Directors have additional disclosure and conflict of interest requirements under the corporate legislation to which the corporation is subject. Regardless of a director's rights under corporate legislation to attend and vote in respect of a matter for which he or she has a conflict of interest, the director must not exercise those rights in order to comply with the Proposed Regulation. However, the guidance should at least allow for the conflicted director to respond to requests for information either prior to or resulting from the board meeting considering the matter.

Limits

This Proposed Regulation is limited to charitable corporations as defined in section 1(2) of the *Charities Accounting Act*. The guidance should note that unincorporated entities and trusts cannot use this Proposed Regulation.