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**CONSIDERATIONS IN DRAFTING RESTRICTED
CHARITABLE PURPOSE TRUSTS**

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A. INTRODUCTION

This paper highlights some of the more common issues that lawyers as well as gift planners should be aware of when drafting the provisions of a testamentary or *inter vivos* restricted charitable purpose trust.¹ As always, lawyers and gift planners must take the time to tailor the restricted charitable purpose trust to fit the factual context and needs of the particular donor or charitable client as the case may be.

The key element of both testamentary and *inter vivos* restricted charitable purpose trusts is the establishment of the restriction, whether the restriction is with regard to the use or with regard to the time during which the charitable gift² is to be applied. What constitutes a “charitable gift”? For ease of use, reference is made to *Black’s Law Dictionary* for a standard definition of what is a gift in law:

Gift – a voluntary transfer of property to another made gratuitously and without considerations.³

If a charity accepts a gift subject to a restricted charitable purpose trust, the charity is legally bound by those restrictions. This form of gift, whether the charity understands it or not, establishes a special purpose charitable trust within the charity itself and the charity, as trustee, is subject to the legal regime governing such trusts. Common types of restricted charitable purpose trusts

¹ This paper is based on a chapter of a book co-authored by the author of this paper: Terrance S. Carter, Theresa L.M. Man, and Jane Burke-Robertson, *Corporate and Practice Manual for Charities and Not-For-Profit Corporations*, Chapter 17, Issues in Drafting Restricted Charitable Purpose Trusts. That chapter is also based, in part, on a collection of papers by Terrance S. Carter, “Considerations When Drafting Restricted Charitable Purpose Trusts” (2011) 30 ETPJ 361; Terrance S. Carter, *Considerations When Drafting Restricted Charitable Purpose Trusts*, (Paper presented at the Ontario Bar Association’s Trusts, Trustees, Trusteeships 2010), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2010/tsc1001.pdf>>; and Terrance S. Carter, “Donor-Restricted Charitable Gifts: A Practical Overview Revisited II” (Paper presented for the Canadian Association of Gift Planners at the 2006 Annual National Conference, 2006), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2006/tsc0421.pdf>> [“Donor-Restricted Charitable Gifts”].

² Under common law, the Federal Court of Appeal has defined a gift as “a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor” in *Friedberg v. R.* (1991), (*sub nom.* R. v. Friedberg) 92 D.T.C. 6031 (Fed. C.A.), affirmed 1993 CarswellNat 1386 (S.C.C.). This has been upheld in recent cases such as *Maréchaux v. R.*, 2010 FCA 287 (F.C.A.), leave to appeal refused 2011 CarswellNat 1911 (S.C.C.) and *French v. R.*, 2015 TCC 35 (T.C.C. [General Procedure]). Although the Canada Revenue Agency also defines a gift as “a voluntary transfer of property without valuable consideration”, a transfer of property for which an advantage is received may be considered a gift in certain circumstances. For further details, see Canada Revenue Agency, “P113 - Gifts and Income Tax 2014”, online: <http://www.cra-arc.gc.ca/E/pub/tg/p113/p113-e.html#gfts_tx>.

³ See *Black’s Law Dictionary*, 6th ed., s.v. “gift”. For an overview of the legal issues that are involved in determining what legally constitutes a gift, see Arthur B.C. Drache, Q.C., “A Gift By Any Other Name May Not Be A Gift,” *Charities and Not-For-Profit Law*, Canadian Bar Association of Ontario, April 24, 1998.

include endowments, long-term funds, scholarship funds, building funds, as well as donor advised funds that are often placed with community foundations, to name a few examples.

As donors become more sophisticated with their giving and demand greater accountability from charities, the use of restricted charitable purpose trusts is becoming a more frequent fundraising vehicle, particularly for donors making large gifts to charities. Many charities in Canada, though, do not fully appreciate the legal implications of accepting restricted charitable purpose trusts. Failing to honour the restrictions imposed by such trusts could expose the charity, and its directors or trustees, to liability for breach of trust. As well, failure to comply with the restrictions has the potential to erode donor confidence and undermine the credibility of the recipient charity as well as the charitable sector in general.

The aim of this paper is to provide lawyers and gift planners advising or working with charities with an understanding of charitable purpose trusts that are subject to restrictions in the context of *inter vivos* and testamentary trusts, an understanding of possible areas of liability for lawyers advising on or drafting such charitable purpose trusts, and practical tips to consider when drafting restricted charitable purpose trusts.

B. WHAT ARE THE BASIC ATTRIBUTES OF A CHARITABLE PURPOSE TRUST?

Before a restricted charitable purpose trust can be drafted, it is important to understand what a charitable purpose trust is. This section of the paper therefore describes some basic trust law principles to assist the practitioner in understanding the fundamental components of a charitable purpose trust.

Charitable purpose trusts have their origin in the medieval concept of the “public use”, as opposed to the “private use”. The public use eventually evolved into the charitable trust.⁴ The definition of a charitable purpose trust is tripartite: it is an exclusive dedication of property to a charitable purpose in a way that provides a public benefit. Although Anglo-Canadian law does not provide a conceptual definition of charity, there are four categories of charitable purposes recognized by the

⁴ See G. Jones, *History of the Law of Charity, 1532-1837* (Cambridge: Cambridge University Press, 1969).

courts: the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community.⁵

Before looking at the specifics of a charitable purpose trust, it is necessary to first review the basics of trust law. A trust is usually established by a trust document or instrument, and must include three essential components or “certainties” to create the trust: certainty of intention, certainty of subject matter, and certainty of object. For charitable trusts, a trust document will typically set out what the purpose of the objects of the trust are, what property is to be held in trust, what the criteria are that will be used to determine the beneficiaries or the purpose of the trusts, and how the trust property is to be managed by the trustees for the benefit of the specified persons or for the specified purposes.⁶

The term “charitable purpose” is generally used in the context of a charitable purpose trust, but has application to other legal forms of charities as well. *Restatement of Trusts* defines a charitable purpose trust as follows:

A charitable purpose trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.⁷

The Ontario Law Reform Commission, in its 1996 seminal *Report on the Law of Charities*, summarized the basic nature of a charitable purpose trust as follows:

... a promise or undertaking made by the initial trustee, followed by undertakings of his or her successor trustees, to apply a certain locus of wealth, sometimes in perpetuity, to a

⁵ For a more detailed discussion of the four categories of charitable purposes, see *Pemsel v. Special Commissioners of Income Tax*, [1891] A.C. 531, [1891-94] All E.R. Rep. 28, 61 L.J.Q.B. 265, 65 L.T. 621, 3 T.C. 53, 7 T.L.R. 657 (U.K. H.L. [“*Pemsel*”]) and *Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue*, [1999] 1 S.C.R. 10, 1999 CarswellNat 18, 1999 CarswellNat 19, [1999] 2 C.T.C. 1, 169 D.L.R. (4th) 34, (sub nom. Vancouver Society of Immigrant & Visible Minority Women v. Canada (Minister of National Revenue)) 59 C.R.R. (2d) 1, 99 D.T.C. 5034, 234 N.R. 249 (S.C.C.) [“*Vancouver Society*”]. See also Mark R. Gillen and Faye Woodman, *The Law of Trusts: A Contextual Approach*, 2nd ed (Toronto: Emond Montgomery, 2008) at 231-271 [“Gillen and Woodman”].

⁶ Donald J. Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 3rd ed (Markham: Butterworths, 2002) at 37 [“Bourgeois”]. See also Donovan W. M. Waters, Mark R. Gillen, and Lionel D. Smith, *Waters’ Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), c. 14 [“Waters et al.”].

⁷ American Law Institute, *Restatement (Second) of Trusts* (Washington, D.C., 1959) at para. 348.

particular purpose. So analyzed, it is more akin to an oath or a vow, albeit legally enforceable, than to a bilateral contract. It is this feature that gives it its special and problematic judicial character.⁸

The relationship between the trustees and the charitable trust and its beneficiaries is a fiduciary one, and the trustee has substantial obligations imposed upon them as a result of the fiduciary relationship.⁹ In this regard, the fundamental obligation of a trustee is to hold the trust property for the benefit of the trust objects in accordance with the specific terms of the trust. When the trust objects are identifiable persons, those persons are entitled to compel the trustee to act in their best interests in accordance with the terms of the trust. When the objects of a trust are purposes rather than persons, there is no interested party who can compel proper administration of the trust. For this reason, the general law is that trusts for purposes are not valid. However, there is an exemption made for charitable purpose trusts on the basis that the Crown, as *parens patriae* for charities, has the power to enforce the performance of the trust. In Canada, the Crown's prerogative is exercised by the Attorney General for each Province or the Office of the Public Guardian and Trustee (Ontario) ("OPGT") in Ontario. It may be that the Attorney General or the OPGT is less inclined to diligently monitor the performance of charitable purpose trusts than an individual who is personally interested in a private trust. The fact that enforcement of charitable purpose trusts may be less vigorous than private trusts does not, however, change the nature of the trustees' legal obligations or the potential liability for a breach of trust.¹⁰

A case in point is *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*,¹¹ where the OPGT participated in proceedings against a parallel foundation that attempted to use funds that it raised for purposes other than the charitable purpose stated in its letters patent. The applicants, the Victorian Order of Nurses for Canada and its Ontario branch ("VON"), were successful in obtaining a court order finding that the Greater Hamilton Wellness Foundation was in breach of its fiduciary and trust obligations to the VON and that, as a result, the

⁸ Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ministry of the Attorney General, 1996) at 395.

⁹ Bourgeois, *supra* note 6 at 40.

¹⁰ M. Elena Hoffstein, Edgar A. Frechette, and Terrance S. Carter, "Endowed and Restricted Gifts: What the Gift Planner Needs to Know" (2003), online: <<http://www.carters.ca/pub/seminar/charity/2003/CAGP0501.pdf>> at 4.

¹¹ *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684, 2011 CarswellOnt 12086, 94 B.L.R. (4th) 246, 75 E.T.R. (3d) 161 (Ont. S.C.J.), additional reasons 2011 ONSC 6801, 2011 CarswellOnt 12731, 75 E.T.R. (3d) 207 (Ont. S.C.J.).

assets and income of the Foundation as of December 15, 2009, were to be transferred in trust to VON Ontario in accordance with the Foundation's original charitable purposes. The VON decision is a useful reminder to both the directors of charitable corporations and the charities themselves that they have a fiduciary duty to their historic donors to apply the charitable property of the corporation in a manner consistent with the charitable purposes set out in its corporate objects at the time that the gifts were made.

The trustees of a charitable purpose trust, like the trustees of any other trust, are also subject to general trust law principles governing the administration of the trust. Thus, for example, at common law the assets held pursuant to a charitable purpose trust must be segregated from the other assets held by the trustees unless the terms of the trust expressly permit commingling.¹² A trustee must carry out his or her tasks honestly and with due care and attention. The trustee must also carry out the duties personally and only under limited circumstances may delegate his or her responsibilities to another person. Additionally, the trustee must place the interests of the beneficiaries or the purpose of the charitable trust first and not permit his or her own interests to conflict in any way with the duties to the beneficiaries or the purpose of the charitable trust.¹³ At all times, the trustee must be ready to provide "full explanations of all of their dealings, and of the causes why outstanding assets were not collected, or property of the estate had disappeared".¹⁴ Although in Ontario, only the Attorney General or the OPGT can compel the trustee to provide an accounting, it is a practical necessity that charities be willing and able to properly account to donors for the administration of charitable purpose trusts.

Compared to other forms of trusts, a charitable purpose trust has certain beneficial attributes which are unique to it. Those attributes can be summarized as follows:

- A charitable purpose trust is an exception to the rule that purpose trusts are void.¹⁵

¹² For the relieving provision, see *Charities Accounting Act*, O. Reg. 4/01 at s.3. See also Terrance S. Carter, "Ontario Releases Regulation under the *Charities Accounting Act*" in *Charity Law Bulletin* No. 1 (February 1, 2001), online: <http://www.carters.ca/pub/bulletin/charity/2001/chylb01-01.pdf>.

¹³ Bourgeois, *supra* note 6 at 40.

¹⁴ *Chisholm v. Barnard*, 10 Gr. 479, 1864 CarswellOnt 40 (U.C. Ch.) at para. 1.

¹⁵ Waters et al., *supra* note 6 at 666. See also *Morice v. Bishop of Durham*, (1805), 10 Ves. Jun. 522, 32 E.R. 947 (Eng. Ch. Div.).

- A charitable purpose trust is exempt from the requirement that there be a beneficiary of the trust. In Ontario, this means that there is no one to enforce the trust other than the OPGT, under the authority of the Attorney General, in accordance with that office’s traditional *parens patriae* role in overseeing charitable purposes.¹⁶
- A charitable purpose will not fail for uncertainty of objects, even though there are no identifiable beneficiaries, provided that the purpose is exclusively charitable. Trustees for charitable trusts may be given discretion to make a determination about whether or not an individual is one of the intended beneficiaries.¹⁷
- The court is prepared to write or rewrite a charitable purpose trust in certain limited circumstances by supplying a *cy-près* scheme (*i.e.* by making the charitable objects “as near as possible”) so that the charitable purpose intended by the donor can continue to be achieved.¹⁸
- The prohibition against remoteness of vesting, otherwise known as the “modern” rule against perpetuities, does not apply to charitable purpose trusts.¹⁹
- A charitable purpose trust is exempt from the prohibition against indestructible or perpetual trusts. This rule would otherwise prohibit the tying up of capital in trust where it is impossible to identify the absolute equitable owners for a period greater than the perpetuity period. This means that charitable property held by a charity can be held in perpetuity without violating any rule of law.²⁰

¹⁶ Bourgeois, *supra* note 6 at 352; Waters et al., *supra* note 6 at 665.

¹⁷ Bourgeois, *supra* note 6 at 39.

¹⁸ Waters et al., *supra* note 6 at 682.

¹⁹ See *Goodman v. Mayor of Saltash* (1882) 7 App. Cas. 633 at 642; *Halifax School for the Blind v. Kelley Estate* [1937] S.C.R. 196 at 204, [1937] 3 D.L.R. 9; *Pemsel*, *supra* note 5 at 580–81; and *Attorney-General v. National Provincial Bank* [1924] A.C. 262 at 266. For a further discussion of the rule against perpetuities, see Adam Parachin, “Charities and the Rule Against Perpetuities,” (2008) 21:3 *The Philanthropist* 256 at 256. This paper is also available online: *The Philanthropist* <https://thephilanthropist.ca/original-pdfs/Philanthropist-21-3-370.pdf>.

²⁰ *Ibid* Parachin at 271. *Ibid* *Halifax School for the Blind v. Chipman* in which the Supreme Court of Canada held that, unless the language establishing a trust states otherwise, and upon the fulfilment of certain requirements, a trust may retain capital in perpetuity and therefore last forever; and Ontario Law Reform Commission, *supra* note 8 at 413.

- The rule of law and statutory enactments relating to accumulations do not apply to charitable purpose trusts, at least not in Ontario.²¹
- Perhaps the best-known advantages accorded to charities are those that derive from taxing statutes. The *Income Tax Act*, for example, exempts the income of registered charities from tax and allows registered charities to issue tax receipts for donations, thus enabling the taxpayer to claim a tax credit for the money given if the taxpayer is an individual and a tax deduction if it is a corporation.²²

However, there are also some restrictions on the use of charitable purpose trusts. For example, a charitable purpose trust must be devoted exclusively to charitable purposes. If not, the trustee would have the discretion to use the funds for either charitable or non-charitable (i.e. invalid) purposes, and therefore the trust would be void. Courts have confirmed that the law governing charitable trusts prevents the same trust from having both charitable and non-charitable objects (i.e. mixed trusts), although courts may sever clauses with non-charitable objects in charitable trust documents.²³ Many cases that address whether a trust is devoted exclusively to charitable purposes focus on the wording of the trust, because the courts have interpreted terms such as “objects of liberality”,²⁴ “benevolent objects”²⁵ and “philanthropic purposes”²⁶ as not referring exclusively to charitable purposes. In every case, a court will search for the expressed intention of the creator of

²¹ *Accumulations Act*, R.S.O. 1990, c. A.5, s. 4 [“*Accumulations Act*”]. For more information on the changes caused by the *Good Government Act, 2009*, see Terrance S. Carter, “Bill 212 Brings Significant Reform to the Regulation of Charities in Ontario” in *Charity Law Bulletin* No. 181 (26 November 2009), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2009/chylb181.htm>>. See also Terrance S. Carter, “Good News - Bill 212 Receives Royal Assent” in *Charity Law Update* (December 2009), online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/09/dec09.pdf>> and Terrance S. Carter, “Breaches of Charitable Gifts Act ‘Cured’ by Good Government Act” in *Charity Law Update* (January 2010), online: Carters Professional Corporation <<http://www.carters.ca/pub/update/charity/10/jan10.pdf>>.

²² R.S.C. 1985, c. 1 (5th Supp.) at s. 118.1 and s. 110.1, as amended, which establishes the tax credit and the deductibility of donations by individuals and corporations to “registered charities”, which are defined in s. 149.1, s. 118.1 and s. 110.1, as amended, establishes the tax credit and the deductibility of donations by individuals and corporations to “registered charities”, which are defined in s. 248(1).

²³ See for example: *Re: Last Will and Testament of Gordon Butler*, 2007 NLTD 105, partially reversed in *Butler v. Butler Estate*, 2008 NLCA 39 with severance of non-charitable clause upheld.

²⁴ *Morice v. Bishop of Durham* (1804), 32 E.R. 656, 9 Ves. Jun. 399 (Eng. Ch. Div.) at p. 658 [E.R.].

²⁵ *Chichester Diocesan Fund & Board of Finance Inc. v. Simpsons*, [1944] A.C. 341, [1944] 2 All E.R. 60 (U.K. H.L.).

²⁶ *Brewer v. McCauley* (1954), [1954] S.C.R. 645, 1954 CarswellNB 36, [1955] 1 D.L.R. 415 (S.C.C.).

the trust. In this regard, drafters of charitable purpose trusts have a responsibility to ensure that the wording of the trust is sufficient to uphold the finding of a charitable purpose trust.²⁷

Furthermore, trusts for political purposes (even if otherwise for charitable purposes) are invalid. “Political purposes” does not mean only direct political party activity; it also includes the promotion of political ideas and any attempts to influence the legislative or executive process. Although some commentators have been critical of the political purposes doctrine, it remains alive and well in Canada.²⁸

Lastly, while the trust structure is not necessarily in itself expensive to establish or to operate, it may actually serve to increase the potential exposure of trustees in comparison to other legal structures. Although the duties of a trustee are similar in nature to the duties of a director of a not-for-profit corporation (especially a charitable not-for-profit corporation), the standard of care is higher for trustees, and in particular trustees of a charitable purpose trust, than it is for directors and officers of a corporation or even of an unincorporated association.²⁹ For this reason, it is important that lawyers and gift planners advising clients who wish to establish a restricted charitable purpose trust or who are managers of such trusts understand the obligations and duties imposed on the trustees by both the applicable statutory provisions and at common law.

C. WHAT ARE THE DIFFERENCES BETWEEN AN UNRESTRICTED AND A RESTRICTED CHARITABLE GIFT?

When drafting testamentary or *inter vivos* restricted charitable purpose trusts, it is important to understand the broader context of unrestricted charitable gifts as compared to restricted charitable gifts, of which restricted charitable purpose trusts are one type. The specific characteristics of restricted charitable purpose trusts are explained in the next section of this paper.

²⁷ Gillen and Woodman, *supra* note 5 at 271-276 for a more detailed discussion of the requirement of exclusive purposes.

²⁸ See for example, *Human Life International In Canada Inc. v. Minister of National Revenue*, (*sub nom.* Human Life International in Canada Inc. v. M.N.R.) [1998] 3 F.C. 202, 1998 CarswellNat 1646, 1998 CarswellNat 366, [1998] 3 C.T.C. 126, 98 D.T.C. 6196, 232 N.R. 174, (*sub nom.* Human Life International in Canada Inc. v. Canada (Minister of National Revenue)) [1998] F.C.J. No. 365 (Fed. C.A.), leave to appeal refused (1998), 236 N.R. 187 (note), (*sub nom.* Human Life International in Canada Inc. v. Canada (Minister of National Revenue)) [1998] S.C.C.A. No. 246 (S.C.C.).

²⁹ Bourgeois, *supra* note 6 at 48.

1. Unrestricted Charitable Gifts

An unrestricted charitable gift is a gift at law to be applied towards a charitable purpose (whether the charitable purpose is in the form of a charitable purpose trust, a charitable corporation, or a charitable unincorporated association) that is not subject to any restrictions imposed either directly or indirectly by the donor, other than the legal requirement that the gift be used for the charitable purpose of the recipient charity in question. As a result, the board of a charity is at liberty to apply an unrestricted gift to its charitable purposes as stated in its constating documents without restrictions, limitations, conditions, terms of reference, directions, or other restricting factors imposed by the donor that would fetter or limit the discretion of the board in applying the gift in whatever manner it deemed to be most appropriate to achieve its charitable purpose.

This means that, provided that the board of a charity does not exceed its charitable purposes, whether through the breach of a fiduciary duty with regard to the general trustee-like obligations in dealing with its charitable property or embarking on *ultra vires* activities that are beyond the objects of the corporation, the charity may use the gift as it wishes in its absolute discretion. This may involve disbursing all or a portion of the gift, or investing the gift over the short-term and using the income to pursue any one of the authorized charitable purposes within the constating documents of the charity. In addition, if the board of a charity decides to designate unrestricted charitable gifts for a specific charitable purpose, there is nothing to stop the board from subsequently un-designating the funds and applying the funds to another charitable purpose within its charitable objects.

Unrestricted charitable gifts form a broader category of gifts than do restricted charitable gifts, since unrestricted charitable gifts include all sources of monies gifted to a charity that are not subject to donor restrictions. The following are some examples of unrestricted charitable gifts:

- General donor solicitation appeals, such as “Please support your local YMCA”;
- Gifts from donors, either while the donor is alive or through a testamentary instrument, that are directed to be used “for the general purposes of the charity,” or alternatively where there is a gift to a charity and there are no references to restrictions, conditions, limitations or restrictions attached to the gift at all; or

- Board-designated funds consisting of unrestricted charitable gifts that have been designated by the board for a particular purpose or held as a board initiated endowment fund.

With all of the above funds, and in particular in relation to board-designated funds, it is open to the board of the charity to vary, change, or terminate the restrictions or purposes for which those funds have been applied in any manner that the board thinks is best to achieve the charitable purposes of the charity without the board being in breach of trust.

2. Restricted Charitable Gifts

For purposes of comparing restricted and unrestricted charitable gifts, a restricted charitable gift generally means a gift at law to a charitable purpose that is subject to restrictions, limitations, conditions, terms of reference, directions, or other restricting factors.³⁰ These limitations are imposed by the donor and serve to constrain or limit a charity concerning how the gift can be used.

While unrestricted charitable gifts are beneficially owned by a charity for its general charitable purposes, restricted charitable gifts, when structured as a restricted charitable purpose trust as opposed to other forms discussed below, are held by the charity in trust for the purposes specified by the donor and are not actually owned beneficially by the charity. In that situation, the charity is, in fact, holding the gifted property subject to a specific charitable purpose trust within the confines of its own general charitable purpose (in essence a charity within a charity). Although for trust law purposes each restricted charitable purpose trust is a separate trust, as long as the trustee is already a registered charity, a restricted charitable purpose trust is not required to be registered by the Canada Revenue Agency (“CRA”) as a separate registered charity.³¹

³⁰ See also *Black’s Law Dictionary*, 8th ed., s.v. “restrict” and “restriction”, which is defined as “To restrain within bounds; to limit; to confine.”

³¹ Canada Revenue Agency, *Charities Glossary*, definition of “Restricted Funds.” Available online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/glssry-eng.html>. “By inference, it can be understood that the CRA does not see that there is any prohibition in the Income Tax Act precluding a charity from having such a restricted fund and consequently does not require a charity to register such a fund as a separate registered charity” (Susan Mott, Manager, Policy, Planning & Legislation, Charities Directorate. Email correspondence of April 9, 2013. Cited with Permission). For an explanation regarding how this applies to restricted charitable purpose trusts, see Terrance S. Carter, “Donor-Restricted Charitable Gifts: A Practical Overview Revisited II” (presented for the Canadian

The board of a charity that receives a restricted charitable gift needs to be careful to identify the nature of the donor restriction and to recognize the legal consequences of the specific type of restriction that has been imposed by the donor, as well as the importance of complying with the restrictions in question. Sometimes lawyers and gift planners advising charitable clients may not identify or adequately understand the nature of the donor restriction that has been imposed. This, in turn, can expose charities and their boards of directors to unnecessary and potentially serious liability.

D. WHAT ARE THE DIFFERENT TYPES OF RESTRICTED CHARITABLE GIFTS?

Before drafting a testamentary or *inter vivos* restricted charitable purpose trust, it is important to understand the different types of restrictions that can be imposed. In this regard, it is also important to understand that not all restrictions associated with charitable gifts necessarily involve a restricted charitable purpose trust. For instance, a gift subject to a condition subsequent (i.e. “I give \$100,000 to Hospital A on the condition that Hospital A commences construction of a cancer wing prior to January 1, 2017”) will involve the imposition of a restricted gift by the donor but the restriction in the form of a condition precedent will not constitute a restricted charitable purpose trust. As such, it is necessary to understand the differences between a restricted charitable purpose trust, in its various forms, compared to other types of restricted charitable gifts in order to better understand what can be imposed as restrictions on a restricted charitable purpose trust and what cannot be. In this regard, this section of the paper will discuss the restrictions that apply to restricted charitable purpose trusts by utilizing the term “special purpose charitable trusts,” which is the specific terminology that the courts normally use when referring to a restricted charitable purpose trust. In the next section of the paper, an explanation is provided concerning other types of restricted charitable gifts for comparison purposes, including donor-advised funds, precatory trusts, conditional gifts, determinable gifts and gifts to charities in Ontario subject to direction under the *Charities Accounting Act* (Ontario) (“CAA”)³² and the *Charitable Purposes Preservation Act* (British Columbia) (“CPPA”).³³

Association of Gift Planners at the *2006 Annual National Conference*, 2006), online: <http://www.carters.ca/pub/article/charity/2006/tsc0421.pdf> at 12.

³² R.S.O. 1990, c. C.10 [“CAA”].

³³ *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59 [“CPPA”].

1. Special Purpose Charitable Trusts

In general terms, when the courts refer to a special purpose charitable trust, they are referring to a gift held by a charity in trust for a specific charitable purpose that falls within the parameters of the general charitable purpose of the charity as set out in its constating documents. The board of a charitable corporation would be acting outside of its authority (whether it be *ultra vires* where the doctrine still applies or simply a breach of fiduciary duties where it does not apply) if it were to authorize the corporation to hold property as a special purpose charitable trust where such purpose was outside the scope of the charity's corporate objects.

To the extent that a gift constitutes a special purpose charitable trust, the charity can only use the gift to accomplish the specific charitable purpose established by the donor and for no other purpose. The Supreme Court of Canada has confirmed this common law principle: “[t]he residue of the estate of the testatrix is given on a valid charitable trust. It is clear that it can never be used for any purpose other than the charitable one to which it is devoted”.³⁴

Special purpose charitable trusts are also commonly referred to as “donor-restricted trust funds”, “charitable trust property”, “charitable purpose trusts”, “restricted charitable purpose trusts”, “restricted funds”, “special purpose funds” and sometimes as “endowment funds.” As indicated above, the general terminology that will be used in this section of the paper is “special purpose charitable trusts.” Both traditionally and in practice, a special purpose charitable trust is considered to have been established when the donor has expressed an intention that the property being given to the charity is to be held for a specific charitable purpose, such as when money has been raised for an endowment program or through a public fundraising appeal for a specific project. However, there are conflicting approaches concerning what type of evidence will be required to establish that the donor had the necessary intent to, in fact, create a special purpose charitable trust. In

³⁴ *Towle Estate v. Minister of National Revenue* (1966), 1966 CarswellNat 317, [1967] S.C.R. 133, [1966] C.T.C. 755, (*sub nom.* Guaranty Trust Co. v. Minister of National Revenue) 60 D.L.R. (2d) 481, 67 D.T.C. 5003, [1966] S.C.J. No. 66 (S.C.C.) at para. 6.

Christian Brothers of Ireland in Canada, Re,³⁵ Blair J. held that there is a higher, more formal standard that is required, whereas in *Rowland v. Vancouver College Ltd.*,³⁶ Levine J. determined that the applicable requirements are less formal and can involve consideration of all relevant circumstances involved in making the gift.

Blair J. stated that before there can be a “true” special purpose charitable trust, the trust must first be established with the general formal requirements of trust law: certainty of intention, certainty of subject matter, and certainty of objects. In addition to requiring all the formalities of trust law, Blair J. confirmed that all gifts received by a charity are presumed to have been received by it beneficially for its general charitable purposes, unless there is evidence that gives rise to the creation of a special purpose charitable trust (meaning where it was created in accordance with the above-noted formalities). Blair J. describes gifts where donors have not formally expressed an intention sufficient to create a special purpose charitable trust to be “precatory trusts”.

However, the approach taken by Levine J. ignores the formalities required by Blair J., and instead adopts a more traditional approach concerning what is required to create a special purpose charitable trust. Levine J. states that the required intention to create a charitable purpose trust is not dependent upon the utilization of technical words, such as “in trust”. Rather, it requires that the court look at all of the relevant circumstances to determine the real intention of the donor. Levine cites *Waters’ Law of Trusts in Canada* with approval, which states that “there is no need for any technical words or expressions for the creation of a trust”.³⁷

³⁵ *Christian Brothers of Ireland in Canada, Re*, 37 O.R. (3d) 367, 1998 CarswellOnt 815, 38 B.L.R. (2d) 286, 21 E.T.R. (2d) 93 (Ont. Gen. Div. [Commercial List]) [*Christian Brothers Gen. Div.*], reversed in part 47 O.R. (3d) 674, 2000 CarswellOnt 1143, 6 B.L.R. (3d) 151, 17 C.B.R. (4th) 168, 184 D.L.R. (4th) 445, 33 E.T.R. (2d) 32, 132 O.A.C. 271, [2000] O.J. No. 1117 (Ont. C.A.), leave to appeal refused 2000 CarswellOnt 4333, 2000 CarswellOnt 4334, 265 N.R. 200 (note), 146 O.A.C. 200 (note), [2000] S.C.C.A. No. 277 (S.C.C.), reconsideration / rehearing refused 2002 CarswellOnt 1770, 2002 CarswellOnt 1771 (S.C.C.) [*Christian Brothers Ont. C.A.*]; followed by *Évêque Catholique Romain de Bathurst v New Brunswick (Attorney General)*, 2010 NBQB 400.

³⁶ *Rowland v. Vancouver College Ltd.*, 78 B.C.L.R. (3d) 87, 2000 BCSC 1221, 2000 CarswellBC 1667, 34 E.T.R. (2d) 60, [2000] 8 W.W.R. 85 (B.C. S.C.) [*Christian Brothers B.C.S.C.*], affirmed 94 B.C.L.R. (3d) 249, 2001 BCCA 527, 2001 CarswellBC 2243, 205 D.L.R. (4th) 193, 41 E.T.R. (2d) 77, [2001] 11 W.W.R. 416, (*sub nom.* Rowland v. Christian Brothers of Ireland in Canada (Liquidation)) 159 B.C.A.C. 177, 259 W.A.C. 177, [2001] B.C.J. No. 1901 (B.C. C.A.), leave to appeal refused, 2002 CarswellBC 1207, 2002 CarswellBC 1208, (*sub nom.* Rowland v. Christian Brothers of Ireland in Canada (Liquidation)) 179 B.C.A.C. 320 (note), 300 N.R. 196 (note), 295 W.A.C. 320 (note) (S.C.C.) [*Christian Brothers B.C.C.A.*]; cited by *Dusanjh v. Appleton*, 2017 BCSC 340.

³⁷ Waters et al., *supra* note 6 at 141.

The dichotomy between the approaches of Blair J. and Levine J. remains unresolved. Until further judicial guidance is available on this matter, it would be prudent for legal counsel to be careful in ensuring that the formalities required for the creation of a special purpose charitable trust are carefully articulated in the document creating a restricted gift, whether it be through an *inter vivos* gift agreement or by means of a testamentary gift. Specifically, it would be important to clearly categorize the gift as being a special purpose charitable trust by naming the charity as the trustee, describing the property that constitutes the gift to be held in trust by using the words “in trust”, and explaining the specific charitable purpose for which the property is to be used. Failure to do so by lawyers who are instructed to establish a restricted gift might become the basis of criticism or even a claim in negligence for not ensuring that the intent of the donor had been adequately expressed to create a binding special purpose charitable trust capable of effectively restricting the charity in the future.

Determining whether a charitable purpose trust has application to a charitable corporation is a highly confused and unsatisfactory area of the law.³⁸ The main aspect of this question is whether a charitable corporation holds its assets “in trust” for its charitable purposes. The difficulty is that the case law has been divergent on this issue.³⁹ As well, this issue has been further confused in Ontario as a result of section 1(2) of the *Charities Accounting Act*,⁴⁰ which states that a charitable corporation is a trustee of its property for purposes of that Act.

American legal authorities have commented upon this grey area of the law as follows:⁴¹

The truth is that it cannot be stated dogmatically that a charitable corporation neither is or is not a trustee. The question is in each case whether a rule that is applicable to trustees is applicable to charitable corporations with respect to unrestricted or restricted property. Ordinarily, the rules that are applicable to charitable trusts are applicable to

³⁸ For a thorough discussion concerning the interrelationship between charitable purpose trusts and charitable corporations, see Cullity J., “The Charitable Corporation: A ‘Bastard’ Legal Form Revisited”, attachment to 17 *Philanthrop*. No 3.

³⁹ For a discussion of the divergent case law on this topic, see Ontario Law Reform Commission, *supra* note 8 at 456–460. See also *Christian Brothers Gen. Div.*, *supra* note 35; *Christian Brothers Ont. C.A.*, *supra* note 35; *Christian Brothers B.C.S.C.*, *supra* note 36; *Christian Brothers B.C.C.A.*, *supra* note 36.

⁴⁰ CAA, *supra* note 32.

⁴¹ A.W. Scott, *The Law of Trusts*, 4th ed. By W.F. Fratcher, vol. 4A (Boston: Little, Brown & Company, 1989), para. 348.1 at 23–25.

charitable corporations, as we have seen, although some are not...

Generally speaking, the attributes of a charitable purpose trust will have application to a charitable corporation when the corporation holds property in accordance with a special purpose charitable trust. The same attributes will also apply, but in a different sense, with regard to unrestricted charitable property of a charitable corporation.

From the *Christian Brothers* decisions, it is clear that a charitable corporation does not hold its unrestricted assets “in trust” for its charitable purposes. Instead, it owns such assets beneficially to be used in accordance with its corporate objects. This was noted by Blair J. in *Christian Brothers Gen. Div.* as follows:

A charitable corporation does not hold its assets “as trustee” for charitable purposes... It holds its assets beneficially, like any other corporation. As a matter of corporate law, of course, it must use those assets in a manner consistent with its corporate objects, and its directors have fiduciary obligations to ensure that such is the case. Where its corporate objects and its charitable purposes coincide – as they do in this case – it must use its assets in a manner consistent with those charitable purposes. Nevertheless, this does not mean that it holds all of its assets in some kind of trust capacity.⁴²

...

In the end, while it may be said that for some purposes a charitable corporation is in a position analogous to that of a trustee with respect to the use and disposition of its property – at least with respect to the court’s power to exercise its “ancient supervisory equitable jurisdiction” over it – the weight of authority supports the conclusion that its assets are not held by it “as trustee” for its charitable objects, but are owned beneficially to be used by the corporation in a fashion consistent with its objects.⁴³

⁴² *Christian Brothers Gen. Div.*, *supra* note 35 at 390–91.

⁴³ *Ibid* at 392.

This position was confirmed by the Ontario Court of Appeal in *Christian Brothers Ont. C.A.*⁴⁴ The British Columbia Supreme Court also came to the same conclusion involving the assets of the Christian Brothers located in that province.⁴⁵ As such, it is now generally accepted that unrestricted property of a charitable corporation is not to be construed as trust property held by a charitable corporation for its charitable purposes.

In a practical context, this means that a charity may use an unrestricted gift to the full extent of its charitable objects based upon its corporate authority as a legal entity without having to interpose a charitable purpose trust to establish either the legal authority or the parameters within which the gift can be used. Since the nature of a charitable corporation as a separate legal entity both empowers the charity to carry out its charitable purposes and also allows it to protect the charitable purposes by virtue of the doctrine of *ultra vires* (i.e., that the corporation cannot operate outside of its corporate objects), it would serve no useful purpose at law to require that a charitable corporation hold its property in trust for its general charitable purposes. A charitable corporation, both according to corporate law, as well as in accordance with the equitable jurisdiction of the courts over charitable property, is obligated to ensure that an unrestricted gift to the charity is only used within the parameters of the corporate objects of the charity.⁴⁶

A charitable unincorporated association, on the other hand, has on its face more in common with a charitable purpose trust, although they are not exactly the same. Since a charitable unincorporated association is not a separate legal entity, its property, by necessity, must be held in trust by trustees. However, the fact that property is held by the trustees of an unincorporated charitable Association is due to its inability to own property itself, rather than because an unincorporated association is holding its unrestricted property in trust for its charitable purposes. Having said that, the property that is held in trust for an unincorporated charitable association, is, by virtue of the trust relationship, a charitable purpose trust. It is interesting, therefore, that a charity organized as a charitable unincorporated association would generally have its property held as a charitable

⁴⁴ *Christian Brothers Ont. C.A.*, *supra* note 35 at 701–702.

⁴⁵ *Christian Brothers B.C.S.C.*, *supra* note 36 at 110 and 153–154. While the B.C. Court of Appeal in *Christian Brothers B.C.C.A.*, *supra* note 36, reviewed with approval the trial judge’s reasoning with regard to the existence of special purpose charitable trusts in the context of ownership of property by charitable associations and by implication by charitable corporations, it did not address the specific question of a charitable corporation’s ownership of its general charitable funds.

⁴⁶ *Christian Brothers Gen. Div.*, *supra* note 35 at 392, concurred with in *Christian Brothers Ont. C.A.*, *supra* note 35 at 702.

purpose trust but if it becomes incorporated, it no longer does. This is an interesting dichotomy that does not yet appear to have been addressed by the courts.

With regard to a charitable corporation, even though the corporation can own its general property without the imposition of a trust, once a donor imposes restrictions on a gift whereby the charity is unable to use the gift for the full range of its charitable objects, then the gift will be held as a separate special purpose charitable trust with all aspects of a charitable purpose trust having application to the donor-restricted gift. It in essence becomes a charity within a charity.

To the extent that special purpose charitable trusts and other types of donor restricted charitable gifts are dealt with in a similar manner by a charity no matter how the charity is organized, whether it be in the form of a charitable corporation, an unincorporated charitable association, or a charitable purpose trust, references in the balance of this section to “charity” are intended to include all legal forms through which charities operate. In this regard, *Waters* makes the following observations:

As Snell⁴⁷ points out, “the question, strictly speaking, is not whether a ‘charity’ exists, but whether the trusts in which property is held are trusts for charitable purpose”. To which might be added, “or whether the objects of a corporation are charitable.”⁴⁸

The following is a description of different types of special purpose charitable trusts.

a) Long-Term Gifts, Including Endowments

One type of restriction applicable to a special purpose charitable trust is a restriction involving the length of time that a gift is held, generally in the context of creating some type of long-term gift. In this regard, a long-term gift to a charity is a gift where the capital is held in trust, in whole or in part for a period of time, where the income and eventually the capital is used either for a specific application, like a scholarship, or for the general charitable purposes of the charity. Some long-term gifts are directed to be held in perpetuity as endowments, while others are to be held for a fixed number of years. Long-term gifts can be subject to a possible right of encroachment by the charity on the capital during the hold period if the donor has built that right within the wording of

⁴⁷ Snell, *Principles of Equity*, 28th ed. (1982) at 145.

⁴⁸ Waters et al., *supra* note 6 at 503.

the gift agreement. Once the hold period has expired (except where the donor directs that the gift be held in perpetuity with no right of encroachment), the entire gift can be disbursed by the charity.⁴⁹

An endowment is the extreme form of a long-term gift. It is generally considered to be a special purpose charitable trust through which the donor requires that the capital of the gift be held in perpetuity. Since one of the advantages of a charitable purpose trust is the exemption from the rule against indestructible or perpetual trusts, a charity is able to accept gifts where the capital is held in trust on a perpetual basis. This method of charitable funding is not available to a non-profit organization under subsection 149.1(1) of the *Income Tax Act*,⁵⁰ since a non-profit organization does not constitute a charitable purpose trust at law.

The capital of a long-term gift, including an endowment fund, is normally invested in accordance with either the investment terms contained in the document creating the gift or in accordance with the investment powers of the charity as set out in its constating documents or in an investment policy that has been adopted by the charity. Whether or not a portion of the income that is earned from an investment will be capitalized and reinvested will depend upon either the terms in the gift agreement or the investment policy established by the board of the charity in accordance with its corporate investment powers. Unless the terms of the long-term gift require that all of the earned income is to be disbursed, it is normal for the board to provide that a portion of the income is to be reinvested so that the capital of the long-term fund, particularly with an endowment, will at least keep up with inflation and will preferably increase on a net basis over the years.

How the income earned on a long-term gift is applied depends upon whether the donor has expressed a specific direction concerning disbursement of income in the gift agreement or, alternatively, whether the board has established terms of reference concerning how income from a long-term gift is to be applied. In either scenario, the board must ensure that the income is applied only towards the charitable purposes of the charity. To the extent that the donor has not established restrictions concerning how the income from the long-term fund is to be used, the board of a charity

⁴⁹ Robert Hayhoe, "A Sketch of the Income Tax Treatment of Endowments," (2010) 23: 1 *Philanthropist* 85.

⁵⁰ *Supra* note 22.

will be at liberty to apply the income to any of its charitable purposes as determined by the board from time to time.

There are three ways in which long-term funds, including endowments, can be created: by the board, by the donor, or by a combination of the two. These three methods also apply to other types of special purpose charitable trusts described later in this section of the paper. When the long-term fund is initiated by the donor, it will normally involve the donor leaving money through a testamentary gift or, alternatively, creating a long-term fund by means of an *inter vivos* gift agreement. If a long-term gift agreement is utilized, whether it be one supplied by the charity or one drafted by the donor's legal counsel, issues such as investment and management of the long-term fund, the name of the long-term fund, as well as disbursement of the income from the long-term fund will normally be addressed.

Alternatively, when the board of a charity takes steps to create a long-term fund itself, it usually advises potential donors that a long-term fund, including an endowment fund, has been established by the charity and invites donors to contribute to it. Another example of a board-created long-term fund is where the board sets aside unrestricted funds and directs that they be applied to a specific purpose. The board will establish the terms of reference for the long-term fund, including how the income will be disbursed and how the fund will be invested. It will also normally have a descriptive name associated with such fund, such as "The Scholarship Fund", or "Research Fund", so that prospective donors can identify it when making a contribution.

In the third type of long-term fund, the board invites donors to establish individual long-term funds with the charity. This allows the donor (within the parameters of the charitable purposes of the charity and subject to the approval of the charity) to structure the long-term fund, including a perpetual fund, on a more customized basis. This type of long-term gift is often encountered with community foundations and may involve the donor being able to name the long-term fund and permit family members and friends to make additional contributions of capital from time to time.

To the extent that the board of a charity contributes any of its unrestricted charitable funds to a long-term fund of its own creation and reserves the right to re-designate these funds to a different application at a later time, such a contribution would constitute a commingling of restricted trust

funds and unrestricted funds and would be prohibited at common law.⁵¹ In a similar vein, any monies that are contributed by donors to either a board-initiated long-term fund or a fund that is initiated by the donor in accordance with the formal requirements of a special purpose charitable trust cannot be applied to a different purpose at the direction of either the board or the donor without court approval unless the terms of the gift agreement or the terms of the board-initiated fund provide the charity with the ability to vary the terms of the long-term gift.

When considering drafting a long-term gift, it is important to be aware that until recently in Ontario, the income of a gift was subject to the ordinary rules that precluded accumulations for longer than 21 years.⁵² The rule against accumulations provides that no disposition of property may direct the accumulation of income deriving from that property for any period of time longer than the permissible accumulations period. The *Accumulations Act* provides for six possible accumulation periods,⁵³ and if the terms of the trust provided for the accumulation of income beyond one of those six periods, the charity was forced to distribute the income in a prescribed manner.⁵⁴ This was a concern for charities holding property in trust on a long-term basis on terms that allowed for the capitalization of income to be derived from property.

However, the passage of the *Good Government Act, 2009*,⁵⁵ has amended Ontario's *Accumulations Act* so that "[t]he rules of law and statutory enactments relating to accumulations do not apply and shall be deemed never to have applied to trusts created for a charitable purpose, as defined in section 7 of the *Charities Accounting Act*".⁵⁶ This is a welcome relief for charities operating in Ontario, as they no longer have to be concerned with drafting restricted charitable purpose trusts in a way that avoids the application of the *Accumulations Act*.⁵⁷

⁵¹ *Charities Accounting Act*, *supra* note 12.

⁵² *Accumulations Act*, *supra* note 21.

⁵³ *Ibid* at s. 1(1).

⁵⁴ *Ibid* at s. 1(6).

⁵⁵ *Good Government Act, 2009*, S.O. 2009, c. 33.

⁵⁶ *Ibid*, at Schedule 2, section 1.

⁵⁷ For more information on the changes brought by the *Good Government Act, 2009*, see Carter, *supra* note 21.

b) Restricted-Use Gifts⁵⁸

Unlike long-term funds, restricted-use funds do not require that the capital of a gift be held in trust for a specific period of time, although a time restriction can apply as well. Instead, the capital, as well as income, will be applied in accordance with applicable charitable purpose restrictions, either immediately or over a relatively short period of time (such as with a building fund), so that the restrictions will eventually be fulfilled, thereby bringing the special purpose charitable trust fund to an end.

Common use restrictions imposed by donors in this regard include restrictions concerning how a gift will be applied to further a particular capital use, such as a building program, or an operational use, such as a relief effort in a foreign country. In either situation, it is essential that the use restrictions established be within the parameters of the charitable purpose set out in the charity's constituting documents. If this is not the case, then the board of the charity will be in breach of trust and will be liable for having authorized an *ultra vires* activity outside of the corporate authority of the charity, if it is a charitable corporation and if the doctrine of *ultra vires* still applies. A use restriction can be combined with a time restriction, such as a long-term gift as described above (including an endowment). An example of a combination would be a scholarship fund for music students to be held for at least 20 years.

Donors may also establish use restrictions concerning the manner in which the charitable objects of a charity are to be carried out. For instance, donors may establish restrictions that do not limit what the charity can do, but, rather, who is entitled to benefit from its activities. In such a situation, it is important that the board ensure that the restrictions are not void as being repugnant or contrary to public policy, such as restrictions that are discriminatory. The general law is that any restrictions that are discriminatory will be void unless they discriminate in favour of historically disadvantaged groups (such as women or people of colour, for instance). For example, in the case of *Canada*

⁵⁸ It is important to note Canada Revenue Agency, Summary Policy CSP-G05“Directed” [03 September 2003] which states: “A registered charity cannot issue an official donation receipt if a donor has directed the charity to give the funds to a specified person or family. In reality, such a gift is made to the person or family and not to the charity. However, donations subject to a general direction from a donor that the gift be used in a particular program operated by a charity are acceptable, provided that no benefit accrues to the donor, the directed gift does not benefit any person not dealing at arms' length with the donor, and decisions regarding utilization of the donation within a program rest with the charity.”

Trust Co. v. Ontario (Human Rights Commission),⁵⁹ a trust was premised on notions of racism and religious superiority that contravened public policy. Robins J.A. stated that public policy “should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds”.⁶⁰ As well, Robins J.A. noted that:

[t]o perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.⁶¹

This was recently affirmed in *Royal Trust Corporation of Canada v The University of Western Ontario et al*,⁶² when the Ontario Superior Court of Justice determined that a discriminatory charitable trust failed as being contrary to public policy. The discriminatory provisions of the will provided a fund for “awards or bursaries” to be awarded to “Caucasian (white) male, single, heterosexual students in scientific studies.” A separate award was to be made to “a hard-working, single, Caucasian white girl who is not a feminist or a lesbian, with special consideration, if she is an immigrant, but not necessarily a recent one.” When posed the question “Is there a general charitable intention expressed in the Will sufficient to permit the court to exercise its inherent jurisdiction in the matter of charitable trusts and direct that the trust be administered *cy-près*?”, the Court answered no. The Court held that the qualifications in the will were void as contrary to public policy since the provisions were discriminatory on the basis of race, gender, marital status and sexual orientation.

⁵⁹ *Canada Trust Co. v. Ontario (Human Rights Commission)*, 74 O.R. (2d) 481, 1990 CarswellOnt 486, 69 D.L.R. (4th) 321, 38 E.T.R. 1, 12 C.H.R.R. D/184, (*sub nom.* Leonard Foundation Trust, Re) 37 O.A.C. 191 (Ont. C.A.). For an example dealing with Registered Canadian Amateur Athletic Associations, see *Maccabi Canada v. Minister of National Revenue*, 1998 CarswellNat 1078, 1998 CarswellNat 3995, [1998] 4 C.T.C. 21, 98 D.T.C. 6526, 229 N.R. 227, (*sub nom.* Maccabi Canada v. Canada (Minister of National Revenue)) [1998] F.C.J. No. 896 (Fed. C.A.).

⁶⁰ *Ibid* at para 34.

⁶¹ *Ibid* at para 38.

⁶² 2016 ONSC 1143

The courts, however, have found that certain types of restrictions that prefer one class of persons are not void. For example, one case addressed gifted property that was to be used to provide bursaries to Catholic students. The Court held that the discriminatory language was “relatively innocuous” and was not offensive to the degree necessary to warrant undermining the testator’s right to testamentary freedom.⁶³

Similarly, a case in Manitoba, *Esther G. Castanera Scholarship Fund, Re*,⁶⁴ addressed a portion of an estate that had been bequeathed to the University of Manitoba to benefit “needy and qualified women graduates of the Steinbach Collegiate Institute”. The University had adopted an anti-discrimination policy with regard to scholarships and bursaries, and applied to the Court of Queen’s Bench of Manitoba (the “court”) to have the trust varied to include both men and women. This was despite the fact that the Faculty of Science recommended the University make an exception to the anti-discrimination policy on the basis that women were consistently underrepresented in the field of science. However, the court denied the University’s request, stating “where a gift can be articulated as promoting a cause or belief with specific reference to a past inequality, there is nothing discriminatory about such a gift.”⁶⁵ Therefore, while discrimination is prohibited under the Manitoba Human Rights Code, an affirmative action exception allowed a women-only trust because it improved the conditions of a disadvantaged group similarly identified under the Human Rights Code.

Donations and testamentary bequests made to organizations whose purposes are illegal in Canada may be held by courts to have been made contrary to public policy, even if the bequest is not made for a specific purpose. This was the case in *McCorkill v Streed*,⁶⁶ (“*McCorkill*”) where a testamentary bequest was held to be void for public policy reasons. In *McCorkill*, the testator died in 2004, leaving all of his property to the National Alliance (“NA”), a US-based neo-Nazi group. In 2013, the testator’s sister filed an application to render the NA bequest void.

⁶³ *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 BCSC 445, 2000 CarswellBC 529, 73 B.C.L.R. (3d) 375, (*sub nom.* University of Victoria v. British Columbia (Ministry of the Attorney General)) 185 D.L.R. (4th) 182, 32 E.T.R. (2d) 298, (*sub nom.* University of Victoria v. British Columbia (Attorney General)) 37 C.H.R.R. D/200, [2000] B.C.J. No. 520 (B.C. S.C. [In Chambers]).

⁶⁴ 2015 MBQB 28 (Man. Q.B.).

⁶⁵ *Ibid* at para 44.

⁶⁶ *Canadian Assn. for Free Expression v. McCorkill Estate*, 2015 NBCA 50 (N.B. C.A.), affirming *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (N.B. Q.B.).

The court concluded the NA's publications "can only be described as racist, white supremacist and hate-inspired" and were "disgusting, repugnant, and revolting." As such, they could not be saved under section 1 of the *Canadian Charter of Rights and Freedoms* ("Charter"), which puts reasonable limits on freedom of speech under section 2(b). NA's publications were also held to be of the type of publications targeted under section 319(2) of the *Criminal Code*,⁶⁷ which criminalizes public incitement of hatred.

Although the respondents argued that there was no evidence that the gift contained any connotation of violence, the court found that NA's purposes were so foundational to the organization that the fact the testator left his entire estate to NA meant that his intentions were for the gift to be used for illegal purposes. In this regard, the court quoted Lord Chief Baron in *Egerton v Brownlow*:⁶⁸

"When, by a condition, he [the testator] attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void."

As with long-term funds, restricted-use funds can be established at the initiation of the donor, either through an *inter vivos* or testamentary gift that includes a time or a use restriction, or both. Alternatively, the board of a charity can take the initiative in establishing a restricted-use fund by inviting donations from supporters or from the public for a specific purpose. Provided that the wording used to establish the restricted fund meets the formal requirements of a trust, the monies received will generally constitute a restricted charitable purpose trust to be used in furthering a designated charitable purpose, such as a building program for a new church or a new wing for a hospital.

For the charity, restrictions on how gifted property can be used raise a number of issues that should be carefully considered before the charity accepts the gift. One issue is whether the restricted gift is exclusively charitable. If the restriction requires that the gifted property can be used in a manner that is not exclusively charitable, then the trust is invalid and the gift fails. Determining whether or not particular restrictions on the use of gifted property are exclusively charitable is not always easy, as there is no precise legal definition of what is charitable. Instead, the gifted property must

⁶⁷ RSC, 1985, c C-46.

⁶⁸ (1853) 10 E.R. 359, 4 H.L.C. 1 (U.K.H.L.).

be able to be used in a manner that falls within one of the four general heads of charity, as discussed earlier in this paper.⁶⁹

In addition to falling within one of the four heads of charity, the particular use of gifted property must be for the public benefit, meaning that it must benefit the public at large or a significantly large section of the public.⁷⁰ Over the years, there have been many cases that have considered whether a particular restricted purpose falls within one of the four heads of charity and whether it is for the public benefit.⁷¹ The results of those cases often turn on subtle distinctions in the wording of the restriction. One example that illustrates the significance of subtle distinctions in wording is the *Diplock v. Wintle* case,⁷² in which the court determined that while a trust for “charitable and benevolent” purposes is charitable, a trust for “charitable or benevolent” [emphasis added] purposes is not. Accordingly, if the charity does not have an opportunity to provide input into the drafting of the restriction, it should ask legal counsel to confirm that the gift is exclusively charitable prior to accepting the gift.

Even if the gift is exclusively charitable at law, the charity must not accept a restriction on the use of the gifted property that is not within the objects of the charity. If the charity accepts a restricted gift that requires the charity to use the gifted property in a manner that is not contemplated by the charity’s objects, the directors or trustees of the charity can be personally liable for the actions of the charity in doing so.

Even if there are no legal impediments to accepting a restricted use gift, there may be practical reasons why the charity may want to decline the gift. A charity may not have the capacity to comply with restrictions that are incompatible with its mission. Alternatively, the administrative requirements of a restricted gift may consume an inordinate amount of the charity’s resources. In

⁶⁹ There are 4 general heads of charity recognized by the courts: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community. For a more detailed discussion, see *Pemsel*, and *Vancouver Society*, *supra* note 5.

⁷⁰ For information on meeting the “public benefit” test, see Canada Revenue Agency, “Policy Statement CPS-024: Guidelines for Registering a Charity: Meeting the Public Benefit Test” (10 March 2006), online: Canada Revenue Agency < <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html> >.

⁷¹ See for example, *Vancouver Regional FreeNet Assn. v. Minister of National Revenue*, [1996] 3 F.C. 880, 1996 CarswellNat 1463, 1996 CarswellNat 2597, [1996] 3 C.T.C. 102, 137 D.L.R. (4th) 206, 96 D.T.C. 6440, 199 N.R. 223, (*sub nom.* Vancouver Regional FreeNet Assn. v. Canada (Minister of National Revenue)) [1996] F.C.J. No. 914 (Fed. C.A.).

⁷² *Diplock v. Wintle* (1950), (*sub nom.* Ministry of Health v. Simpson) [1951] A.C. 251, [1950] 2 All E.R. 1137 (U.K. H.L.), affirming [1948] 1 Ch. 465, (*sub nom.* Diplock, Re) [1948] 2 All E.R. 318 (Eng. C.A.).

such circumstances, the charity would best serve its charitable objects by declining the gift. In this regard, it would be prudent for charities to adopt a policy that all restricted gifts need to be approved by the directors or trustees of the charity or by senior management where the board has delegated that authority. Charities should also avoid simplistic targets or quotas that encourage development staff to accept restricted gifts that are not in the best interests of the recipient charities.

c) Restricted Charitable Trust Property

Restricted charitable trust property is a term used to describe real estate that is gifted subject to certain terms of trust, usually contained in the deed to the property. Religious charities often receive or acquire property through deeds that set out specific terms of trust that may continue in perpetuity, even if the land and buildings are sold, by impressing the sale proceeds with the same terms of trust. As a result, it is essential that the board of a charity, particularly a religious charity, determine whether or not any of its real property, either now or in the past, is subject to restricted charitable purpose trusts and, if so, to ensure that the property either was, or is, currently being used in accordance with the applicable restrictions.

Generally, restrictions normally found in deeds containing restricted charitable purpose trusts tend to be of a religious nature and fall into one of three categories:

- Restrictions pertaining to religious doctrine (i.e. requiring that the property be used only for individuals who subscribe to a particular religious doctrine);
- Restrictions pertaining to use (i.e. limiting the property to a particular use, such as use for a church, cemetery or seminary); or
- Restrictions limiting the use of the property to those who follow a particular religious practice, similar to requiring that the property be used only by members of a church who adhere to the practice of “strict communion” (where the sacrament of communion can only be received by baptized members of a particular denomination).

What is often not understood by a charity, either in receiving a deed to property from a vendor that is made subject to a special purpose trust or in unilaterally imposing a trust at the time that it takes title to the property, is that the trust that is created is generally a trust in perpetuity that will have

permanent implications: similar to an endowment fund or to any other special purpose trust fund. Since the charity will not have the ability to unilaterally vary the terms of trust without court authorization, it needs to be both aware of the terms of trust and to ensure that it can either comply with the restrictions or otherwise seek court authorization to vary it.

Restricted charitable trust properties are almost invariably created by the inclusion of a specific trust clause in a deed or transfer of land. This can occur when a donor gifts property to a charity and intends that the property be used only for a particular purpose. In such a scenario, the donor may include a reversionary clause in the deed stipulating that the property is to revert back to the donor in the event that the terms of the trust are not complied with. When this occurs, it is important to review the specific wording in the deed to determine whether or not a condition subsequent has been created as opposed to a special purpose charitable trust since different legal implications flow from the distinction as is discussed below.

In the other usual scenario where a trust clause is included in a deed, the charity itself imposes the terms of trust stating that the property being acquired can be used only for a specific purpose or purposes. The self-imposed terms of trust, though, would need to be consistent with the charitable objects of the charity. If not, it would be unlikely that the restricted charitable trust in the deed would be a valid and enforceable special purpose charitable trust.⁷³

d) Implied Special Purpose Charitable Trust Funds

The word “implied” in an implied special purpose charitable trust fund refers to what is required at law as evidence that the donor in fact intended to create a restricted charitable purpose trust. If the document accompanying a charitable gift clearly states that the gift is to be held in trust and the basic three certainties of a trust are met, the donor will clearly have created an express special purpose charitable trust. On the other hand, even if there is not express language, if the circumstances surrounding the gift or the general language in the document accompanying the gift are sufficient to establish that the donor intended the gift to be held in accordance with a special

⁷³ For further discussion regarding how restricted charitable trust properties are created and a discussion of the applicable case law see Terrance S. Carter, “Donor-Restricted Charitable Gifts: A Practical Overview Revisited II” (Paper presented for the Canadian Association of Gift Planners at the 2006 Annual National Conference, 2006), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2006/tsc0421.pdf>>.

purpose charitable trust, then the donor would be considered to have established a special purpose charitable trust by implied intent.

Presuming that the reasoning of Levine J., in *Christian Brothers B.C.S.C.*,⁷⁴ prevails over that of Blair J., in *Christian Brothers Gen. Div.*,⁷⁵ instances where an implied special purpose charitable trust might be found would include the following:

- A public fundraising campaign initiated by the charity for a specific purpose, whether it be a capital endowment fund or a building project.⁷⁶
- A donor who gives money to a charity with no accompanying written documentation setting out his or her intentions. However, in discussions with the development officer for the charity and in preliminary correspondence between the donor and the development officer, there is clear reference made to the fact that the gift is to be held in perpetuity as an endowment fund for a particular purpose, such as funding a professorship at a university.

Most donors making a gift to a parallel foundation, such as a hospital foundation, assume that the gift will be used to benefit the parallel operating charity. However, some foundations have charitable objects that permit the board of the foundation to use the monies received by the foundation for purposes other than benefiting the parallel operating charity. Notwithstanding the doctrine of constructive notice,⁷⁷ if the authority of a foundation to give money to charities other than the parallel operating charity has not been effectively communicated to its donors, particularly where the foundation has the same name as the parallel operating charity and the public fundraising campaign makes reference to the need to support the parallel operating charity, donors who make gifts to the foundation could very well allege breach of an implied special purpose trust fund under

⁷⁴ *Supra* note 36.

⁷⁵ *Supra* note 35.

⁷⁶ *Supra* note 36 at para 277, aff'd in *Christian Brothers Ont. C.A.*, *supra* note 35.

⁷⁷ *Ernest v. Nicholls* (1857), 6 H.L. Cas. 401, 10 E.R. 1351, 3 Jur. (N.S.) 919, 30 L.T.O.S. 45, 6 W.R. 24 (U.K. H.L.). The doctrine of constructive notice states that third parties dealing with a corporation are deemed to have constructive notice of the registered public documents of the corporation.

section 6 or section 10 of the CAA if the monies are disbursed to charities other than the parallel operating charity.⁷⁸

To overcome potential problems in this regard, it would be advisable for a foundation having objects allowing it to fund a broad spectrum of charities to ensure that it has given donors clear written communication of this broad corporate authority — through brochures and annual reports, for example — to refute future allegations that an implied special purpose trust fund had been created by the foundation to benefit only the parallel operating charity.

Even though both the Ontario Court of Justice and the Ontario Court of Appeal in *Christian Brothers of Ireland in Canada (Re)*⁷⁹ held that unrestricted charitable gifts are owned beneficially by a charitable corporation, and are not held in trust for its charitable purposes, such property may still only be used in accordance with the corporate objects of the charitable corporation in compliance with the doctrine of *ultra vires* (which has been removed under the *Canada Not-for-profit Corporations Act*⁸⁰ and pending its removal under Ontario *Not-for-Profit Corporations Act, 2010*⁸¹) or in accordance with the general fiduciary obligation to apply charitable property to its corporate objects.⁸² Otherwise, board members of a charity could be found personally liable for losses that arose out of *ultra vires* actions they authorized. As such, there are similarities between an implied special purpose trust fund and an unrestricted gift to a charity. In both situations, there is an implied restriction on what the charity can do with the gift that has been received, with corresponding personal liability consequences to the board members if they fail to comply. With an implied special purpose charitable trust fund, the trust restrictions are gleaned from circumstantial evidence; with an unrestricted charitable gift, the restrictions are found in the charitable objects of the charity itself. In accordance with the doctrine of constructive notice,⁸³ a

⁷⁸ For more information on section 6 of the CAA, see *Corporate and Practice Manual for Charities and Not-For-Profit Corporations*, supra note 1 at Chapter 19: Issues in Advising Charities: A Proactive Approach. For more information on section 10 of the CAA, see text accompanying footnote 107, below.

⁷⁹ *Christian Brothers Ont. C.A.*, supra note 3535.

⁸⁰ S.C. 2009, c.23.

⁸¹ *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15. For more information about possible amendments to the *Not-for-Profit Corporations Act*, see Bill 85, *An Act to amend various companies statutes and to amend other statutes consequential to the Not-for-Profit Corporations Act, 2010*, 2nd Sess, 40th Parl, Legislative Assembly of Ontario, 2013 (first reading 5 June 2013).

⁸² *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)*, [2001] O.T.C. 432, 2001 CarswellOnt 1971, 39 E.T.R. (2d) 96, [2001] O.J. No. 2170 (Ont. S.C.J.).

⁸³ *Supra* note 77.

donor is entitled to presume that the charitable objects of a charitable corporation are in fact those that are set out in its letters patent.

Although reversed on appeal for other reasons, the Supreme Court of British Columbia (the “SCBC”), in *TLC, The Land Conservancy of British Columbia (Re)*, gave an insightful decision involving the circumstances in which a special purpose charitable trust will be formed.⁸⁴ The decision is complicated, but in essence dealt with the sale of property given to a society in Vancouver that operates as a land trust, The Land Conservancy of British Columbia Inc. (“TLC”). TLC had received a culturally significant property, the Binning House, from the Binning Heritage Property Society (“BHPS”), and a Deed of Gift was executed at that time to effect a transfer of the property. As TLC was faced with significant debt, it accepted an offer to sell the Binning House for \$1.6 million on the condition that it received court approval in order to pay its creditors. In its decision, the Court considered whether TLC was restricted from selling the Binning House by virtue of the B.C. CPPA⁸⁵ and common law trust obligations.

The Court stated that, in the absence of a specific purpose charitable trust, TLC would own the Binning House beneficially and could sell it to advance TLC’s general purposes. However, if a specific purpose charitable trust was found to be imposed by BHPS, the Binning House would have to be used for that purpose and not be sold. In this regard, although the Deed of Gift did not use the term “trust” or “trustee”, the Court found that the Deed of Gift created a specific purpose charitable trust under the common law through its language, which stated that Binning House was gifted to TLC “for the purpose of restoring, developing and preserving the Binning House ... for historical purposes with a view to educating the public and commemorating the site.” The Court further held that the “overall circumstances” of the transfer demonstrated that BHPS had intended, and TLC had treated, the transaction as a specific purpose charitable trust. Additionally, “by necessary implication,” it found that BHPS had intended for Binning House to be kept and administered separately and for TLC to use it to advance specific charitable purposes. Thus, Binning House was also found to be a “discrete purpose charitable property” under the CPPA.

⁸⁴ 2014 BCSC 97.

⁸⁵ *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59.

The Court recognized that the CPPA’s purpose was to ensure that property donated to a charitable organization for a specific charitable purpose be preserved exclusively for that charitable purpose, and that the property be protected from being used to satisfy the debts, liabilities or other legal obligations in certain circumstances. However, the Court stated that the CPPA does not allow a trustee holding discrete purpose charitable property (i.e. a specific purpose charitable trust at common law) to avoid future trust obligations by simply selling the property contrary to the terms of the trust. It would be “anomalous” to allow a trustee to escape its statutory obligations under the CPPA or its common law obligations by simply disregarding the terms of the trust.

Based on its findings, the Court saw “no basis at this time” for TLC to argue that it would be “impossible to continue to abide by the terms of the trust in preserving the Binning House.” The Court adjourned TLC’s application for approval of the sale and allowed TLC to reset its application with further evidence or to amend its application and seek other relief. The decision of the SCBC, although complicated in its facts and analysis of the law, underscores the importance of charities ensuring compliance with the terms of restricted purpose charitable trusts, including when such trusts are used in the context of real property.

Although, as indicated above, the SCBC’s decision was overturned at the Court of Appeal,⁸⁶ it was overturned on the basis that the SCBC erred in law in respect of its interpretation of the last will and testament of Jessie Binning (the “Will”), rather than on its interpretation of the Deed of Gift. The Court of Appeal held that the exercise of power of the trustees under the Will was outside the scope of the power granted to them in the Will when they transferred the property to the new society. As the Court of Appeal decision turned on an issue of interpretation of the Will, and despite the case being overturned, the SCBC decision still provides helpful insight into the court’s interpretation of specific purpose charitable trusts.

2. Precatory Trusts and Donor-Advised Funds

The basic characteristic of donor-advised funds and precatory trusts, in contrast to other forms of restricted charitable gifts (such as special purpose charitable trusts or conditional gifts), is that they do not have any legally enforceable restrictions associated with them. With both donor-advised

⁸⁶ 2014 BCCA 473.

funds and precatory trust funds, the donor expresses a preference, desire or request that something specific be done with the gift. However, such expressions are made as a “suggested direction” rather than a legal obligation upon the charity. Notwithstanding this, there are considerable practical consequences, and also significant moral obligations, placed upon a charity receiving such form of gift.

A precatory trust is actually not a trust at all, but only a nonbinding request of the donor.⁸⁷ Since a precatory trust is a misleading term in that it is not in fact a trust, it is more useful to describe such a gift as an unrestricted gift that is accompanied by a nonbinding designation. For ease of reference, such gifts may be referred to simply as “designated gifts”.⁸⁸ Designated gifts are often encountered by religious charities where donors wish to support a specific missionary who is employed by a missionary organization. In Interpretation Bulletin IT-110R3,⁸⁹ the CRA permits a donor to make a gift subject to a general designation or direction (i.e. requiring that a gift be used in a particular program operated by the charity, provided that the decisions regarding the use of the donation within the program rest with the board of the charity). As a result, the designation by a donor that a gift is to be used to support missionaries in general would be acceptable to the CRA. But the further designation that the gift *must* be used to support a particular missionary would not be acceptable to the CRA, nor be binding on the charity. A donor could, however, indicate as a non-binding designation accompanying the gift that, where possible, the donation be used to support a particular missionary. Such a form of designation would constitute a designated gift or precatory trust because it would not be binding on the charity.

Distinguishing precatory wishes from binding trust obligations can be difficult. Clearly the use of phrases such as “in trust”, “on condition that”, or other mandatory language suggest the creation of a legally binding restriction. On the other hand, words such as “wish” or “desire” suggest that the donor did not intend to create a legal obligation. The difficulty arises when donors use less than clear or contradictory terminology. In such circumstances, a charity would be prudent to obtain a legal opinion in order to determine whether a trust has been created or not.

⁸⁷ *Christian Brothers Ont. C.A.*, *supra* note 35.

⁸⁸ This is not to be confused with the term of “designated gifts” referred to in the federal Budget 2010, which is discussed further in the text accompanying footnote 167.

⁸⁹ Canada Revenue Agency, “IT-110R3: Gifts and Official Donation Receipts” (20 June 1997), online: Canada Revenue Agency <http://www.cra-arc.gc.ca/E/pub/tp/it110r3/it110r3-e.html#P113_3712>.

A donor-advised fund is a form of designated giving whereby the donor makes a gift to a charity and then periodically makes non-binding recommendations concerning the distribution of assets from the fund to other charities or for certain charitable activities. A donor-advised fund may allow the donor to make recommendations in one or two fashions. One possibility is that the charity may invite the donor to make recommendations on how the annual disbursements to be made by the charity are to be met. As well, some donor-advised funds may also invite donors to recommend how their original donation is to be invested by the charity.⁹⁰

Donor-advised funds are widely used in the United States where they are frequently referred to as “advise and consult funds”, “donor-designated funds”, “donor-directed funds”, “gift funds”, “advisory funds”, or simply “accounts” or “funds” within community trusts or foundations. The difference between a donor-advised fund and a designated gift or precatory trust is that with designated gifts, the donor’s intentions, although not binding, are stated only once at the time that the gift is made, whereas with donor-advised funds, the donor has input into the distribution of the funds on a continuing basis. In a sense, donor advised funds create more challenges for the charity than gifts subject to an initial precatory wish, because the charity has a moral obligation (though not a legal duty) to respond to the wishes of the donor on an on-going basis.⁹¹

The primary concern with donor-advised funds is that if too much control is retained by the donor, it will no longer be considered a gift at law and cannot therefore be receipted under the *Income Tax Act*.⁹² This is also in accordance with the principle, as described in *Pinusic v LaValley* that a gift “must be followed by the requisite surrender of control over the item gifted”.⁹³ As a result, charities that employ donor-advised funds must be careful to warn donors that input by the donor can be of an advisory nature only. All rights of ownership must be transferred by the donor to the registered charity and the recipient charity must retain control over all its decisions, including investing and grant making. The documentation creating a donor-advised fund must clearly state

⁹⁰ Susan Manwaring, “Donor Advised Funds: A Growing Option for Canadian Philanthropy” in *Charitable Thoughts* 9:2 (October 2005).

⁹¹ Donor-Restricted Charitable Gifts, *supra* note 1 at 36-37.

⁹² Although mentioned in the context of directed gifts, CRA has stated that “if the donor retains too much control the donation will no longer be considered a gift at law and an official donation receipt cannot be issued.” Canada Revenue Agency, “What is a gift?” online: < <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/gfts/whts-eng.html> >.

⁹³ *Pinusic v LaValley*, [2005] O.J. No. 2350 (Ont. Sup. Ct.). Note also that, in support of the decision, Justice Zelinski quoted Black’s Law Dictionary at paragraph 77: “*inter vivos gift* A gift made during the donor’s lifetime and delivered with the intention of irrevocably surrendering control over the property.”

that it is the charity that administers the fund, reserving the right not to follow the donor's suggestions or advice concerning its distribution or application.

The advantage of donor-advised funds is that such funds allow the donor to receive an immediate tax receipt for a charitable gift while deferring the ultimate disbursement of the gift for future charitable projects. It is similar to having an informal private foundation within the parameters of an established and well-organized charity that has the ability to provide proper administration and guidance from the charity's board of directors.

3. Conditional Gifts

The distinction between a conditional gift and a restricted charitable purpose trust is not an easy one to make, particularly since a conditional gift can also involve a charitable purpose trust. Part of the distinction relates to the ownership of the gift and the other part relates to the wording accompanying the gift. A conditional gift involves the charity becoming the beneficial owner of the gift, either after the condition has been fulfilled or until a condition subsequent fails or occurs, as the case may be. With a charitable purpose trust on the other hand, the charity never becomes the beneficial owner of the gift. Instead, the charity holds title to the gift in trust, subject to certain terms and restrictions. It is possible for a conditional gift to also be a restricted charitable purpose trust if the gift involves both a condition precedent and a donor requirement that the gift be used for a particular purpose. For example, the donor might say, "I give \$1,000,000.00 as a perpetual endowment for cancer research, on the condition that the charity opens a cancer research facility in Calgary by the year 2015".

With a conditional gift, the operative wording involves a transfer of beneficial ownership of the gift, subject to an independent clause of defeasance commencing with words such as "but if", "provided that", or "on condition that". It is not sufficient, however, to look only at a particular phrase or word to determine if a gift is conditional; it is important to look at the whole wording of the document by which the gift is given.⁹⁴

⁹⁴ Hubert Picarda, *The Law and Practice Relating to Charities*, 3d ed. (London: Butterworths, 1999) at 212.

A condition that is repugnant to the nature of the gift granted, such as a condition that totally restrains the alienation of the gift by requiring, for instance, that rents of the property never be raised, will be void. Similarly, an illegal condition, such as a condition requiring a breach of the law or a discriminatory action, will also be void.⁹⁵

The general rule that a charitable purpose is exempt from the rule against remoteness of vesting (i.e. the “modern rule against perpetuity”) does not apply to a conditional gift. The Ontario Law Reform Commission’s *Report on the Law of Charities* stated that:

[i]n general, if a gift to a charity or charitable purpose trust is conditional, in unreformed jurisdictions, the rule applies to require that the gift necessarily vest within the perpetuity; in reformed jurisdictions [i.e. in Ontario], we ask whether it must so vest, and if not, we wait and see whether in fact it does so vest.⁹⁶

Conditional gifts are either subject to a condition precedent or a condition subsequent. A condition precedent occurs when the condition must be fulfilled *before* the gift takes effect (for example, a gift of \$100,000 provided that the registered charity is able to raise an equal amount of money within a stated period of time). In the event that a condition precedent fails, the transfer of the beneficial ownership of the gift to the charity will not occur and ownership of the gift remains with the donor. A gift subject to a condition precedent is not a gift at law until after the condition is fulfilled. Accordingly, it is improper for a charity to issue a receipt for tax purposes before the condition precedent is fulfilled.

By contrast, a condition subsequent is a condition which operates to defeat a gift which has already been made (for example, a gift made to a charity on the condition that the funds be used to operate a particular named shelter for the homeless). If the condition subsequent fails and there is a right of reversion in the gift back to the donor, the reversion to the donor will only be operative if the failure of the condition occurred within the relevant perpetuity period and if the gift did not contain a gift over to another charity. If there is neither a reversionary right in favour of the donor nor a gift over, the failure of the condition subsequent will leave the initial interest of the charity as an absolute interest that is no longer subject to any conditions or other donor restrictions. Although a

⁹⁵ Jean Warburton and Deborah Morris, *Tudor on Charities*, 10th ed (London: Sweet & Maxwell, 2015) at 470.

⁹⁶ *Supra* note 8 at 408.

charity may issue a tax receipt for a gift subject to a condition subsequent, if the condition fails and the gift reverts back to the donor, the donor will receive a double benefit. In this regard, the CRA advises that the charity returning the gift has 90 days upon returning the gift to file an information return in cases where an official donation receipt was issued, and if the returned gift has a fair market value of over \$50 so that the CRA can ensure the returned gift is reported as taxable income by the donor.⁹⁷

Often, conditional gifts will be given subject to a “gift over” that will address the situation where the condition has not been met. This means that if the charity fails to comply with the condition, the gift will then transfer to another charity. If a gift over is valid, and the circumstances upon which it was to arise are shown to have happened, the property passes and cannot be recalled. It makes no difference that the gift over is for the benefit of another, different charity. However, lawyers or gift planners who are instructed to provide for a gift over as part of a restricted charitable purpose trust should ensure that the gift over is to a charity with similar charitable purposes, since a gift over from a charity to a non-charitable purpose is void.⁹⁸

In *Norman Estate*, the BCCA considered the validity of a donation made pursuant to what the BCCA determined to be a conditional donation agreement, upholding the trial court’s decision that the conditional gift in question was an *inter vivos* gift rather than a testamentary gift. In this decision, Lloyd and Lily Norman (the “Normans”) made regular monetary gifts to the Watch Tower Bible and Tract Society (the “Society”), a registered charity. On June 5, 2001, Mr. Norman sent a \$200,000 cheque to the Society indicating “For N.I. Demand Loan” in the memo line, with a cover letter stating:

My understanding of such a loan ..., in the case of an emergency, or other, the return of such a portion can be requested. Otherwise, on the death of both parties of the suppliers of loan, these funds will remain the property of the [Society].⁹⁹

⁹⁷ Canada Revenue Agency, “Guidance CG-016: Qualified donees – Consequences of returning donated property”, (19 October, 2012), online at: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/rtrng-dntd-prpty-eng.html>>. For more information on conditions precedent and subsequent, see *supra* note 95 at 143-150.

⁹⁸ *Supra* note 95 at 146, 150.

⁹⁹ *Norman v. Watch Tower Bible and Tract Society of Canada*, 2013 BCSC 2099 at para 11, affirmed in *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277.

The Society responded to the Normans and explained two different possible arrangements: an “Interest-Free Demand Loan”, whereby the remaining balance of the loan upon the death of the lender would be turned over to the estate for distribution under the will and a “Conditional Donation Agreement”, whereby the remaining balance of the loan would automatically remain with the Society upon the death of the lender. The Normans and the Society subsequently entered into a confusing Conditional Donation Agreement in an attempt to confirm the latter arrangement.

Subsequent to the agreement, the Normans paid a total of \$310,000 to the Society, of which \$60,000 was turned into outright gifts for which the Society issued donation receipts. Mr. Norman survived his wife. On Mr. Norman’s death, a balance of \$250,000 remained from the funds advanced under the agreement. The Society issued a charitable donation receipt for \$250,000, but Mr. Norman’s estate (the “Estate”) claimed that the Society was not entitled to the \$250,000 and sued for the return of the funds to the Estate.

The trial court held that the agreement created an *inter vivos* trust because the Normans intended for the agreement to have immediate effect and because the agreement created gifts with a subsequent condition. The trial court held that the correct test for evaluating whether a disposition is testamentary continues to be set out in *Cock v. Cooke*.¹⁰⁰ This test states that to determine the nature of a disposition, a court must first consider whether the person who executed the disposition intended that it only take effect after his or her death and then examine whether the gift is dependent on the death of the donor for its vigour and effect. In reaching her decision, the trial judge pointed to the Normans’ cover letter, which said that upon the Normans’ deaths “these funds will remain the property” of the Society.

On appeal, the BCCA held that the Estate failed to demonstrate that the trial judge made a palpable and overriding error in finding the Normans’ intention was to transfer an immediate proprietary interest in the donations to the Society. The BCCA agreed with the trial judge’s decision that the gift was a transfer of a proprietary interest to the Society during the Normans’ lifetimes. It found that the Normans were bound by the terms of the agreement, which they could not revoke at any point. Further, the Normans were found not to have the unrestricted opportunity to dispose of the property as they saw fit. The BCCA also found that the Normans could revoke their donations, but

¹⁰⁰ (1886), L.R. 1 P. & D. 241 at p. 243.

only in compliance with the terms of the agreement. However, the Normans could not revoke the agreement itself.

Based on the above findings, the BCCA held that the Society could spend the funds at its discretion in the interim and therefore that the transfer was in fact an *inter vivos* conditional gift, entitling the Society to keep the funds in question. This case illustrates the need for careful drafting when preparing a conditional donation agreement, with regard to whether a gift is to be effective immediately or at a future time, in particular upon death.

4. Determinable Gifts

A determinable gift is a technical variation on a gift that is subject to a condition subsequent. With a condition subsequent, the gift is absolute but is subject to being defeated if the condition is not fulfilled. With a determinable gift, the gift consists of a limited interest which will eventually come to an end, such as “I give the income from my commercial building so long as I own the building and the charity uses the property income to run a youth centre”. It may be limited to endure only during the continuance of a particular state of circumstances, or until the happening of an uncertain event.¹⁰¹ In this regard, a determinable gift “bears a seed of its own destruction and is said to determine automatically, whereas a conditional interest is complete but with an independent clause added which may operate to defeat it.”¹⁰²

When a determinable gift comes to an end, the capital will normally revert to the donor unless there is a gift over to another charity. As with a gift subject to a condition subsequent which is fulfilled, the charity should advise the CRA of the taxable benefit to the donor where a determinable gift comes to an end and some or all of the original capital is returned to the donor.¹⁰³ Where there is a gift over, lawyers and gift planners should ensure that the gift over is to another charity rather than a non-charitable entity. Otherwise, that portion of the gift will no longer qualify as charitable and the donor will not be entitled to claim any income tax credits or deductions with respect to the gift.

¹⁰¹ *Ibid* at 142.

¹⁰² *Supra* note 94 at 278-279.

¹⁰³ *Supra* note 97.

5. Gifts Subject to Donor Directions under the *Charities Accounting Act*¹⁰⁴

In Ontario, donors also have the ability to enforce their restrictions via statute. Subsection 4(d) of the *Charities Accounting Act* (“CAA”) provides a mechanism by which the OPGT can seek a court order requiring a charity to comply with the directions of a donor. If an executor or trustee “is not applying any property, fund or money in the manner directed by the will or instrument,” the OPGT may apply to a judge of the Superior Court and the judge, among other powers, has the power to enforce the direction of the donor.

The effect of subsection 4(d) of the CAA means that the OPGT can seek a court order to enforce a direction imposed by a donor without being required to establish that a restricted charitable purpose trust had been created. All that is required is that a “direction” by the donor be shown. This is a much lower threshold for either a disgruntled donor or the OPGT to meet, but still achieves the same result – as if a special purpose charitable trust had been created by the donor and had been breached by the charity. In either situation, a court would be able to order the charity to comply with the terms of the direction established by the donor.

Ironically, if the violation was categorized by the courts as being a violation of subsection 4(d) of the CAA, then, in addition to the directors of a charity being found in breach of trust, the directors could also be exposed to a court imposed penalty and even face imprisonment in accordance with the provisions of subsection 4(k) of the CAA.

In addition, aggrieved donors in Ontario have additional rights under subsection 10(1) of the CAA. Where donors allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they can apply to the Superior Court of Justice for an order to carry out the trust subject to terms that the court considers just. The OPGT must be given notice of an application under subsection 10(2).

*Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*¹⁰⁵ is an example of where section 10 of the CAA was used to initiate a request for the instructions of the

¹⁰⁴ *Supra* note 32.

¹⁰⁵ *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 608, 2010 CarswellOnt 384, 100 O.R. (3d) 340 (Ont. S.C.J.).

court to enforce a charitable purpose trust based upon an alleged breach of trust. The Ontario Society for the Prevention of Cruelty to Animals (“OSPCA”), which has the ability to enforce standards of animal care throughout the province and to confer affiliate status on animal shelters in Ontario, suspended the Toronto Humane Society’s (“THS”) affiliate status after an investigation and launched a court application under section 10 of the CAA. The court eventually approved a settlement agreement between the parties, but not without reaffirming the immense inherent power of the court to ensure charitable purposes are being carried out by a charitable organization. In fact, the court reserved the power to call the parties back before the court to ensure that the charitable purpose was being carried out.¹⁰⁶

However, section 10 of the CAA is much broader than simply allowing aggrieved donors to use it to allege a breach of trust. Section 10 states that:

[w]here any two or more persons allege a breach of a trust created for a charitable purpose *or seek the direction of the court for the administration of a trust for a charitable purpose*, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law [emphasis added].

Section 10 therefore encompasses two rights of action for aggrieved individuals. They are able to allege a breach of a trust created for a charitable purpose, *or* they can seek the direction of the court for the administration of the charitable purpose trust. In this regard, the CAA is a powerful tool for donors and their families who feel aggrieved and wish to obtain the court’s assistance in enforcing a charitable purpose.¹⁰⁷

¹⁰⁶ *Ibid.*

¹⁰⁷ Some additional cases where section 10 of the *Charities Accounting Act* was used include *O’Neill Community Ratepayers Assn. v. Oshawa (City)*, 22 O.R. (3d) 648, 1995 CarswellOnt 376, 8 E.T.R. (2d) 11, 46 R.P.R. (2d) 92 (Ont. Gen. Div.) and *Rare Charitable Research Reserve v. Chaplin*, 2006 CarswellOnt 8774 (Ont. S.C.J.).

6. Discrete Purpose Charitable Property under the *Charitable Purposes Preservation Act*

The *Charitable Purposes Preservation Act* (the “CPPA”) was proclaimed in force by British Columbia’s provincial government on March 8, 2007.¹⁰⁸ The CPPA is intended to address uncertainty surrounding the protection of donations that have been given for a specific charitable purpose and seeks to prevent such donations from being used for objects other than those intended by the donor.

The CPPA has not changed or replaced the British Columbia common law of trusts. Instead, its effect is to provide additional protection where donors intend to provide a gift for a specific charitable purpose. To receive this protection, a gift must qualify under the CPPA as “discrete purpose charitable property”. To qualify, the donated property in question must be:

1. given to a charity for a specified charitable purpose (whether or not it is stated to be given in trust);
2. identified with certainty by the donor, either expressly or through some formula or method; and,
3. donated with the express or implied intention that it will be kept and administered by the charity separately from any other property, and used exclusively to advance the specified charitable purpose, rather than to assist or support the charity generally or to assist or support the charity in advancing any of its goals, purposes or objects.¹⁰⁹

If property donated to a charity meets these requirements, the charity will have no beneficial interest in the property and it will be protected from any seizure or attachment to satisfy a debt or

¹⁰⁸*Supra* note 33. For a proposed further application of the CPPA, see also the Uniform Law Conference of Canada Civil Section, *Uniform Trustee Act* (August 2012), online: <<http://www.ulcc.ca/en/uniform-acts-en-gb-1/619-uniform-trustee-act-2012/1255-uniform-trustee-act>>, and the *Final Report of the Working Group* regarding the *Uniform Trustee Act*, online: <<http://www.ulcc.ca/en/uniform-acts-en-gb-1/619-uniform-trustee-act-2012/1254-uniform-trustee-act-final-report-of-the-working-group>>.

¹⁰⁹ *Ibid* at s. 2.

liability of the charity, except those debts or liabilities incurred by the charity in “advancing, or in attempting or purporting to advance, the discrete purpose for the property”.¹¹⁰

The CPPA also provides in section 3(4) a general codification of the court’s common law *cy-près* jurisdiction to vary restricted charitable purpose gifts where it is not possible for the charity to continue using the gift for its intended purpose. The section provides that:

if a charity holding discrete purpose charitable property is unwilling or unable to continue to keep, administer and use the property to advance the discrete purpose, the court may make whatever orders, including arrangements, it considers appropriate, including transferring the property to a new charity, so that the property is kept, administered and used to

- a) advance the discrete purpose, or
- b) advance another charitable purpose that the court considers is consistent with the discrete purpose.

In *Mulgrave School Foundation, Re*,¹¹¹ (“*Mulgrave*”) the British Columbia Supreme Court (“BCSC”) clarifies its interpretation of section 3(4) of the CPPA by denying a request by the Mulgrave School Foundation (the “Foundation”) to vary restrictions on its discrete purpose charitable property. The *Mulgrave* decision also confirmed that once donors have donated funds to a charitable purpose, the donor loses any further interest in those funds.

In *Mulgrave*, the BCSC considered the Foundation’s request to vary a restricted gift so that it could apply two restricted donations of \$250,000 and \$861,217.50 toward the construction of a new senior school facility at Mulgrave School. The donors had originally restricted their donations for the creation of an endowment to be used to support scholarships at Mulgrave School. Although the donors consented to their donations being varied and put towards the construction of the new facility, the Attorney General of British Columbia opposed the Foundation’s application to vary the restrictions based on its responsibility over charities in British Columbia and its interpretation of section 3(4) of the CPPA.

¹¹⁰ *Ibid* at s. 2(4).

¹¹¹ 2014 BCSC 1900 (B.C. S.C.).

The Foundation also relied on section 3(4) of the CPPA, submitting that the BCSC has inherent jurisdiction over charitable matters and can alter endowment or purpose restrictions regarding how to apply the income of the fund. The Court found that the original scholarship fund had a discrete charitable purpose and that there was a lack of evidence to show that carrying out this purpose was either impossible or impractical, as required for a court to exercise its *cy-près* power. The BCSC therefore refused to allow donations that were intended for use as scholarships to be used in the construction of the school despite the Foundation urging the Court to interpret section 3(4) widely to apply the CPPA even where it is not impossible or impractical to continue using the donated funds for their original stated purpose.

It should be noted that the CPPA also imposes obligations on charities holding discrete purpose charitable property. Such property will only retain its character as discrete purpose charitable property if and for so long as the charity keeps, uses, and administers the property in accordance with the intention of the donor and exclusively for the advancement of the discrete purpose.¹¹² In addition, the charity must keep, administer, and use the discrete purpose property separately from all other property. This requires charities to maintain records quantifying the property and identifying its discrete purpose. The CPPA also clarifies that although discrete purpose charitable property must be administered separately, decisions respecting that property can be made at the same time as decisions respecting other property of the charity.¹¹³

Under the CPPA, charities are also obligated to comply with any relevant court orders concerning the discrete purpose charitable property. The CPPA confers broad authority on the courts in relation to discrete purpose charitable property. If a charity holding discrete purpose charitable property is unwilling or unable to meet its obligations under the CPPA, the court may make whatever orders it considers appropriate, including transferring the property to a new charity.¹¹⁴

A case on this point is *Lee v. North Vancouver School District No. 44*,¹¹⁵ where an application was made by the school board for an order relieving it of its obligations as trustee of a charitable purpose trust, and to transfer its obligations as trustee as well as the assets of the trust to a suitable

¹¹² *Ibid.*, s. 3(1).

¹¹³ *Ibid.*, s. 2(2).

¹¹⁴ *Ibid.*, s. 3(3), (4).

¹¹⁵ *Lee v. North Vancouver School District No. 44*, 2011 BCSC 222, 2011 CarswellBC 344, 67 E.T.R. (3d) 274 (B.C. S.C. [In Chambers]).

foundation. Lee sought injunctive relief against the school board mandating it to continue in its capacity as trustee in accordance with the terms by which the trust was created. The trust deed provided that the board would hold the trust fund and would apply the income from the capital amount in perpetuity for the purposes of maintaining an annual award in an amount that was the lesser of \$500 or the annual interest income of the trust fund. However, the trust fund was diminishing over the years due to historically low interest rates and would likely only last another seven to ten years, rather than in perpetuity. Lee learned that yearly awards were being made in excess of the income earned in each respective year so that the capital of the trust fund was being depleted. When she expressed concern, the board asked that the terms of the trust be varied to allow an award of \$500 or more. She denied the request and the school board brought its petition to be removed as trustee.

The court relied on subsections 3(3) and (4) of the CPPA as authority for the relief sought by the board in being removed as trustee and transferring its obligations to a suitable foundation. There were no issues amongst the parties that the trust was for a “charitable purpose” and that the trust fund was “discrete charitable property” as defined by section 1 of the CPPA. However, both counsel submitted that subsections 3(3) and (4) were not intended to apply to charitable purpose trusts generally. Justice Davies did not accept these submissions and instead applied a liberal interpretation to the CPPA, stating that had the legislature intended on limiting the application of those provisions, it would have specifically done so.¹¹⁶ As such, Justice Davies stated that “[i]n this case, the Board is unwilling to continue to act as trustee and has provided ample and cogent reasons for that unwillingness that are, in my view, sufficient to invoke the Court’s jurisdiction to make the order relieving it of those responsibilities”.¹¹⁷

The court found that the school board had acted responsibly in searching out an alternate qualified trustee to fulfill the discrete purposes of the trust, despite the fact that the terms of the trust would need to be varied somewhat in order to enable the foundation to undertake its administration as the new trustee. In making the order to substitute the foundation for the school board as trustee, Justice Davies stated that:

¹¹⁶ *Ibid* at para 57.

¹¹⁷ *Ibid* at para 61.

I am not prepared to not compel the continuation of the Board in that role given the obvious animosity of Elaine Lee towards it and its non-capricious wish to be relieved of its responsibilities. In doing so, I apply the principles enunciated in *Mitchell v. Richey* (1867), 13 Dr. 445 (U.C. Ch.), that an unwilling trustee cannot be compelled to continue to serve.¹¹⁸

Under the CPPA, where the recipient charity goes into bankruptcy or is the subject of a winding-up order and the trustee in bankruptcy, liquidator, or receiver cannot fulfil their obligations or find another charity to do so, the court must make such arrangements.¹¹⁹ In making such an order, a court may require the new charity to advance the same discrete purpose as applied to the former charity, but the legislation also allows the court to designate another charitable purpose that it considers to be consistent with the original discrete purpose.¹²⁰

Where discrete purpose charitable property is transferred by court order to another charity, the new charity will be subject to the same obligations imposed on the former charity in relation to its use of the discrete purpose property.¹²¹ The new charity will also be required to pay from the transferred property any debts or liabilities arising from the “actual, attempted or purported advancement by the former charity of the discrete purpose that applied to that property before the order”.¹²² These debts are to be paid in full if possible, or rateably otherwise.¹²³

The CPPA applies to all discrete purpose charitable property in British Columbia, whether it was donated before or after the coming into force of the CPPA.¹²⁴ Thus, all donations made in the past in British Columbia that fulfil the CPPA’s definition of discrete purpose charitable property will be protected. The CPPA provides both donors and charities with some assurance that special purpose charitable property will be protected from claims against the charity that are unrelated to the discrete purpose charitable property.

¹¹⁸ *Ibid* at para 72.

¹¹⁹ *Supra* note 33, s. 4(1).

¹²⁰ *Ibid*, s. 4(1)(b).

¹²¹ *Ibid*. s. 3(5), 4(2).

¹²² *Ibid*.

¹²³ *Ibid*.

¹²⁴ *Ibid*, s. 6.

E. CAN THE TERMS OF A RESTRICTED CHARITABLE PURPOSE TRUST BE VARIED?

Many donors and charities believe that the terms of a restricted charitable purpose trust can be varied at will. In fact, the objects of a restricted charitable purpose trust can only be altered by the court based upon the court's inherent jurisdiction over charitable property, unless the donor has provided the charity with the ability to vary the restriction in the trust document. As stated in *Tudor on Charities*:

it is not for the trustees to deal with the funds on their own authority, even by the direction of the original subscribers of the charitable funds or (where the trust is for the benefit of a particular parish or place) of a meeting of the parishioners or inhabitants.¹²⁵

This means that to vary a donor restricted charitable gift, assuming the gift does not include a power to vary, a court application would, generally, have to be made for a *cy-près* order, although with a straight forward application the charity may be able to proceed on the basis of a consent order from the OPGT in Ontario under section 13 of the CAA. In this regard, *cy-près* involves the ability of the court to exercise its inherent jurisdiction to supply trust purposes (or objects) in place of those the donor or testator chose.¹²⁶ Professor Waters indicates that,

[t]o describe *cy-près* shortly, it might be said that at the moment when the *inter vivos* or testamentary charitable trust would come into force, there is no way in which the declared purpose or purposes can be carried out, or during the lifetime of the trust there comes a time when the purposes of an endowment trust can no longer be carried out.¹²⁷

The *cy-près* doctrine is generally stated as follows:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to

¹²⁵ *Supra* note 95 at 245-246.

¹²⁶ Donovan Waters et al, "Administrative and Cy-Près Judicial Scheme-Making: When are these Applications of Use in Canada Today?" (presented at the 2010 National Charity Law Symposium, April 30, 2010) online: <http://www.carters.ca/pub/article/charity/2010/waters0430.pdf> at 6. For a proposed simplification of *cy-près* see the Uniform Law Conference of Canada, *supra* note 108.

¹²⁷ *Ibid.*

devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.¹²⁸

The *cy-près* jurisdiction of a court is only exercised when the charitable objects set out by the settlor are either impossible to carry out or are impracticable. An example of what is meant by impossibility is a situation where the trustees are unable to use the fund for the particular purpose because the purpose has already been achieved, while an instance of impracticability is the erection of a church in an area where such a building is no longer necessary.¹²⁹

There are several Canadian cases in which the court has varied the terms of charitable purpose trusts in relying upon its *cy-près* jurisdiction. For instance, *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (“*Boy Scouts*”)¹³⁰ is a decision in which the court applied the *cy-près* doctrine to vary the purpose of a restricted charitable purpose trust where the original purpose could no longer be carried out. In that case the settlor of the trust had intended for a gifted piece of property to be used for the benefit of a particular Boy Scouts troop. The Newfoundland Court of Appeal decided that despite the fact that the troop had disbanded, rendering the purpose of the trust impossible to achieve, the trust could be expanded in accordance with the *cy-près* doctrine, to allow the property to be used for the benefit of all Boy Scouts groups now in existence.

Conversely, as described in the previous section, in *Mulgrave*,¹³¹ the British Columbia Supreme Court denied a request by the Mulgrave School Foundation for the Court to use its *cy-près* power to vary restrictions on its discrete purpose charitable property despite the fact that the donors had agreed to the change. As opposed to the facts in *Boy Scouts*, the Court in *Mulgrave* found a lack of evidence showing an impossibility or impracticality in carrying out the intended purpose of the gifts and, therefore, held that it could not vary the trust in accordance with its *cy-près* power. Consequently, the Court refused to allow donations that were intended for use as scholarships to be used in the construction of the school. This case confirms that once donors have donated funds

¹²⁸ American Law Institute, *supra* note 7 at para. 399.

¹²⁹ Waters et al., *supra* note 6 at 682.

¹³⁰ *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (1997), (*sub nom.* Boy Scouts of Canada v. Doyle) 149 D.L.R. (4th) 22, 1997 CarswellNfld 325, 151 Nfld. & P.E.I.R. 91, 471 A.P.R. 91, [1997] N.J. No. 151 (Nfld. C.A.).

¹³¹ 2014 BCSC 1900 (B.C. S.C.).

to a charitable purpose, a subsequent change in the donor's intent is not sufficient to create a situation that allows for a court to use its *cy-près* power.

Whether a court will be able to exercise a *cy-près* scheme will depend upon whether the failure is an initial failure or a subsequent failure. With an initial failure, but not a subsequent failure, the court will be able to intervene and apply the charitable property *cy-près* only if it can find a general charitable intention of the donor. This becomes particularly problematic in relation to public fundraising campaigns. If a surplus results from a public fundraising campaign for a particular charitable purpose, but the charity is unable to use the monies for its publicly stated purpose, the court can apply the remaining surplus to another charitable purpose only if it can find that the donors, many of whom may be anonymous, had a general charitable intention and did not limit their gifts to the specific project for which the fundraising campaign was directed. The primary problem involved with the surpluses resulting from public fundraising campaigns is therefore determining whether or not a general charitable intent can be found.

To avoid the complexities and costs of making a *cy-près* court application and the possibility that the court may not find a general charitable intention in relation to a surplus for a public fundraising campaign, a charity should clearly state in its fundraising literature or on its website that any surpluses resulting from a public fundraising campaign for a particular project will be used to further the general charitable purposes of the charity in question.

Where there is a subsequent failure of a restricted charitable purpose trust, the court will apply the *cy-près* doctrine where it can be shown that there is a supervening impracticality or impossibility without finding a general charitable intent. This is, of course, subject to the requirement that the gift not contain a provision for a gift over by the donor.

In addition to the power to vary the objects of a charitable purpose trust with its more limited *cy-près* jurisdiction, the court may also exercise its broader scheme-making power if adherence to the administrative terms of a trust would disrupt the specific purpose of the charitable trust. The normal

situation where the court will permit deviation from administrative terms is where a change in circumstances makes adherence to the original administrative terms impossible or impractical.¹³²

Such a result was reached in *The Sidney and North Saanich Memorial Park Society v British Columbia (Attorney General)*¹³³ when the British Columbia Supreme Court approved a trustee's application to modify several terms of a charitable trust that was established in 1965. The trust required the trustee to maintain a particular area of property for the purposes of a war memorial. However, that area of property had been expropriated. One of the provisions of the trust required that if any lands that formed part of the trust were expropriated, the proceeds must be used to purchase, improve, and maintain new lands. This meant that the existing lands were not to be maintained by the proceeds of the expropriation. Although the Court concluded that not all the indicia were present to justify the application of the *cy-près* power, it did conclude that it had inherent jurisdiction under its administrative scheme-making authority to be able to apply the proceeds from the expropriation to all of the trust property, otherwise the property would fall into disrepair. In arriving at this decision the Court stated that it had:

inherent jurisdiction for administrative scheme-making for charitable trusts. In cases where it cannot be said that the requirements to achieve the purposes of a charitable trust have become sufficiently impracticable or impossible so as to engage the *cy-près* doctrine, the courts may nonetheless, pursuant to this administrative scheme-making jurisdiction, vary the administrative terms of a trust for the furtherance of charitable purposes.¹³⁴

Regardless of whether the court uses its *cy-près* jurisdiction or its scheme-making jurisdiction to vary a restricted charitable purpose trust, the result may be the same, as shown in *Killam Estate, Re*,¹³⁵ *Stillman Estate, Re*¹³⁶ and *Fenton Estate, Re*,¹³⁷ which provide examples where the courts have varied the administrative provisions of charitable purpose trusts by authorizing a “total return

¹³² *Supra* note 126 at 6-7. See also, Picarda, *supra* note 94 at 364-365.

¹³³ 2016 BCSC 589.

¹³⁴ *Supra* 120 at para 76.

¹³⁵ *Killam Estate, Re*, 38 E.T.R. (2d) 50, 1999 CarswellNS 456, 185 N.S.R. (2d) 201, 575 A.P.R. 201 (N.S. S.C. [In Chambers]) [“*Killam Estate*”].

¹³⁶ *Stillman Estate, Re*, 68 O.R. (3d) 777, 2003 CarswellOnt 5329, 5 E.T.R. (3d) 260, (*sub nom.* Toronto Aged Men's & Women's Homes v. Loyal True Blue & Orange Home) [2003] O.J. No. 5381 (Ont. S.C.J.) [“*Toronto Aged Men's*”].

¹³⁷ *Fenton Estate, Re*, 2014 BCSC 39, 2014 CarswellBC 47 (B.C. S.C.). [“*Fenton Estate*”].

investment strategy” (*i.e.* to allow capital gains to be distributed as a supplement to income). In each case, testamentary trusts had been established for charitable purposes and the trustees had been directed to maintain a capital fund in perpetuity with only the income to be used to fund charitable activities. In each case, a court application was brought because the income generated by the trust’s capital assets was insufficient to meet the charity’s disbursement objectives. In *Killam Estate*, the Court invoked its broad inherent scheme-making jurisdiction to approve arrangements whereby the administrative provisions of charitable purpose trusts, which are perpetual in nature, are adapted to suit changing circumstances so as to accomplish the donor’s charitable intent more effectively as economic times change. The Court accepted that its inherent jurisdiction allowed it to authorize a total return investment strategy in order to vary the terms of the trust to allow the charity to encroach on and distribute capital where the testator or settlor had directed the perpetual maintenance of a capital fund.¹³⁸

In *Stillman Estate*, the court also permitted the trustees to distribute capital gains through a total return investment strategy, despite the will containing directions to the contrary. However, in this case, it did not do so pursuant to the court’s inherent scheme-making jurisdiction over administrative matters, but instead relied upon its narrower and more conservative *cy-près* scheme-making jurisdiction. In *Fenton Estate*, the most recent of the three cases, the court followed the more conservative decision in *Stillman Estate*, granting an order permitting the use of the total return investment strategy based upon the its *cy-près* scheme-making jurisdiction in order to allow the trustee to add a portion of realized capital gains to income as necessary to meet the charity’s disbursement objectives.

Most recently, on March 12, 2015, the BCSC revisited the extent of its inherent jurisdiction over charitable trusts in *Vancouver Opera Foundation, Re*.¹³⁹ This case primarily dealt with the court’s ability to remedy irregularities in a society’s affairs. In this case, the Vancouver Opera Foundation (“the Foundation”), which holds endowments to fund and support the Vancouver Opera Association’s (“VOA”) activities, applied to the court for an order amending unalterable provisions in its constitution. The Foundation sought to alter certain unalterable conditions because

¹³⁸ M. Elena Hoffstein, “Managing Endowments in Difficult Financial Times” (PowerPoint presented at the Canadian Association of Gift Planners, May 12-14, 2010) online: Carters Professional Corporation <<http://www.carters.ca/pub/seminar/charity/2010/meh0513.pdf>>.

¹³⁹ 2015 BCSC 390 (B.C. S.C.).

it found them to be “incompatible with current standards in not-for-profit governance and financial administration”. As such, the Foundation believed that they restricted the Foundation’s ability to “efficiently and appropriately manage its assets.”

In its discussion of the court’s *cy-près* jurisdiction to supply specific purpose where needed to implement a charitable trust, the BCSC referred to the *Mulgrave* decision. In this regard, it reaffirmed that the court’s inherent *cy-près* jurisdiction is not intended for changing conditions where the terms are simply inconvenient. In this case, the BCSC concluded that its *cy-près* jurisdiction was too narrow to apply and that there was no impossibility or impracticality to address. It reasoned that requested changes must reflect the original donors’ and founders’ intentions rather than be made solely for convenience where the charitable purpose is otherwise still possible and practical to perform.

While the discussion of the court’s *cy-près* jurisdiction has largely been derived from common law, New Brunswick enacted its *Trustees Act (2015)*¹⁴⁰ on June 5, 2015, which expands on the court’s inherent *cy-près* jurisdiction. New Brunswick’s Office of the Attorney General has indicated that the *Trustees Act (2015)* is “substantially modelled on the Uniform Law Conference of Canada’s *Uniform Trustee Act*”, with some changes to the wording and substance.¹⁴¹ The *Uniform Trustee Act* was developed as a sample statute, recommended for provincial enactment by the Uniform Law Conference of Canada.

Part 7 of the *Trustees Act (2015)*, concerning charitable trusts and charitable gifts, discusses the power of the court to vary charitable trusts and gifts, and applies to all charitable gifts in New Brunswick, including those given before the act comes into force.¹⁴² It provides that trustees of a charitable trust, donors or their personal representatives may apply to the court to have the terms of a trust or gift varied. Upon an application, if the court is of the opinion that (a) the terms of the trust or gift cannot be given effect due to an impracticability, impossibility or other difficulty, or

¹⁴⁰ *Trustees Act*, R.S.N.B. 2015, c. 21 [“*Trustees Act (2015)*”].

¹⁴¹ Office of the Attorney General, “Law Reform Notes #37”, June 2015, online: <<http://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes37.pdf>>

¹⁴² *Trustees Act (2015)*, *supra* note 140, s. 69(1).

(b) a variation would facilitate carrying out the settlor or donor's intention,¹⁴³ the court has legislative power under subsection 69(3) to:

“(a) vary, delete or add to the terms of the trust or gift,

(b) vary, delete or add to the powers of the trustees in relation to the administration of the trust, and

(c) vary, delete or add to the powers of the donee in relation to the management or administration of the gift.”¹⁴⁴

Where the court finds that an impracticability, impossibility or other difficulty prevents giving effect to the terms of the trust or gift, the court is given the power to vary, delete or add to the terms in a manner that provides for a purpose as close as is practicable or reasonable to an existing purpose of the trust or gift.¹⁴⁵

Generally, for purposes of variation under the *Trustees Act (2015)*, it is irrelevant whether the charitable intent of the settlor or donor is general or specific. However, subsection 69(5) provides one exception where the terms expressly provide for a gift over or a reversion where the charitable purpose lapses or otherwise fails. In such instances, the gift over or reversion, if otherwise valid, will take effect.

In Nova Scotia, the *Variation of Trusts Act*¹⁴⁶ (“VTA”) has been held to apply to charitable trusts. On July 24, 2015, the Supreme Court of Nova Scotia released its decision in *Bethel Estate (Re)*¹⁴⁷ confirming that charitable trusts can be varied under the VTA. In this case, five charitable beneficiaries had asked for the variation of five trusts which provided that each charity would receive \$5,000 annually. The trusts had originally provided that each charity would receive this amount until the funds were exhausted. However, the funds had grown to exceed \$2 million and it

¹⁴³ *Ibid.*, s. 69(2).

¹⁴⁴ *Ibid.*, s. 69(3).

¹⁴⁵ *Ibid.*, s. 69(4).

¹⁴⁶ R.S.N.S. 1989, c. 486.

¹⁴⁷ 2015 NSSC 216.

appeared that the trusts would never be exhausted. As such, the charities sought an order to vary the trusts under the VTA to increase the distribution.

In response, the trustees argued that the VTA did not apply to charitable trusts. They further argued that the beneficiaries only had a vested interest in \$5,000 per year as stated in the will rather than a fully vested or contingent interest in the capital of the income. However, the Court found that the language of the VTA does not exclude charitable trusts. Further, it stated that the charitable beneficiaries' interests were vested without further contingencies, as the will contemplated that the trusts would eventually be exhausted. Finally, the Court stated that the testator's intention had been to provide substantial funds to the beneficiaries with the anticipation that the funds would eventually be exhausted. As such, it found that varying the trusts would be consistent with the testator's original intentions.

F. WHAT PROVISIONS SHOULD BE CONSIDERED WHEN DRAFTING RESTRICTED CHARITABLE PURPOSE TRUSTS?

It is important to remember that failure to comply with the terms of a restricted charitable purpose trust could result in the board of directors being found in breach of trust and exposed to personal liability. Accordingly, lawyers and gift planners must carefully consider what provisions to include when drafting testamentary and *inter vivos* restricted charitable purpose trusts, taking into consideration the need to ensure both the validity of the trust, as well as the legal and moral implications of the trust. This section of the paper will highlight some of the more important issues that lawyers and gift planners should consider when drafting the specific terms of restricted charitable purpose trusts.¹⁴⁸

1. Initial Considerations Involving Endowment Funds

Frequently, lawyers and gift planners will be asked by their clients to draft an endowment in some form. However, the client, whether it is a donor or a charity, will often not be sure what they mean in requesting an endowment. Lawyers and gift planners therefore, need to be careful before using the term endowment when drafting restricted charitable purpose trusts. The fact is that

¹⁴⁸ See Terrance S. Carter, "Effectively Structuring Endowment Agreements" (1 October 2009), online: Carters Professional Corporation <http://www.carters.ca/pub/seminar/charity/2009/tsc1001_files/frame.htm>.

“endowment” is not a *legal* word.¹⁴⁹ Rather, it is a term of art that is most often used by charities and donors to indicate an intention that the capital of a restricted purpose charitable trust fund is to be held “in perpetuity”. However, the word “endowment” has also been used in recent years to refer to trusts where the capital is to be retained for a minimum period of 10 years in the form of a 10 year gift pursuant to the disbursement quota rules that were in existence prior to the 2010 Budget¹⁵⁰ reform rather than requiring that the capital of the trust be held in perpetuity. Usage of the term “endowment” in this context (i.e. of establishing 10 year gifts) has caused significant confusion with donors to date.

As a result, the words that are used in establishing a restricted charitable purpose trust need to carefully reflect what the donor actually wants and what the charity is prepared to accept. Specifically, donors and charities should only use the term “endowment” where it is intended that the capital is actually to be held in perpetuity, in which event the restricted charitable purpose trust should be called a “perpetual endowment” to be absolutely clear regarding what is intended. With gifts where the capital is to be held for some specific period of time, but not in perpetuity, those gifts should be called “long term funds” or by some similar terminology, as opposed to a “perpetual endowment”.

In this regard, it is important to recognize that not every charity actually wants to receive a perpetual endowment because of the difficulty in administering those funds into the future and the concern that circumstances in the future may require that the capital of such funds be expended. Even when a charity is prepared to accept a perpetual endowment, the charity will normally only be interested in receiving such type of gift if there is the inclusion of a provision giving the charity the ability to encroach on the capital under certain special circumstances, such as meeting the disbursement quota, or in response to extenuating circumstances as may be determined by the board of the charity from time to time. This last point is an important consideration that legal counsel should carefully discuss with the charity or donor before drafting a restricted charitable purpose trust that is intended to create a perpetual endowment, in order to ensure that the charity and the donor both fully understand the difference between a perpetual endowment with no ability

¹⁴⁹ See Malcolm D. Burrows, “The End of Endowments?” (2010) 23: 1 *The Philanthropist* at 54.

¹⁵⁰ For more information on the 2010 Budget, see footnote 167.

to encroach, a perpetual endowment with the ability to encroach, and a long term fund where the capital of the fund will be expended by a particular date.

2. Thresholds in Establishing a Restricted Charitable Purpose Trust

The charity should consider whether it will require a minimum amount in order to accept a restricted charitable purpose trust. For example, if a donor would like to create a restricted charitable purpose trust with a gift of \$5,000.00, the charity should consider the cost to the charity that will be spent in administering that trust. As well, the charity will want to consider whether further contributions of capital to the restricted charitable purpose trust will be permitted, and if so, whether there should be any limitations imposed on these further contributions, such as who may make contributions and whether a minimum donation will be required. Prior to the 2010 Budget changes,¹⁵¹ charities would have had to structure additional contributions to the capital of long-term charitable purpose trust funds as separate 10-year gifts in order to comply with the enduring property exemption requirements in the *Income Tax Act*,¹⁵² which resulted in significant administrative burdens for the charity. However, with the repeal of the 80% disbursement quota and 10-year gift requirements for enduring property, charities are now able to structure restricted charitable purpose trusts to receive additional capital contributions on an ongoing basis.

3. Description of Restricted Purpose

The donor and the charity must ask what the restricted purpose of the charitable purpose trust is, and whether such restricted purpose is to be permanent, or whether variations to the restricted purpose should be permitted. If the restricted purpose is intended to be permanent, it must be sufficiently general in scope in order to meet the test of time and changing circumstances. However, the charity must consider what will happen to the restricted charitable purpose trust when the intended restricted purpose has been achieved, is no longer relevant, or is no longer practical. As a result, it is generally advisable to include a provision permitting the charity to vary the restricted purpose in the discretion of the board of the charity in order to avoid having to seek

¹⁵¹ For more information, see footnote 167.

¹⁵² *Supra* note 22.

a *cy-près* order from a court to do so.¹⁵³ Variation of the restricted purpose of the trust is discussed in more detail below.

With regard to the specifics of the restricted purpose, as explained earlier in this paper, it is possible to include restrictions dealing with time, such as a restriction to hold the gift over a number of years, or in perpetuity (normally subject to some type of right to encroachment), or a restriction on use, such as a scholarship, or combination restriction (i.e. a perpetual endowment with the income to be used for medical research). Determining which restrictions are appropriate and how broadly or narrowly to word these restrictions will require careful drafting, often involving consultation with both the charity and the donor where possible.

4. Assets Forming the Trust

The charity must consider what assets the restricted charitable purpose trust will consist of. For instance, will the trust consist of monies or gifts in kind, such as shares? Different types of property will have to be handled differently by the charity. For example, if the trust involves a gift of shares, the charity needs to ensure that there is a proper evaluation of the shares done in advance of the gift. Gifts of publicly traded shares will be exempt from capital gains tax, but not gifts of private shares.¹⁵⁴ As well, whether the gift consists of cash or a gift in kind such as shares, it is important for both the donor and the charity to give consideration to whether the split receipting and anti-tax shelter provisions of the *Income Tax Act* could affect the fair market value of the gift for receipting purposes, either through the deduction of an “advantage” from the fair market value of the gift, or

¹⁵³ Elizabeth Moxham, “Endowments 2.0: Rethinking Endowments in the New World” in *Gift Planning in Canada* 15:5 (May 2010).

¹⁵⁴ *Supra* note 22 at ss. 38(a.1). For more details see Terrance S. Carter, “An Overview of Capital Gains Tax Exemptions as a Philanthropic Incentive in Canada” (Presented for the Australian Centre for Philanthropic and Nonprofit Studies *Modernising Charity Law Conference*, Brisbane, 2009), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2009/tsc0418b.pdf>>.

the reduction of the fair market value of the gift through the deeming provision applicable to some specific types of gifts in kind.¹⁵⁵

5. Naming Rights

Some donors may wish to build naming rights into the terms of the trust. If so, the charity must determine how long the naming rights will extend for. A charity must also decide whether it wishes to reserve the right to terminate the naming rights of a donor, and under what circumstances it can do so.

Both the donor and the charity may also need to consider whether the naming rights might be considered to constitute an “advantage” under the *Income Tax Act* for receipting purposes. The position of the CRA is that individual naming rights on their own do not constitute an advantage that would prejudice the ability of the donor to obtain a tax receipt for the full value of the gift.¹⁵⁶ However, it is possible that naming rights might constitute a taxable “advantage” under subsection 248(32) of the *Income Tax Act*.¹⁵⁷ This is a question of fact based on whether there is any “prospective economic benefit” associated with the granted naming right and, if so, would reduce the amount of the gift eligible for a tax receipt by its fair market value where it is reasonably ascertainable.¹⁵⁸ For example, for a business, if the naming rights amounted to a form of sponsorship which promoted the brand or the products of the business, then the naming rights could very well constitute an advantage that would need to be deducted from the fair market value of the gift to determine the eligible amount of a gift for receipting purposes. However, the business

¹⁵⁵ For more information on the application of the split-receipting rules and anti-tax shelter provision of the *Income Tax Act* see M. Elena Hoffstein and Theresa L.M. Man, “When Is an Advantage Not an Advantage--Issues Arising From the Proposed Split Receipting Regime” (Presented for the Canadian Bar Association and the Ontario Bar Association *4th National Symposium on Charity Law*, Toronto, May 2006), online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2006/mehtlmlew0511.pdf>>; and also Theresa L.M. Man, “Recent *Income Tax Act* Amendments That Affect Charities” *Charity Law Bulletin* No. 221 (29 July 2010), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb221.pdf>>.

¹⁵⁶ Canada Revenue Agency, “Split Receipting Rules”, Technical Interpretation Document 2010-0375811E5 (22 February 2011). CRA Technical Interpretations are only available by subscription or written request to CRA.

¹⁵⁷ See amendments to the *Income Tax Act* under *Bill C-48, An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation*, 1st Sess, 41st Parl, 2013, (Royal Assent 26 June 2013), online: Parliament of Canada <<http://www.parl.gc.ca/legisinfo/BillDetails.aspx?Language=E&Mode=1&billId=5839600>>.

¹⁵⁸ *Supra* note 156.

would then be able to deduct the value of such advantage as a business expense and would be in the same tax situation as if the full amount of the gift was received.¹⁵⁹

6. Disbursing Trust Funds

One of the most difficult issues to deal with in drafting a restricted charitable purpose trust is to determine on what basis trust funds are to be disbursed in accordance with the terms of the restricted charitable purpose. If there is no restriction as to time, then the charity will generally disburse funds received together with any short-term interest earned as soon as it is practical. However, where there is a time restriction, such as with a long term or perpetual endowment, the question becomes whether all of the income earned is to be expended on the restricted purpose, or if only a portion is to be expended with the balance being capitalized, presumably in order to keep up with inflation.

Another issue that may need to be addressed is whether the income to be disbursed is to include interest and dividend income only or whether it is also to include realized capital gains. In this regard, the charity might want to consider utilizing a total return investment model where the charity is directed to treat all returns from the fund as expendable on an annual basis, whether derived from interest, dividends, or capital gains.¹⁶⁰

Whatever preference a charity has toward these issues, it is generally better to have the charity clearly articulate them in its own disbursement policy that it can amend from time to time and have the terms of that disbursement policy then incorporated by reference into the trust document instead of leaving it to be worked out within the terms of the trust document itself or leaving it up to the direction of the donor.

7. Donor-Advised Provision

Another consideration is whether the donor wishes to retain some input into the disbursement of the trust funds as a “donor advised fund”. As discussed earlier in this paper, in such cases the donor will retain the ability to provide non-binding advice with regard to how the capital and income of

¹⁵⁹ Theresa L.M. Man, “Corporate Giving: A Tax Perspective” (18 September 2006) online: Carters Professional Corporation <http://www.carters.ca/pub/article/charity/2007/tlm_corpgiving.pdf>.

¹⁶⁰ *Supra* note 149 at 54, 58. See also *Killam Estate*, *supra* note 135 and *Toronto Aged Men’s*, *supra* note 136.

the gift will be used. However, it should be made clear to the donor that the board of the charity must exercise ultimate control over the expenditure of the income and capital of the gift. As indicated previously, too much control by the donor will defeat the gift and will result in the donor being unable to have the gift receipted for income tax purposes and possibly even challenged on a subsequent audit of the donor's charitable gifts by CRA.

8. Administration Fee

Another issue to consider in drafting a restricted charitable purpose trust is whether the charity wishes to be allowed to charge a reasonable administrative charge against income and/or capital of the trust fund. If so, the charity should either reflect the details of the administrative charge in the trust document itself, or the charity should require a cross-reference in the trust document to the gift acceptance policy of the charity that would set out a reasonable administrative fee that would be charged against the income and/or capital of the trust funds.

9. Investing Trust Monies

When drafting a restricted charitable purpose trust, lawyers and gift planners should become familiar with the investment policy of the charity (if there is one), since such policy will normally determine how the capital of the restricted purpose charitable trust will be invested. In Ontario, the *Trustee Act* requires that there be an investment policy if investment decision making is delegated.¹⁶¹ Although it is not a requirement that there be an investment policy where there is no delegation of investment decision making, it is still advisable for a charity to consider adopting an investment policy. A well drafted investment policy will help protect the board of directors from personal liability, and it will also assist in ensuring that the board of directors has addressed the statutory requirements in the Ontario *Trustee Act*.¹⁶²

The standard of care by which trustees, including charities with regard to charitable property, must adhere to when investing trust monies has been implemented by statute in every Canadian

¹⁶¹ *Trustee Act*, R.S.O. 1990, c. T.23, s. 27.1(2).

¹⁶² For more information, see *Corporate and Practice Manual for Charities and Not-For-Profit Corporations*, supra note 1 at Chapter 14: Provincial Investment Power Issues. As well, see Terrance S. Carter, "Considerations in Drafting Investment Policies in Ontario" in *Charity Law Bulletin* No. 207 (29 April 2010), online at: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb207.htm>>. For a proposed standardization of investment powers for charities, see the Uniform Law Conference of Canada, supra note 108.

jurisdiction.¹⁶³ In Ontario, the *Trustee Act* states that “a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments”.¹⁶⁴ This means that trustees are free to invest in any form of property they wish, so long as it is one in which a prudent investor would invest. A trustee’s investment decisions will be viewed objectively to determine if the standard is met. If an investment were to perform poorly or lose money, the trustee would not be liable for the loss if he or she is able to demonstrate that the investment was made according to a reasonable assessment of risk and return that a prudent investor would make under similar circumstances.¹⁶⁵ Charities will generally want to incorporate their investment policies into the trust document, or alternatively the charity might be prepared to allow the donor to impose specific investment terms of reference on the gift, although the former is preferable. Where the donor does impose specific investment terms, the charity will need to ensure that they are consistent with the “prudent investor” standard set out in the Ontario *Trustee Act*, its existing investment policy, as well as its charitable purposes, before accepting.

10. Variation of the Trust

At the outset, it is important to remember that the donor cannot vary the terms of the charitable trust after it has been created, although as stated above, the donor can retain the ability to provide non-binding input through a donor-advised provision as part of the terms of the trust. As well, as stated earlier in this paper, the charity has no authority to vary the terms of a charitable trust on its own unless the document creating the restricted charitable purpose trust permits the charity to vary the terms of the trust. As such, it is essential that the trust document include a provision that permits the charity to vary the terms of the restricted purpose at the discretion of the charity, whether such restriction deals with restrictions involving use or time. The lawyer needs to ensure that the charity is given the maximum amount of flexibility as possible in this regard.

¹⁶³ Terrance S. Carter, “Investment Powers of Charities and Not-for-Profits Under Ontario’s *Trustee Act*” in *Charity Law Bulletin* No. 192 (25 February 2010), online at: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2010/chylb192.htm>>.

¹⁶⁴ *Supra* note 161 at s. 27(1).

¹⁶⁵ *Supra* note 163.

11. Transfer of Trust Property

Another important provision to consider including in the trust document is one that provides the charity with the ability to transfer the trust funds to a subsequent trustee, provided that the subsequent trustee is a registered charity and will enter into a deed of appointment as contemplated by section 3 of the Ontario *Trustee Act*.¹⁶⁶ The deed of appointment will ensure that the recipient charity agrees to be bound by all of the terms of the original restricted charitable purpose trust as a subsequent trustee. If the recipient charity is not at arm's length to the transferor charity, then the transferor charity will want to record the transfer as a "designated gift" in its T3010 *Registered Charity Information Return* in order to avoid the recipient charity being required to spend 100% of the transferred property by the end of the following taxation year in accordance with the anti-avoidance provisions contained in the 2010 Federal Budget proposals.¹⁶⁷

12. Refusal or Return of a Gift

When considering whether or not to accept a restricted charitable purpose trust, a charity will need to consider under what circumstances a gift may need to be refused. Some examples could be where the donor has been criminally convicted, has exhibited immoral conduct, or the charity has concerns about the donor being involved in possible terrorist, money laundering or other illegal activities.

Where these and other similar circumstances occur after a gift has already been accepted by the charity, it is important to recognize that a charity cannot unilaterally return a gift on its own. Once a gift is completed, it is the property of the charity and cannot be returned unless the original gift has failed. Circumstances that could lead to the failure of a gift include: the terms of the restricted charitable purpose trust become impractical or impossible to fulfil and it is not possible to obtain a *cy-près* court order; an applicable condition precedent or condition subsequent to the gift being

¹⁶⁶ *Supra* note 161.

¹⁶⁷ The stated purposes of the anti-avoidance provisions are to ensure that charities do not enter into transactions which are meant to avoid or unduly delay the expenditure of amounts on charitable activities in accordance with the disbursement quota requirements, as well as to ensure that inter-charity transfers between non-arm's length charities will be used to satisfy the disbursement quota of only one charity. For more information on the federal Budget 2010, and subsequent introduction of Bill C-9, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures*, 3rd Sess, 40th Parl, 2010, (Royal Assent 12 July 2010), see <<http://www.budget.gc.ca/2010/plan/toc-tdm-eng.html>> and <http://www.parl.gc.ca/content/hoc/Bills/403/Government/C-9/C-9_4/C-9_4.PDF>.

unfulfilled; or, a limited interest in a determinable gift coming to an end. Depending upon the circumstances, it may also be necessary before a gift is returned for the charity to obtain authorization from a court in exercising its inherent jurisdiction in charitable matters, where necessary. Given all of these complexities, it is critical that a charity seek legal advice before actually proceeding to return a gift, otherwise the directors of the charity could be personally liable for breaching the terms of the restricted charitable purpose trust. As well, the charity could be left liable to sanctions, including revocation of charitable status, or penalties under subsection 188.1(4) and (5) of the *Income Tax Act* for giving charitable property to a non-qualified donee.

Where the charity is in a situation where the return of a gift has become necessary and there is legal authority to do so, CRA advises that the charity will need to file an information return (in essence a letter) with CRA within 90 days of the return of the gift, or any other property that may reasonably be considered compensation for or a substitution of, in whole or in part, the original gift, if an official donation receipt was issued for the original gift, and if the returned property has a fair market value of more than \$50. No information return is required if the return of the original gift is reasonable consideration or remuneration for property acquired by or services rendered to a person. CRA states in CG-016 *Qualified Donees - Consequences of Returning Donated Property*¹⁶⁸ that a donor's income tax return may be reassessed for any claim that can reasonably be regarded as relating to the returned property. The information return is simply a letter that must include all of the following information:

- a description of the returned property;
- the fair market value of the returned property at the time it is returned;
- the date on which the property is returned;
- the name and address of the person that the property is being returned to including, in the case of an individual, their first name, initial, and last name; and

¹⁶⁸ Canada Revenue Agency, "Guidance CG-016: Qualified Donees – Consequences of returning donated property" (19 October 2012), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/rtrng-dntd-prpty-eng.html>>.

- the information contained in the original donation receipt, or a duplicate copy of the original receipt, if the property is being returned by the qualified donee that originally issued the receipt or a person not at arm's length with the qualified donee.¹⁶⁹

13. Anti-terrorism and Money Laundering Considerations¹⁷⁰

As well, charities may also need to consider addressing due diligence considerations under Canada's broad reaching anti-terrorism and money laundering legislation. The terms of that legislation can significantly impact charities, particularly those charities operating outside of Canada in conflict zones. Accordingly, the charity, under certain circumstances, may need to take appropriate steps to ensure that it conducts the necessary due diligence inquiries that need to be made of a donor.¹⁷¹ The charity may also want to consider retaining the right in the trust document *not* to apply the trust monies to the restricted purpose in the event that the charity subsequently has concerns about its ability to comply with applicable anti-terrorism and money laundering legislation with regard to the restriction.

14. Independent Professional Advice

Finally, before accepting a gift that is subject to a restricted charitable purpose trust, a charity should consider advising the donor in writing to seek independent legal advice and/or tax advice from an accountant or financial planner. Donors should be informed of this right *before* the gift has been made and to have it confirmed in the trust document. Doing so will help reduce the risk of a gift subsequently being challenged by the family of the donor due to allegations of undue influence. In this regard, the charity should be aware of any other evidence of undue influence apparent in the donor's actions, and should appropriately address any concerns about undue influence before the gift has been made.

¹⁶⁹ It is unclear whether the requirement to file an information return changes CRA's prior administrative position that the charity must also file an adjustments to the charity's T3010 Registered Charity Information Return for the affected year, thereby reducing the amount of receipted donations listed on line 4500 of the return. Therefore, a charity may wish to take this precautionary measure. See Canada Revenue Agency, *supra* note 97.

¹⁷⁰ For more information on anti-terrorism, see *Corporate and Practice Manual for Charities and Not-For-Profit Corporations*, *supra* note 1 at Chapter 18: Anti-terrorism and Money Laundering Issues for Charities.

¹⁷¹ For more information see <www.antiterrorism.ca>. See also Terrance S. Carter, Sean S. Carter, and Nancy E. Claridge, "The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance" (26 October 2007), online at: <<http://www.carters.ca/pub/article/charity/2007/tsc1026.pdf>>.

15. Considerations When Drafting Board-Created Restricted Charitable Purpose Trusts

When considering what terms to include in a board-created restricted charitable purpose trust to which donors would be invited to make contributions, the substantive terms of the trust should generally be similar to the terms of a donor-created trust as described above, and therefore should be as carefully drafted as the terms of a testamentary or *inter vivos* charitable trust.

Additionally, boards should be careful to ensure that they adopt a board resolution to authorize the restricted charitable purpose trust when establishing the terms of the fund. In fact, there should be a board resolution to authorize each separate board-created trust or alternatively, there should be a board resolution to delegate that ability to an authorized officer of the charity. Lastly, to reduce the risk that the restricted charitable purpose trust will be challenged, the board should take steps to ensure that the terms of the trust have been adequately communicated to the donor in writing.

G. CONCLUSION

Before drafting a restricted charitable purpose as either a testamentary or *inter vivos* trust, it is important to understand what a charitable purpose trust is, as well as the duties and obligations that boards of directors of charities have in terms of managing and investing the funds that are subject to a charitable trust. As well, drafting restricted charitable purpose trusts necessitates an understanding of the restrictions that can be applied, since there can be significant legal consequences associated with different restrictions that the charity and the donor will need to be aware of before such restrictions are included in the terms of the trust.

Many donors prefer making gifts that are subject to restricted charitable purpose trusts because it allows them to retain some measure of control over their gift, and provides better assurance that their philanthropic objectives will be advanced. By contrast, charities usually prefer receiving unrestricted gifts, since restricted gifts may involve significant legal and administrative burdens for the charity. Regardless of their presence, however, restricted charitable purpose trusts are at present and will continue to be an important part of fundraising for charities. Moreover, given the increased demands on fundraising by charities and the associated need for innovative and sophisticated gifts, there is little doubt that the importance of addressing and understanding the issues involved with restricted charitable purpose trusts will continue to be an important aspect of

funding for charities in the future. For these reasons, lawyers and gift planners advising charitable clients and donors need to be aware of the legal duties and resulting consequences associated with establishing restricted charitable purpose trusts. It is hoped that this paper will help in this regard.

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