Ontario charities: Accessing restricted funds during the COVID-19 pandemic

01 avril 2020

The Ontario Public Guardian and Trustee (PGT) developed temporary guidelines (the PGT Guidelines) to assist Ontario charities that are impacted by the economic consequences of the COVID-19 pandemic. The PGT Guidelines, which apply to charities in Ontario that are in danger of closing, allow eligible charities to access the income and capital of restricted purpose trust funds for operating expenses. The PGT Guidelines defer the requirement to obtain a court order under section 13 of the *Charities Accounting Act* (Ontario) until after the pandemic has ended.

For purposes of the PGT Guidelines, restricted purpose trust funds include the income and capital of perpetual endowment funds, as well as the income and capital of trust funds held for a restricted charitable purpose (the funds).

According to the PGT, Ontario charities may access and use the funds subject to each of the following conditions:

- The organization is in danger of closing, which includes becoming insolvent or filing for bankruptcy or receivership, unless it can access the funds;
- The organization may only access the funds as a last resort. Non-restricted funds, including reserve funds, should be used first;
- The organization must first notify the PGT by indicating the name and address of the organization; the name of the perpetual endowment fund or the restricted purpose trust fund; and the name, address and telephone number of a contact person for the organization. The PGT will accept notification via email;
- All board members must approve the decision to use or encroach upon the funds and the decision should be documented contemporaneously;
- Subject to the next bullet point, the funds must be used only for operating expenses and the contractual obligations of the charity and only to the extent necessary to maintain solvency. Operating expenses include: salaries, building expenses, utilities;
- If a charity's purposes enable it to provide services in response to the COVID19 pandemic, the funds may be used for such services;
- The organization must keep an accounting of the use of the funds;
- The organization shall apply for an order approving the encroachment under section 13 of the *Charities Accounting Act* (Ontario) within a reasonable time after the pandemic has subsided;

- The funds must not be transferred to another organization except in compliance with previously existing contractual obligations;
- The amounts withdrawn should be reasonable given the circumstances of the organization; and
- If it is necessary to sell stocks, bonds or other securities, the PGT will consider the sale reasonable even if there is a loss of capital, provided such investments are sold to an arms-length third party on the open market.

As noted above, charities who access the funds in accordance with the PGT Guidelines will still be required to apply for an order approving the encroachment under section 13 of the *Charities Accounting Act* (Ontario) within a reasonable time after the pandemic has subsided. Section 13 of the *Charities Accounting Act* (Ontario) provides a simplified procedure to obtain a court order without having to go to court or commencing formal court proceedings. It is unclear at this time what criteria will be used to determine that the pandemic has subsided.

Please do not hesitate to contact any member of our Charities & Not-Profit Group with any questions. BLG has also created a COVID-19 Resource Centre to assist businesses on a variety of topics, including contractual risks, public disclosure requirements, schools and criminal law.

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Ryma Nasrallah, Victoria Prince

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blg.com

Bureaux BLG

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000, rue De La Gauchetière Ouest
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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