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**CAGP\*ACPD  
ADVANCED GIFT PLANNING SYMPOSIUM**

**November 3, 2005 - Ottawa**

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**Returning a Gift – What are the Options?**

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**OVERVIEW**

- **Case Study: Radler/Queen’s Gift**
- **Donee Obligations**
- **Possible Consequences of Returning a Gift**
- **Options**

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**Case Study: Radler/Queen’s Gift**

**FACTS (from published reports):**

- **Pledge in May 2000 of \$1 million to Queen’s University**
- **Donors include David Radler, Hollinger, and several Hollinger papers, including Kingston Whig-Standard**
- **\$915,180 received as of September 22, 2005**
- **Mr. Radler was a member of University Council**

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**FACTS (cont’d):**

- **Donation to be used for construction of a new business school called Goodes Hall, which opened in 2002**
- **Name on business office wing of the building and on the university’s “Benefactor Wall”**
- **Hollinger Board report indicates \$168,000 of company money was used for Radler’s part of donation**

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**FACTS (cont'd):**

- **September 21, 2005 – David Radler plead guilty to fraud charges in a U.S. District Court related to his role in a \$32 million fraud at Hollinger International Inc.**
- **Under a plea bargain, he has agreed to cooperate with a continuing criminal probe into Conrad Black and other executives at Hollinger**
- **He faces possibility of 29 months imprisonment and a \$250,000 (U.S.) fine**

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**FACTS (cont'd):**

- **September 22, 2005 – Queen’s announced it is stripping Mr. Radler’s name from the wing and returning the donation**
- **“[T]he integrity of this gift to the university has been compromised... the best course of action was to return the money to the individuals and corporations that had given it”**
- **The university chose not to give the money to another charity**

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**Other Examples**

- **\$1.5 million gift to Mount Sinai from Mark Valentine (broker who pleaded guilty to securities fraud)**
- **\$5 million donation to Hospital for Sick Children from Conrad Black**
- **\$1.5 million gift to Ontario’s Ridley College by Patrick Lett, sanctioned by Ontario Securities Commission – College sued by American investors on the basis that he used money fraudulently obtained to make the donation**

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**Legal Obligations**

**A. Income Tax Act**

**1. Donee**

- **Registered charities may face revocation of their registered charity status if they fail to spend funds equal to their disbursement quota on carrying on charitable activities or making gifts to qualified donees (subsections 149.1(2), (3) and (4))**

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- **Since returning a gift is not a gift to a qualified donee and is not likely to be considered an expenditure related to carrying on charitable activities, it cannot be considered in determining whether the organization has met its disbursement quota**
- **Such a situation is not one where CRA would likely grant relief pursuant to subsection 149.1(5)**

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- **The definition of “charitable organization” requires that a charitable organization devote all of its resources to charitable activities carried on by the organization itself**
- **CRA statement: “Registered charities can only do two things with the money they receive: use it for their own good works or give it to another charity”**

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- The only situation where CRA has published a position and considered the possibility of returning a gift is where the gift has not been completed because the charity could not satisfy the donor's conditions - implied in the technical interpretation is a requirement that a Court order must be obtained (CRA Technical Interpretation #2005-0051761)

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- When considering the ITA implications of returning a gift, a distinction must be made between a completed gift for which a receipt has been issued and a pledge with respect to a conditional gift.
- Has the gift been completed in accordance with the law, eg. was the gift subject to a condition precedent or a condition subsequent?
- Donee would likely be able to return the property if the gift was not complete.

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2. Donor

- Has the gift been completed in accordance with the law, eg. was the gift subject to a condition precedent or a condition subsequent?
- If the gift was not completed at the time the property was returned, CRA takes the position that it can reassess any claim for a donation deduction or credit

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- While each situation would be considered on a case-by-case basis, CRA has indicated that if the gift was completed it would not be entitled to reassess the donor's claim for a deduction or credit for the gift on the basis that the return of the funds would not constitute income to the donor
- Also, normal reassessment limitation period would apply (3 years)

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**B. Trust Law Obligations**

**1. Failure of the original gift?**

- There is no principle in trust law whereby a special purpose trust will fail for reasons such as those cited by the institutions.
- Usually, such an arrangement will come to an end if:
  - Restricted term becomes impossible or impractical
  - Limited interest in a determinable gift comes to an end

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- Condition precedent or subsequent is unfulfilled
  - If condition precedent not fulfilled then gift fails
  - If condition subsequent not fulfilled then will revert back to donor – does not appear to be the case here.

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**2. Obligations as Trustee**

- **Duties of trustees / directors of charity are similar to those of ordinary trustee**
- **Directors /trustees must carry out charitable purpose in accordance with charitable objects and applicable restrictions**
- **Directors/trustees must ensure that gifts that are expended in accordance with the donor's restrictions**

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- **Duty to secure effective use by seeking a court order to impose cy-près or administrative scheme**
- **Directors/trustees must protect and conserve trust property**
- **Must protect funds from the seizure of creditors**

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**3. Breach of Trust**

**Examples include:**

- **Diverting funds intended for one charitable program for use in another charitable program**
- **Withholding a fund and not applying it to the charitable purpose intended by donor**
- **Encroaching upon the capital of endowment fund intended to be held in perpetuity**
- **Unilaterally attempting to alter terms of trust deed**
- **Using surplus funds for a different charitable purpose without court authorization**
- **Altering donor restriction without court approval**

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- **Returning a completed gift to the donor or donors in the absence of a specific reversionary clause or gift-over would likely result in breach of trust.**
- **May also result in breach of fiduciary obligations and breach of contract.**

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**Possible Consequences**

- **Personal liability for breach of trust**
  - **If in breach of special purpose trust for not having complied with terms then directors/trustees could be found jointly and severally liable**
  - **If found in breach of trust must compensate trust for the full amount of any loss suffered as a result of the failure to comply**

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- **Remedies under the Charities Accounting Act:**
  - **PGT can require charity to submit accounts for formal passing s.3**
  - **PGT can obtain a court order to enforce directions established by donor s.4(d)**
  - **Member of public can complain to judge of the Ontario court who can order that the PGT conduct an inquiry. S.6(1)**
  - **Court can make order as “deems in the circumstances to be just” s.10**

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- **Income Tax Act**
  - Donor may be reassessed to disallow credit/deduction in limited circumstances (would a windfall non-taxable gain be appropriate in these circumstances?)
  - Charity may face revocation

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### Options

- **Gift Agreement**
  - Many large gift agreements contain default provisions which enable the donor to terminate unilaterally upon the happening of certain events.
  - Consideration should be given to ensuring that a similar clause be included which provides the donee with the power to terminate unilaterally upon the happening of an event such as a criminal conviction, particularly if the agreement includes naming rights.

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- Upon the happening of a material default, including situations such as the Radler conviction, provision could be made for a gift-over to another registered charity of qualified donee (such a provision is usually found in these agreements but always solely at the donor's election).
- Are such agreements enforceable?

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- **Payment into Court**
  - **In the absence of specific provisions in a gift agreement, the money could be paid into Court and the donee could seek its guidance under Section 60 of the Trustee’s Act.**

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- **Gift Acceptance Policy**
  - **include provisions dealing with such situations**
- **Naming Policy**
  - **include strict criteria and requirements**
  - **require removal of name in certain circumstances at the unilateral option of the institution**

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