

# **PROCEDURES FOR OBTAINING AN ORDER UNDER S. 13 OF THE CHARITIES ACCOUNTING ACT**

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## BACKGROUND

### 1. ORDERS AVAILABLE

1. Section 13 of the *Charities Accounting Act* provides a simplified procedure to obtain a Court Order without having to go to Court or commencing formal Court proceedings. You do not have to appear in Court or prepare an Application Record or factum to obtain a draft order, which is deemed to be a Court Order under s. 13. However, you do have to obtain the written consent of the Public Guardian and Trustee and of every other person who would have been required to be served in a proceeding to obtain the order. These procedures explain how to request the Public Guardian and Trustee's written consent. A copy of s. 13 is attached as schedule "A."

### 2. ORDERS AVAILABLE

2. Orders which may be obtained under s. 13 are orders which could be made by the Superior Court of Justice under the *Charities Accounting Act*, or any other Act dealing with charitable matters, or in the exercise of the Court's inherent jurisdiction in charitable matters. The following are examples of orders which are available under s. 13 if the required consents are obtained:
  - cy-près orders, that is, where it has become impossible or impracticable to apply charitable property to the original purposes. New purposes, which are as similar as possible to the original purposes, can be substituted for the original purposes (for example, where a charity has been wound up or ceased to exist, funds may be applied cy-près to a charity with similar objects);
  - orders made under the Court's scheme-making powers, that is, where the methods of carrying out the charitable objects do not work (for example, (i)

where a charitable trust makes no provision for appointing replacement trustees and the trustees retire, a replacement trustee could be appointed and (ii) where the trust requires investment in instruments which are not available, new investment powers can be established);

- revesting land in a charity under s-s. 8(5) of the *Charities Accounting Act*; and
  - orders under ss. 3(3) of the *Charitable Gifts Act* to extend the time by which a charity must dispose of a business interest;
3. The following consent orders may also be available under s. 13 if they pertain only to charitable matters and do not involve non-charitable interests :
- orders for directions which may include orders appointing new trustees; and
  - orders under ss. 35(1) of the *Trustee Act* excusing trustees or fiduciaries for having committed a breach of trust where they had acted honestly and reasonably.

## **REQUESTING THE PUBLIC GUARDIAN AND TRUSTEE'S CONSENT**

4. Section 13 requires the written consent of the Public Guardian and Trustee and every other person who would have been required to be served if the matter proceeded in Court. After the consents of all parties and of the Public Guardian and Trustee have been obtained, the draft order must also be filed with the Court, which will usually be arranged by the Public Guardian and Trustee. The terms of the draft order take effect when it is filed.
5. If all required consents are not obtained, s. 13 cannot be used and will have no effect. Accordingly, the draft order will not be deemed to be a Court Order and

will have no effect even if the Public Guardian and Trustee consented and the draft order was filed with the Court.

6. Where any matter of procedure arises which is not provided for by these procedures, the Public Guardian and Trustee will look to the Rules of Civil Procedure as an example of what procedure might be followed.
7. These procedures are intended to provide an inexpensive and simple way to request the Public Guardian and Trustee's consent. It will be less expensive and simpler to obtain the Public Guardian and Trustee's consent where all relevant information is provided with the request. The Applicant is encouraged to take time to thoroughly review the material he or she provides to the Public Guardian and Trustee to ensure that there is sufficient information and evidence to provide a legal basis for the relief requested in the draft order.

### **3. 2.1 DEFINITIONS**

8. The "Applicant" is the person who requests the Public Guardian and Trustee's consent to the terms of a draft order under s. 13 of the *Charities Accounting Act*.
9. "Other Persons" are every other person who would have been required to be served if the Applicants had gone to Court to obtain the order, but does not include the Public Guardian and Trustee.

### **4. 2.2 HOW TO REQUEST THE PUBLIC GUARDIAN AND TRUSTEE'S CONSENT**

10. A request for the Public Guardian and Trustee's consent shall be in writing delivered to the Charitable Property Program and shall include the following

material and documentation:

- the Applicant's name, telephone number and street address including the postal code, and fax number if any;
- an affidavit setting out the basis for the Order (see 2.4 below)
- any other affidavit(s) upon which the Applicant intends to rely;
- four (4) clean copies of the draft Order;
- two (2) original signed consents of the Applicant(s) and every other person, who would have been required to be served in a proceeding to obtain the order (Applicants may submit a draft order without the required consents if they wish the Public Guardian and Trustee to review the form of the draft order before obtaining the consents, see paragraph 24);
- cheque or money order in the amount of \$500.00 made payable to the Public Guardian and Trustee.

## **5. 2.3 SUPPORTING AFFIDAVIT**

11. Every request for the Public Guardian and Trustee's consent will include one or more affidavits which include the following:

- The name and address of every Other Person who would have been required to be served in a proceeding to obtain the order;
- A statement that to the deponent's knowledge and belief there are no Other Persons who would have been required to be served in such a proceeding;
- Where appropriate, the steps taken to identify every Other Person who would have been required to be served in such a proceeding;
- Confirmation that every Other Person was provided a copy of the request and all

supporting material and given a reasonable opportunity to read such documents and material and to obtain independent legal advice before consenting;

- The specific facts upon which the Applicant relies to justify the request for the order;
- Any documents which are referred to in the affidavits or which would be relevant to the matter;
- Full, true and plain disclosure of all facts material to the matter;
- A copy of the documents which define the purposes or the scheme of administration of the charitable interest affected by the order sought and any amendments thereto, attached as an exhibit to the affidavit. Examples of such documents include letters patent, constitution, trust deed, by-laws, wills and codicils, and court orders;
- A copy of the proposed draft order attached as an exhibit to the affidavit; and
- Any other information and documents relevant to the issue which would be required for the Public Guardian and Trustee to make a fully informed decision.

#### **6. 2.4 MISREPRESENTATIONS/NON-DISCLOSURE**

12. The Public Guardian and Trustee's consent is given in reliance of the information and documentation provided by the Applicant. If misrepresentations or non-disclosure is discovered after the draft order is filed with the Superior Court of Justice, the Public Guardian and Trustee may apply to have the Order set aside and seek costs against the party responsible for such misrepresentations or non-disclosure.

#### **7. 2.5 FORMS**

13. Precedent forms which may be used are attached in the Appendix of Forms to



these Procedures. Any forms prescribed by the Rules of Civil Procedure may be used, with such variations as the circumstances require.

14. The Public Guardian and Trustee recommends the Applicant submit supporting affidavits in a form that is similar to, or that contains the same information, as would be required if the matter was in Court in the event that the Public Guardian and Trustee does not consent or any Other Persons withdraw their consent. This will enable the Applicant to use the materials prepared as a basis for an application to Court, if necessary.

## **8. 2.6        CONSENTS FROM OTHER PERSONS AND THE APPLICANT**

15. The Public Guardian and Trustee will not consider a request until it has received the written consent of the Applicant and all Other Persons including the charitable corporation if applicable. However, the Public Guardian and Trustee will review the form of a draft order before receiving the consents if requested by the Applicant(s)(see paragraph 24 below). If a person signing a consent is a director of a charitable corporation, the consent should clearly state whether the person is signing the consent in his or her personal capacity or on behalf of the corporation.
16. The applicants may indicate their consent by writing "I consent to this draft order" on a copy of the draft order and signing immediately below. The Public Guardian and Trustee will consider the written consents of the Other Persons to be sufficient if they are in the form of the precedent attached as schedule "B" to these procedures. One or more persons may sign one consent. Two (2) original copies of each consent must be provided.

17. It is the Applicant's responsibility to identify every other person who would have been required to be served in a Court proceeding to obtain the order. The Public Guardian and Trustee will not consent where in its view, a person who would be required to be served by the Rules of Civil Procedure has not consented. If the Applicant does not obtain the consent of every person who would have been required to be served in a proceeding to obtain the order, s. 13 cannot be used. As there is no authority to waive a consent, s. 13 cannot be used if a person who would have been required to be served cannot be located.
18. Consents are required for all the directors or trustees of a charity in cases where the Order is to approve the provision of a personal benefit to one or more of the directors or trustees, such as the approval for an employee of a charity to be appointed to its board of directors , and in other cases where the personal interests of one of the directors or trustees either are or appear to be in conflict with the charity's interests. A consent for the charity must also be provided.

## **9. 2.7                      ADDITIONAL PARTIES**

19. Any person may submit their views with respect to a request or provide additional information regarding a matter in writing to the Charitable Property Program of the Public Guardian and Trustee.
20. In some cases, there may be other persons who might not be required to be served, but who have relevant views or information which might have a bearing on whether the Public Guardian and Trustee should consent. The Public Guardian and Trustee may, before consenting to a matter, invite any person or persons to submit their views with respect to the matter. These views, if known

to the Applicant, should be outlined in the Applicant's supporting affidavit.

21. Circumstances may arise where there are other persons who a Court might require to be served had the matter proceeded in Court. The Public Guardian and Trustee may, before consenting to a matter, invite any persons who may have an interest in the matter or who may qualify as parties or intervenors or who the Court might have otherwise required to be served, to submit their views with respect to whether the Court would require them to be served in a proceeding to obtain the order. The Public Guardian and Trustee may withhold its consent until a written consent is obtained from a person whom the Public Guardian and Trustee believes the Court might have required to be served in the matter. If a person that the Public Guardian and Trustee believes would have been required to be served had the matter proceeded in Court, refuses to consent, then the Public Guardian and Trustee will not consent. The Public Guardian and Trustee will only consent after consents are obtained from all other persons that the Public Guardian and Trustee believes the Court would have required to be served.
22. Generally, the Public Guardian and Trustee will provide the Applicant with an opportunity to respond to information adverse to the request, where such information is relevant and does influence the Public Guardian and Trustee to refuse its consent, except that the Public Guardian and Trustee may not disclose information that is exempt from disclosure under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

### **10.2.8 AMENDMENTS**

23. The Public Guardian and Trustee will only consent to a draft order which has been amended if the Applicant(s) and all other persons required to consent

have given their written consent to the amended draft order. It is the responsibility of the Applicant and not the Public Guardian and Trustee, to obtain the required consents to the amended draft order. The Applicant may indicate his or her consent to the amended draft order by writing "I consent to this draft order" on a copy of the amended order and signing immediately below. The applicant's consent is required to confirm that all affected parties consent to any changes in the draft order.

24. Applicants may submit a draft order for the Public Guardian and Trustee's preliminary review before the required consents are obtained. This will save the Applicants from having to go back to the other parties for their consents if the Public Guardian and Trustee requires changes to the draft order. The Applicant must provide the sworn supporting affidavit, draft order and the Public Guardian and Trustee's fees in the amount of \$500.00. The Public Guardian and Trustee will review the form of the draft order and advise the Applicants of any changes that should be made to the draft order. The Public Guardian and Trustee will make a more substantive review when the final draft order, affidavit and required consents are received.

#### **11. 2.9 WITHDRAWAL OF CONSENT**

25. The Public Guardian and Trustee will not consent where any person delivers a written withdrawal of their consent, before the Public Guardian and Trustee has sent the draft order and consents to the Court. Once the draft order is filed, a consent cannot be withdrawn.

#### **12. 2.10 AGREEMENTS**

26. If the Public Guardian and Trustee is requested to consent to a draft order which is proposed under a settlement agreement or other agreement, the draft order

shall state that the Public Guardian and Trustee is consenting for purposes of s. 13 and does not thereby become a party to the agreement.

### **13. 2.11 DRAFT ORDER OR JUDGMENT**

27. Because s. 13 requires the draft order to be filed with Superior Court of Justice, the draft order must be in the form prescribed by the Rules of Civil Procedure with such additions or modifications required by s-s. 13(1) or appropriate in the circumstances. A precedent draft order which the Court has agreed to accept is attached to these procedures. All draft orders and judgments must have a back sheet in the form prescribed by the Rules of Civil Procedure with such additions or modifications required or appropriate in the circumstances.

### **14. 2.12 EXAMINATIONS**

28. In rare cases, the Public Guardian and Trustee may require a deponent of an affidavit filed in support of, or in response to, a request, to be examined. If the deponent refuses to attend an examination, the Public Guardian and Trustee may refuse to give its consent, request additional information or disregard the deponent's affidavit.

### **15. 2.13 WITHDRAWAL OF REQUEST**

29. An Applicant may withdraw their request by delivering written notice to the Charitable Property Program of the Public Guardian and Trustee before the draft order and consents have been sent to the Court.

30. If an Applicant fails to respond to any correspondence from the Public Guardian and Trustee for a period of three (3) months, the Public Guardian and Trustee will consider the Applicant's request to be withdrawn. The Applicant can revive their request by written request received by the Public Guardian and Trustee within one year of the date that the request was considered to be withdrawn.

**16.2.14 FORM OF THE PUBLIC GUARDIAN AND TRUSTEE'S CONSENT**

31. The Public Guardian and Trustee's consent shall be in writing under seal as required by s. 13. The Public Guardian and Trustee's consent will be signed by the Public Guardian and Trustee's in-house legal counsel and shall be noted on the draft order.

**17.2.15 FILING THE DRAFT ORDER OR JUDGMENT**

32. Upon giving its consent to a draft order, the Public Guardian and Trustee will file the draft order and consents with the Superior Court of Justice.

33. In accordance with s-s. 13(3), the terms of the draft order take effect when it is filed with the Superior Court of Justice. The Public Guardian and Trustee sends a copy of the filed Order to the Applicant's contact person.

**FEES**

34. In accordance with s. 8 of the *Public Guardian and Trustee Act*<sup>1</sup> a fee of \$500.00 is payable to the Public Guardian and Trustee for considering a request to consent to a draft order under s. 13. A cheque or money order in the amount of \$500.00 made payable to the Public Guardian and Trustee must be forwarded with a request for the Public Guardian and Trustee's consent. ,

35. The Applicant is also responsible for the payment of any Court filing fees. The Superior Court of Justice does not currently charge a fee for filing s. 13 orders.

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<sup>1</sup> A copy of s. 8 and of the fee schedule established thereunder are available upon request from the Charitable Property Program of the Public Guardian and Trustee. Please fax your request to (416) 326-1969 or call 326-1963.

## SCHEDULES

### **18. Schedule “A”: Charities Accounting Act , S-S. 13(1)**

13. (1) A draft order or judgment that could have been made by the Superior Court of Justice under this Act, under any other Act dealing with charitable matters, or in the exercise of its inherent jurisdiction in charitable matters, shall be deemed to be an order or judgment of that court if the following persons give a written consent to its terms:

1. The Public Guardian and Trustee .
2. Every other person who would have been required to be served in a proceeding to obtain the order or judgment.

(2) In the case of the Public Guardian and Trustee, the consent shall be sealed.

(3) The terms of the draft order or judgment take effect when it is filed with the Superior Court of Justice.

**19. Schedule "B": Consent**

## CONSENT UNDER SECTION 13 OF THE CHARITIES ACCOUNTING ACT

I, \_\_\_\_\_ (*insert name*) , have received and considered the request for the Public Guardian and Trustee's consent under s-s. 13(1) of the *Charities Accounting Act* and supporting affidavit(s) of \_\_\_\_\_ (*insert name*) \_\_\_\_\_ sworn on the (*date*) day of (*month*) , 20\_\_\_ and the draft order [or judgment].

I understand that the Public Guardian and Trustee does not represent me nor protect my interests in this matter, and I have obtained whatever legal advice I considered necessary.

I understand that if the Public Guardian and Trustee and every other person who would have been required to be served in a proceeding to obtain the order or judgment, consent to its terms, then the draft order or judgment shall be deemed to be an order or judgment of the Superior Court of Justice when it is filed with that Court.

I acknowledge that I am a director or officer or trustee of the charity and that I have a fiduciary duty to protect the charity's interests in this matter and that I have authority to sign this consent on behalf of the charity. ~~I delete if person signing is not signing on behalf of the charity~~

I acknowledge that this consent can only be withdrawn by delivering to the Public Guardian and Trustee, Charitable Property Program written notice that the consent is withdrawn before the Public Guardian and Trustee gives its consent.

I consent to the terms of the draft order [or judgment].

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.



## 20. Schedule "C": Precedent Draft Order

Court file no.

### SUPERIOR COURT OF JUSTICE

B E T W E E N

(name)

Applicant(s)

and

(name)

Respondent(s)

### ORDER UNDER S. 13 OF THE CHARITIES ACCOUNTING ACT

ORDER under s. 13 of the *Charities Accounting Act*, on consent of the Public Guardian and Trustee and every other person who would have been required to be served in a proceeding to obtain the order.

The Applicant(s), *(insert names)* having obtained under s-s. 13(1) of the *Charities Accounting Act*, the written consent to the terms of this order of every other person who would have been required to be served in a proceeding to obtain the order, namely *(insert names)* and the written consent under seal of the Public Guardian and Trustee,

1. THIS COURT ORDERS that...
2. THIS COURT ORDERS that...

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In accordance with s. 13 of the *Charities Accounting Act*, this draft order is deemed to be an order of the Superior Court of Justice when it is filed with the Superior Court of Justice.

**21. Schedule "D": Checklist**

Your request to the Public Guardian and Trustee should include the following:

- ❑ Cover letter setting out your name, address, telephone number and fax number if applicable;
- ❑ Supporting affidavit(s) which include a clear explanation as to what parties would have been required to be served in a proceeding to obtain the order;
- ❑ Any additional supporting or relevant documents or evidence (e.g. prior court orders);
- ❑ Four clean copies of the draft order or judgment;
- ❑ Two original consents signed by the applicants;
- ❑ Two original consents from every Other Person including the charitable corporation if applicable (Applicants may submit a draft order without the required consents if they wish the Public Guardian and Trustee to review the form of the draft order before obtaining the consents, see paragraph 24);
- ❑ \$500 cheque payable to the Public Guardian and Trustee ; and
- ❑ Payment of all fees required by the Court for filing the draft order (currently, no fees are charged although this is subject to change without notice).

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### Charitable Property Program:

Tel.: (416) 326-1963  
Fax: (416) 326-1969

[PGT-Charities@ontario.ca](mailto:PGT-Charities@ontario.ca)

### London Region

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Ministry of the Attorney General  
OPGT  
Procedures for Obtaining a Section  
13 Under the Charities Accounting  
Act

© Queen's Printer for Ontario, 2007  
Reprinted in 2020  
Disponible en français  
ISBN 0-7794-8116-X