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# CANADIAN CANCER SOCIETY

Ottawa – October 8, 2003

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## Key Legal Responsibilities of Charities in Planned Giving

(Power Point Presentation)

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*By Terrance S. Carter, B.A., LL.B.  
Carter & Associates*

**CARTERS**.ca

**CARTER & ASSOCIATES**  
BARRISTERS, SOLICITORS & TRADE-MARK AGENT  
Affiliated with **Fasken Martineau DuMoulin** LLP

211 Broadway, P.O. Box 440  
Orangeville, Ontario L9W 1K4  
Tel: (519) 942-0001  
Fax: (519) 942-0300

Toll Free: 1-877-942-0001

[www.carters.ca](http://www.carters.ca)

[www.charitylaw.ca](http://www.charitylaw.ca)

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**Key Legal Responsibilities Of Charities In  
Planned Giving**

By Terrance S. Carter, B.A., LL.B.  
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**Overview**

- **Legal Responsibility of Charities and Directors for Planned Giving**
- **Fundamental Legal Considerations Involved in Planned Giving**
- **Donor's Rights and Remedies in Planned Giving**
- **Avoiding Liability for Planned Giving Involving Testamentary Gifts**
- **Legal Responsibilities Involving Donor Restricted Charitable Gifts**
- **Legal Responsibilities in Planned Giving Programs**

### Resource Materials

- [www.charitylaw.ca](http://www.charitylaw.ca)
  - Charity Law Bulletins #8, #9, #13, #17, #21 and #23
  - Article entitled “*Looking a Gift Horse in the Mouth & Avoiding Legal Liability in Fundraising*”
  - Article entitled “*Donor Restricted Charitable Gifts Revisited: A Practical Overview*”
- [www.antiterrorism.ca](http://www.antiterrorism.ca)
  - Article entitled “*Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law*”

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### Legal Responsibility of Charities and Directors for Planned Giving

- Improper or negligent actions by development officers or fundraisers may expose a charity and its directors to legal liability
- The court held in *The Aids Society for Children* (Ontario) that
  - Although a charity does not hold its charitable property in trust for its charitable purpose, a charity has a fiduciary obligation to apply donations for its charitable purposes

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- **A fiduciary has a legal obligation to put the interests of others ahead of the interests of the fiduciary**
- **There is little practical distinction for directors between being a trustee and having fiduciary obligations**
- **A charity and its directors have a fiduciary obligation to account to the public for all funds raised from donors**
- **Charities and directors therefore have a fiduciary obligation to donors to ensure that donations are applied for the charitable purposes of the charity**

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- **It is essential for charities and their directors to review charitable objects on a regular basis and amend those objects as necessary**
- **Third party fundraisers and subcontractors are agents of the charity and may cause liability for both the charity and its board of directors personally**
- **Fundraising contracts which provide for unreasonable compensation may be voidable based upon both violation of public policy and/or misrepresentation**

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- **Misrepresentation is determined by the perception of the donor, not by the intent of the charity or its directors in receiving the gifts**
- **The fiduciary duty of a charity and its board of directors to account for donations applies to the gross amount of donations raised by third party fundraisers, not to the net amount that the charity may be entitled to pursuant to a fundraising contract**
- **Fundraising costs of between 70% to 80% rendered the contracts void as being contrary to public policy**

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- **The directors were found personally liable for unreasonable fundraising costs in the amount of \$766,000**
- **Fundraising companies were required to repay unreasonable fundraising costs**
- **The directors were subjected to a penalty of \$50,000.00 under the *Charities Accounting Act* (Ontario)**
- **The court in *National Society for Abused Women and Children* confirmed**
  - **Fiduciary obligation of directors to account for unconscionable fundraising costs**

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- **Fundraising contract was declared void *abinitio* as being contrary to public policy**
- **Donors are entitled to know about fundraising and administrative costs when making donations**
- **For more information on these cases, see Charity Law Bulletins #9, #13 and #17 at [www.charitylaw.ca](http://www.charitylaw.ca)**
- **The “buck” stops with the board of directors of a charity after everyone else has left the charity**
- **The board of directors must therefore be made familiar with all fundraising programs and the liabilities that are associated with those programs**

### **Fundamental Legal Considerations Involved In Planned Giving**

- **Fundraising is not an end in itself**
- **Fundraising must comply with the applicable corporate objects and powers of the charity**
  - **The fundraising program must not be *ultra vires* the charitable objects of the charity**
  - **The charitable purpose being furthered by fundraising must not be *ultra vires* the charitable objects**
  - **A donor restricted gift resulting from fundraising must not be *ultra vires* the charitable objects**

- **Fundraising must not violate applicable statutory provisions**
  - **Specific charitable statutes affecting fundraising**
    - *Charities Accounting Act (Ontario) and applicable regulations*
    - *Charitable Gifts Act (Ontario)*
    - *Religious Organizations Land Act (Ontario)*
    - *Income Tax Act (Canada)*

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- *Charitable Fund-raising Act (Alberta)*
- *The Charities Endorsement Act (Manitoba)*
- *Charities Act (PEI)*
- *Charitable Fund-raising Businesses Act (Saskatchewan)*
- *Anti-terrorism Act (Canada)*
- *Taxation Act (Quebec)*

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- **General statutes affecting charitable fundraising**
  - *Trustee Act (Ontario)*
  - *Securities Act (Ontario)*
  - *Insurance Act (Ontario)*
  - *Loan and Trust Corporations Act (Ontario)*
  - *Competition Act (Canada)*
  - *Privacy Act (PIPEDA) (Canada)*
  - *Provincial Privacy Legislation*
- **Fundraising must not involve gifts that are contrary to public policy**
  - **Charitable Gifts involving discrimination**
  - **Charitable Gifts involving illegal activities**

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### **Donor's Rights And Remedies** **In Planned Giving**

- **General exposure to liability involving donors**
  - **Misrepresentation involving issuance of charitable receipts**
  - **Failure to comply with donor restrictions**
  - **Failure to disclose excessive fundraising costs**
  - **Detrimental reliance upon charitable endorsements**
  - **Detrimental reliance upon improper tax advice involving donations**

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- **Breach of fiduciary duty and/or breach of trust in applying funds to charitable purposes**
- **Donor's statutory rights**
  - *Charities Accounting Act (Ontario)*
    - **Section 6 of the CAA (public inquiry)**
    - **Section 10 of the CAA (alleged breach of trust)**

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- **Section 4(d) of the CAA (noncompliance with donor directions)**
- **Section 3 of the CAA (formal passing of accounts)**
- *The Income Tax Act (Canada)*
  - **Informal complaint to CCRA**
  - **Resulting audits**
  - **Receipting and disbursement violations**

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**Avoiding Liability For Planned Giving  
Involving Testamentary Gifts**

- **Reducing legal risks from estate planning programs**
  - **Shift the legal risk away from the charity**
    - **Download the risk to professionals, i.e. accountants or lawyers, to establish evidence of due diligence**
    - **Raise the shield of liability insurance whenever possible, if available**
    - **Return any original wills or codicils to donors or their lawyers**

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- **Avoid circumstances conducive to allegations of undue influence**
  - **Directing work to a particular lawyer**
  - **Paying for a portion of donor's legal costs**
  - **Acting as either an estate trustee (executor) or attorney under a power of attorney**
  - **Preparing a will or power of attorney**
  - **Providing advice on how to structure disposition clauses in a will**
  - **Providing recommendations on how much of the estate should be given to a charity or charities in general**

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- **Completing the will guide on behalf of the testator instead of only assisting with background information**
- **Meeting with the lawyer when the donor gives instructions for the will**
- **Being present when the will is being signed**
- **Offering to store the original will, codicil to a will, or power of attorney**
- **Managing testamentary gifts**
  - **Ensure that a copy of the will is received and carefully review charitable gift provisions**
  - **Review any applicable donor restrictions before agreeing to receive the gift**

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- **Require progress reports on the administration of an estate**
- **Request the distribution of gifts to the estate at the earliest opportunity**
- **Have legal counsel review estate releases as the charity cannot sign an indemnity for money or cause of action beyond what the estate would have otherwise been liable for**
- **Have legal counsel review estate accounts before signing estate releases**
- **Review appropriateness of investments**
- **Ensure that tax credits are used against 100% of income in the year of death and carried back one year, if necessary**

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- **Make sure that only duly authorized signing officers execute the releases**
- **Resisting voluntarily renouncement of a charitable gift**
  - **A charity may be asked to renounce a testamentary gift in situations of financial hardship involving family members of the deceased**
  - **There is no legal authority for a charity to unilaterally renounce a gift**
  - **Even court authorization for a renunciation of a testamentary gift is unlikely**
  - **The charity therefore has a fiduciary obligation to pursue testamentary gifts**

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### **Legal Responsibilities Involving Donor Restricted Charitable Gifts**

- **The difference between unrestricted and donor restricted charitable gifts**
  - **What is an unrestricted charitable gift?**
    - **An unrestricted charitable gift is a gift to the charity that is not subject to any restrictions or limitations**
  - **What is a donor restricted charitable gift?**
    - **A donor restricted charitable gift that is a gift subject to binding restrictions, conditions or limitations**

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- **Instances of breach of trust involving donor restricted charitable gifts**
  - **Diverting a fund to another application**
  - **Withholding a fund**
  - **Pooling restricted funds with funds of another donor**
  - **Encroaching on the capital of an endowment fund**
  - **Altering the terms of a trust deed**
  - **Borrowing from a restricted fund**
  - **Using surplus funds from a fundraising appeal for a different purpose**

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- **Altering terms of a donor restricted fund without court authorization**
- **Can a donor restriction be unilaterally varied?**
  - **Only a court can vary a donor restricted charitable gift**
  - **Exceptions are**
    - **Gift reverting to the donor on a failed *cyprés* application**
    - **Gift reverting to the donor on the failure of either a condition precedent or a condition subsequent**

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- **How should donor restricted gifts be managed once received?**
  - Identify the nature of the charitable gift
  - Review and approve donor restrictions
  - Effective ongoing management of donor restricted charitable gifts
    - Deposit into the bank account of the named charity
    - Invest fund in accordance with applicable investment power
    - Do not borrow against restricted fund
    - Co-mingle restricted funds only in accordance with regulations in Ontario and not with general funds

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- **How can donor restricted charitable gifts be avoided in the first instance?**
  - Encourage unrestricted gifts
  - Alternatively encourage the use of non-binding directions
  - Advise donors that all gifts are deemed to be unrestricted unless specifically stated otherwise

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- **Preventative steps to reduce liability involving donor restricted charitable gifts**
  - **Public fundraising appeals should state that any surplus funds will be used for the general charitable purposes of the charity**
  - **Ensure that donor restricted gift includes a *cyprès* clause that will allow the charity to amend the purpose**
  - **Ensure that documentation creating donor restricted charitable trusts include the words “in trust”**

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- **Protecting donor restricted charitable gifts**
  - **Background of Christian Brothers series of decisions**
  - **Exigibility of special purpose charitable trusts**
  - **Commentary on the *Christian Brothers Ont.* Court of Appeal decision**
    - **Decision is at odds with common law that trust property is not subject to claims against the trustee**
    - **Misunderstanding of what a charitable purpose trust is**
    - **Limited application of the decision provides little comfort**

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– **Impact of the Christian Brothers Ont. Court of Appeal decision**

- **Claims against charities will likely increase**
- **Special purpose trust endowments will be at risk to creditors of the charity**
- **The ability of donors to create enforceable restricted gifts will be weakened**
- **Donors will be reluctant to give large gifts directly to an operating charity**

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– **Developing a strategy in response**

- **Utilize an arms length parallel foundation**
- **Utilize a community foundation or trust company**
- **Structure gift as a determinative gift with a gift over to another charity**
- **For more information see [www.charitylaw.ca](http://www.charitylaw.ca) article on “*Donor Restricted Charitable Gifts Revisited: A Practical Overview*”**

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**Legal Responsibilities in Planned Giving Programs**

- **Gift of shares or interests in a business will be subjected to the *Charitable Gifts Act* (Ontario)**
  - **Charities cannot own more than a 10% interest in a business for longer than 7 years**
  - **If a charity owns more than a 50% interest in a business then reporting requirements to P.G.T. apply**
- **Gifts of real estate**
  - **Three year restrictions on property investments under the *Charities Accounting Act* (Ontario)**

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- **Liability for toxic property and need for environmental assessment**
- **Need for due diligence searches**
- **Inability of charity to manage real property**
- **Receiving used “gifts in kind”**
  - **Need for appraised value**
  - **Potential liability to third parties from using recycled property**
- **Self insured gift annuities**
  - **The difference between self insured and reinsured gift annuities**
    - **Self insured gift annuity**

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- **Reinsured gift annuity**
- **Legal risks associated with self insured annuities**
  - **Lack of corporate authority**
  - **Violation of the *Insurance Act* (Ontario)**
  - **Operational financial risks**
  - **Restrictions on foundations issuing annuities**
- **Debt instruments forgivable on death**
  - **Need testamentary instrument to forgive debt**
  - **If not properly forgiven, will become an asset owing to the estate**

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- **Impact of technical amendments released on December 20, 2002**
  - **New split receipting rules**
  - **Concern about definition of private foundation based upon control test as opposed to contribution test**
  - **See Charity Law Bulletin #21 and #23 for more details at [www.charitylaw.ca](http://www.charitylaw.ca)**
- **Transferring capital funds between charities**
  - **Ensure that there are charitable objects to permit the transfer of funds**
  - **Identify donor restricted charitable gifts**
  - **Identify impossible or impractical donor restrictions**

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- **Change of trustees by deed of trust**
- **Unrestricted funds to be applied for original charitable purpose**
- **Investment issues in fundraising**
  - **Determine what investment power applies**
  - **Review prudent investment standard**
  - **New delegation of investment decision making under *Trustee Act* (Ontario)**
  - **See [www.charitylaw.ca](http://www.charitylaw.ca), Charity Law Bulletin #8 for more details**

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- **Managed or pooled investment of charitable funds**
  - **Does the recipient charity have the corporate power to operate a pooled fund?**
  - **Does the investment power of each participating charity permit it to invest charitable monies by pooling monies with a third party?**
  - **Does the *Loan and Trust Corporations Act* (Ontario) have application?**
  - **Does the *Bank Act* (Canada) have application?**
  - **Does the *Securities Act* (Ontario) have application?**
  - **Is court authorization required to pool investment funds of various charities?**

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- **The effect of new regulations under the *Charities Accounting Act* (Ontario)**
  - **No relief to the common law rule prohibiting directors from receiving remuneration**
  - **Indemnification of directors and officers and liability insurance is now permitted**
  - **Charities may co-mingle restricted and special purpose funds provided that detailed accounting records are maintained**
  - **However, co-mingling of restricted funds and general funds are not permitted**

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- **Utilizing ten year gifts in charitable fund raising**
  - **Documenting ten year gifts**
  - **Expenditure of income by foundations and the 4.5% disbursement quota**
  - **Consequences of expending capital prior to expiry of ten years**
  - **Expenditure of ten year gifts after expiry of ten years**
  - **Managing ten year gifts**
    - **Keep the ten year gifts in a separate account**

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- **This would help to accomplish the following**
  - **Keep track of original capital and capital gain**
  - **Less chance that capital would be expended**
  - **Different investment powers could apply if necessary**
- **Problems in transfer of ten year gift to foundations**
- **Problems in transfer of ten year and other long term gifts from private foundations to public foundations**

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- **Conditional gifts**
  - **What is the nature of a conditional gift?**
    - **A conditional gift involves the charity becoming the beneficial owner of the gift subject to being defeated by a condition**
    - **With a special purpose charitable trust, the charity never becomes the beneficial owner of the gift but instead holds it in trust**
  - **Receipting conditional gifts**
    - **Condition precedent gifts cannot be receipted**
    - **Condition subsequent gifts may be receiptable:**

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- **Reversion to donor precludes receipting**
- **Reversion to another charity will likely be receiptable**
- **When will excessive donor control defeat a gift**
  - **Donor advised fund where the donor is allowed to direct control**
  - **Donor retaining the right to direct investments**
  - **Donor requiring that the gift must be invested in only one type of investment**
  - **Donor approving the recipient of a scholarship**
  - **Donor appointing the nominee to the board of directors**
  - **Donor approving the appointing of the CEO**

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- **Protecting against liability from anti-terrorism legislation**
  - **Legislation is complicated, see [www.antiterrorism.ca](http://www.antiterrorism.ca) for article “Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law”**
  - **Charity and its directors need to have a working knowledge of the anti-terrorism legislation in making a gift to charity**

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- **Even gifts that unintentionally end up in the wrong hands through agents of the charity can violate anti-terrorism legislation and create exposure to liability for the charity and its board**
- **A charity can lose its charitable status**
- **Directors, donors and fundraisers can be found personally liable**
- **Need to develop a due diligence checklist to avoid unintentional violations of the legislation**
- **However, anti-terrorism legislation generally involves strict liability legislation so due diligence is not necessarily a defence**

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