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# THE ASSOCIATION OF CORPORATE GRANTMAKERS

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## A Selective Overview of Legal Issues for Corporate Grant Makers

(Power Point Presentation)

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## **SUMMARY OF LEGAL ISSUES**

- **Introduction - The Legal Nature of A Corporation as a Grant Maker**
- **Issue #1 - What is the Traditional Definition of a Gift at Law?**
- **Issue #2 - What are the New Split Receipting Rules?**
- **Issue #3 - When Can a Charity Issue a Charitable Receipt in Return for a Corporate Grant?**
- **Issue #4 - What are the General Tax Consequences of a Grant by a Corporation?**

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## **SUMMARY OF TOPICS - continued**

- **Issue #5 - Why Would a Corporation Not Want a Charitable Receipt?**
- **Issue #6 - What Type of Restrictions Can a Corporation Place on a Gift?**
- **Issue #7 - Can a Corporate Gift to a Charitable Organization Render It a Private Foundation?**
- **Issue #8 - What Due Diligence Inquiries Should Be Done Before Making a Gift to a Charity?**
- **Issue #9 - When Can a Corporate Grant Maker Become Exposed to Liability?**
- **Other Legal Issues to Consider**

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## **Introduction - The Legal Nature of a Corporation as a Grant Maker**

- **A corporation as a grant maker is more multi-faceted and therefore more complicated than an individual donor.**
- **A corporation as a grant maker may be involved in one or more of the following relationships with a charity:**
  - **as a donor of charitable gifts**
  - **as a parallel foundation for charitable gifts**
  - **as a sponsor of a charity**
  - **as a sponsor of a charitable event or program**

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- **as an advertiser for a charity**
- **as a provider of endorsements for a charity**
- **as a recipient of endorsements by a charity**
- **as a founder of an endowment fund**
- **as a creator of a scholarship fund**
- **Each one of these relationships involves varying degrees of legal issues depending upon the nature and complexity of the relationship in question.**
- **It is therefore important for a corporation as a grant maker to be aware of the applicable legal issues and structure their relationship accordingly.**

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**Issue #1 - What is the Traditional  
Definition of a Gift at Law?**

- **The traditional common law definition of a gift requires:**
  - **the donor must have an intention to give**
  - **there must be a transfer of property**
  - **the transfer must be made voluntarily without contractual obligation**
  - **no consideration or advantage can be received by the donor**

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- **Therefore a contract to dispose of property to a charity at a price below fair market value would not generally be considered a gift at common law for which a charitable receipt could be issued.**
- **Similarly , a grant to a charity that entitles the corporation to receive advertising and/or sponsorship benefit of a material nature would not be a gift at common law for which a receipt could be issued even if the value of the gift significantly exceeded the benefit received.**

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## **Issue #2 - What are the New Split Receipting Rules?**

- **December 20, 2002 - Technical Amendments and Technical News No. 26 on December 24, 2002 has introduced a radical new definition of what is a gift for income tax purposes.**
- **The key requirements of what will be recognized as a gift for income tax purposes are the following:**
  - **there must be voluntary transfer of property with a clearly ascertainable value**

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- **any advantage received by the donor must be clearly identified and its value ascertainable**
- **there must be a clear donative intent by the donor to benefit the charity**
- **donative intent will generally be presumed provided that the fair market value of the advantage does not exceed 80% of the value of the gift**
- **the eligible amount of a gift will be the excess of the value of the property transferred over the amount of the advantage received by the donor**

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- the amount of the advantage is the total value of all property, services, compensation or other benefits to which the donor is entitled as partial consideration for the gift
- excluded from the value of the advantage is token consideration for the gift calculated on the basis of a “*de minimis* threshold” of the lesser of 10% of the value of the gift and \$75.00
- The charitable receipt will now need to identify the advantage and the amount of the advantage as well as the eligible amount of the resultant gift.

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- The new split receipting definition of a gift for income tax purposes does not constitute a gift at common law because the donor receives some consideration, although it does constitute a gift at civil law.
- Therefore to ensure that the title of property passes to a charity at common law where there is split receipting, it will be important to document the gift as a contract, i.e.. by a grant agreement.

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**Issue #3 - When Can a Charity Issue a Charitable Receipt in Return for a Corporate Grant?**

- **No charitable receipt can be issued for the donations of volunteer services, since volunteer services are not a gift of property.**
- **Similarly no receipt can be issued for the loan of property, i.e. the use of a time share or a condominium, because the loan of property does not constitute a gift of property.**

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- **A receipt can be issued where the advantage received by the corporation (less any token consideration based upon the “*de minimis* threshold” of the lesser of 10% of the value of the gift and \$75.00) does not exceed 80% of the value of the gift.**
- **For example, the ticket price for a table of 8 at a fundraising dinner is \$2,000.00, the fair market value of the dinner is \$800.00, the value of complimentary items, i.e.. the door prizes and table gifts is \$200.00, and the value of the advertising received by the corporation is \$500.00.**

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<b>Total price for a table of 8</b>		<b>\$2,000.00</b>
<b>Less:</b>		
- value of dinner	<b>\$800.00</b>	
- complimentary items	<b>\$200.00</b>	
- advertising	<b><u>\$500.00</u></b>	
<b>Total value of advantage received by the donor</b>		<b><u>\$1,500.00</u></b>
<b>Eligible amount of charitable receipt</b>		<b><u>\$ 500.00</u></b>

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#### **Issue #4 - What Are the General Tax Consequences of a Grant by a Corporation?**

- **A corporation can utilize a charitable receipt as a tax deduction (not a credit) up to 75% of its taxable income and can carry forward any excess for 5 years.**
- **If the gift is characterized as a promotion or advertising expense, then the gift can be recorded by the corporation as a business expense with generally the same taxable benefit as utilizing a charitable receipt.**

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- **The value of a gift in kind must be supported by an appraisal, preferably an external appraisal if over \$1,000.00.**
- **A gift in kind for which a charitable receipt for the value of the gift is received will result in the corporation being deemed to have received taxable proceeds in the same amount, either as business income or as capital gains, depending upon the nature of the gift in kind donated.**

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- **A gift in kind for which a charitable receipt is not issued will not result in taxable income for the fair market value of the property granted but will allow the corporation to claim its cost of the gift in kind as a business deduction.**
- **There is therefore generally no tax difference to a corporation whether it receives a charitable receipt for a gift or treats the gift as a business expense.**

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### **Issue #5 - Why Would a Corporation Not Want a Charitable Receipt?**

- **The issuance of a charitable receipt is problematic for a charity because it increases the disbursement quota of a charity for the following year by 80% of the receipted gifts and therefore must be expended in the following tax year, save and except if the gift is a 10 year gift, a testamentary gift or a gift of capital from another charity.**

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- **Non receiptable gifts from a corporation (resulting in the same tax treatment to a corporation as a receipted gift), grants from governments and sponsorship proceeds do not increase the disbursement quota of a charity and therefore help the charity to build up a capital base and avoid a disbursement quota shortfalls.**
- **If no charitable receipt is issued for a gift in kind then no appraisal is required.**
- **If no charitable receipt is issued, then there is no taxable deemed disposition by the corporation equal to the value of the receipt to be included on its taxable income.**

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**Issue #6 - What Type of Restrictions Can a Corporation Place on a Gift?**

- **If the gift is non-receiptable, then limitations on donor control for tax purposes is not a factor.**
- **If it is a receiptable gift, then for tax purposes the restrictions imposed must not leave control over the gift in the hands of the donor.**
- **Example of restrictions that are generally acceptable involving receiptable gifts:**
  - **donor advised funds**
  - **special purpose charitable funds, like a building fund**

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- **endowment funds, including existing endowment funds or new named endowment funds**
- **scholarship funds, either endowed or not**
- **ten year gifts**
- **name recognition rights and restrictions**
- **Example of non-acceptable restrictions on receiptable gifts**
  - **donor directed funds**
  - **donor selected investments**
  - **donor appointed or approved board members**

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- donor appointed or approved CEO
- donor controlled flow through of funds to another charity
- All restricted gifts need to be carefully documented:
  - donor restricted gifts that are receiptable should be structured as a charitable purpose trust
  - name recognition rights should be structured as a condition subsequent gift

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- Failure by a charity to comply with donor restrictions can leave the charity and its board of directors susceptible to one or more of the following:
  - breach of contract
  - breach of trust
  - breach of fiduciary duty
  - public inquiry under the *Charities Accounting Act* (Ontario)
  - judicial passing of accounts initiated by the Public Guardian and Trustee

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**Issue #7 - Can a Corporate Gift to a Charitable Organization Render It a Private Foundation?**

- **Technical amendments on December 20, 2002 have changed the definition of a private foundation because of a change from a “contribution test” to a “controlled test” that could unwittingly render a recipient charitable organization a private foundation.**
- **A charity can be designated a private foundation if either of the following occur:**
  - **more than 50% of the directors, officers, trustees or similar officials do not deal with each other at arms length**

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- **more than 50% of the capital of a charity is contributed by a person or group of persons that directly or indirectly control the charity**
- **As a result, a corporation that retains the right to appoint, approve or veto, more than 50% of its board, officers or trustees of a charity, or otherwise directly or indirectly control a charity where the corporation has contributed more than 50% of the capital of the charity, may result in a charitable organization unwittingly becoming designated as a private foundation.**

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**Issue #8 - What Due Diligence Inquiries  
Should Be Done Before Making a Gift to a  
Charity?**

- **Corporate profile search to ensure that the charity is an active corporation and to determine its correct corporate name.**
- **CCRA on line search at [www.c CRA-adrc.gc.ca/tax/charities/list/chtysr-e.html](http://www.c CRA-adrc.gc.ca/tax/charities/list/chtysr-e.html) to confirm charitable status, designation as either a charitable organization or a foundation (public or private).**
- **CCRA on line search of past T3010 filings to determine disbursement quota compliance.**

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- **Obtain a copy of letters patent and all supplementary letters patent, if any, to determine if corporate objectives encompass proposed activities.**
- **Inquire about donor acceptance policy, investment policy and sexual abuse policy, if applicable.**
- **Obtain copy of most recent audited financial statement.**
- **Inquire about the existence of an independent audit committee for the board.**

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### **Issue #9 - When Can a Corporate Grant Maker Become Exposed to Liability?**

- **Anti-terrorism legislation (see our web site [www.antiterrorism.ca](http://www.antiterrorism.ca) for details).**
  - **donors and/or the board of directors can be held criminally responsible for directly or indirectly supporting and/or facilitating “terrorist activities” or “terrorist groups”, whether or not there is a clear intent to do so**
  - **corporations therefore need to do due diligence before making a gift to a charity**
  - **need to determine if the charity has a anti-terrorism policy statement and whether it is being complied with**

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- **Collecting donations from employees and/or customers and not applying the monies to the intended purpose could result in:**
  - **breach of trust and/or breach of fiduciary duty in not complying with donor’s intentions**
  - **Public Guardian and Trustee can intervene under the *Charities Accounting Act* (Ontario)**
- **Participating in a charitable programme that constitutes a tax shelter:**
  - **a tax shelter involves purported tax savings that exceed the cost of the tax shelter to the taxpayer**

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- **February 2003 - Federal budget expands the definition of Tax Shelter to include tax credits, i.e. charitable receipts, as well as tax deductions**
- **charitable programmes involving the sale of inventory which is then gifted and receipted at a higher fair market value resulting in a net tax credit to the purchase will likely have to be registered as a tax shelter**
- **corporations that participate in a tax shelter charitable programme face exposure to liability from possible penalties under the *Income Tax Act* (Canada) and to donors if the purported tax savings do not materialize**

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- **Participating in charitable programmes that result in exorbitant fundraising costs:**
  - **generally must limit fundraising costs to 20% of receipted monies**
  - **fundraisers who charge high percentages, i.e. 50% or more, may result in personal liability for directors of a charity**
  - **corporations should inquire into the fundraising costs of a fundraising event before supporting it**

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- **Participating in fundraising programmes:**
  - **exposure to third party injuries**
  - **possibility of sexual abuse of children**
  - **inadequate insurance coverage**
  - **Lack of adequate risk management policies in place, i.e. like child abuse policies**

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### **Other Legal Issues to Consider:**

- **On going compliance with investment powers by charities for donated funds, i.e. endowment funds.**
- **When can a charity become involved in a business venture with a business corporation?**
- **What are the terms that should be included in a sponsorship agreement?**
- **What are the terms that should be included in an endowment agreement?**

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- **When will a business corporation be considered to be a charity?**
- **What are the pros and cons of establishing a parallel private foundation?**
- **What are the extra-provincial requirements for parallel foundations that operate across Canada?**

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