

## UNIVERSITY OF OTTAWA LAW SCHOOL

### DONOR-RESTRICTED CHARITABLE GIFTS

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#### A. INTRODUCTION

- ◆ New generation of philanthropists- Baby Boomers- want to exercise control over their gifts
- ◆ Philanthropy is becoming donor centered rather than cause centred
- ◆ Realization that donor's wishes and expectations must be considered
- ◆ Increasing obligation on charities to ensure restrictions imposed by donors are respected
- ◆ Presentation focuses on potential liability of charities and boards of directors and how to avoid liability
- ◆ Example: financially troubled charity uses endowment fund to "balance the budget": what are the possible implications for the charity and board of directors?

#### B. PRELIMINARY CONSIDERATIONS

- ◆ **Definition of charitable gift:** "a voluntary transfer of property to another made gratuitously and without consideration." Black's Law Dictionary
- ◆ **Definition of charitable Purpose Trust:** "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 particular purpose" Ontario Law Reform Commission *Report on the Law of Charities*
- ◆ **Basic attributes** of a charitable purpose trust:
  - Exempt from requirement that there be a beneficiary
  - Only Attorney General can enforce the trust- *parens patrie* role

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- Will not fail for uncertainty of objects
- *Cy-près* scheme- court can write or rewrite charitable purpose trust- makes charitable purpose as near as possible to original one
- Exempt from prohibition against remoteness of vesting- “modern” rule against perpetuities
- Exempt from prohibition against indestructible or perpetual trusts
- But not exempt from the accumulation act

◆ **Application of charitable Purpose Trust to charitable corporation?**

- Highly confused / unsatisfactory area of the law
- Does corporation hold its assets in trust for its charitable purposes?
- S.1(2) of *Charities Accounting Act* (CAA) (Ontario)- charitable corporation is trustee of its property for purposes of that act.
- Charitable purpose trust will apply to charitable corporation if corporation holds property in accordance with a special purpose charitable trust
- Charitable corporation does not hold its unrestricted assets “in trust” for its charitable purposes- these are owned beneficially to be used in accordance with its corporate objects.- *Christian Brothers*
- Incorporated charity can use unrestricted gift to the full extent of corporate objects- does not need to hold these in trust
- However if donor imposes restriction on a gift, then gift must be held as separate special purpose charitable trust
- If gift is donor-restricted, then all aspects of charitable purpose trusts apply to gift- becomes “charity within a charity”- charity is managing a separate and specific charitable purpose trust within confines of own general charitable purpose

**C. UNRESTRICTED AND DONOR-RESTRICTED CHARITABLE GIFT**

◆ **What is unrestricted charitable gift?**

- Gift at law to be applied towards the general charitable purpose that is not subject to any restriction by donor
- If board designates gift for a specific charitable purpose can change its mind and apply gift to another purpose as long as within charitable objects

◆ **Examples of unrestricted charitable gifts**

- Government grant not restricted to a specific program
- Sponsorship money with no restrictions
- Gifts from donors that are directed to be used for general purposes of charity
- Board designated funds or board-initiated endowment fund

◆ **What is a donor restricted charitable gift?**

- Restrict means “to restrain within bounds; to limit; to confine” Black’s Law Dictionary

- Donor restricted gift is a gift at law that is subject to restrictions imposed by donor that constrain how a charity can use gift
- Very important for charity to understand nature of restriction that has been imposed and the importance of complying with restriction
- Different forms of legal restrictions with distinctive legal consequences

#### D. GENERAL FORMS OF DONOR-RESTRICTED CHARITABLE GIFTS

##### ◆ **Special purpose charitable trust**

- Special purpose charitable trust is 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 originating documents.
- Corporations established for particular purpose cannot be trustees of charitable trusts for purposes other than those for which they were established.
- Gifts that are contributed to a special purpose charitable trust must be held by the charity in trust for the stated special purpose - they are not owned beneficially by the charity
- Charity can only use gift to accomplish the specific charitable purpose
- Special purpose trust is not required to be registered by Canada Revenue Agency (CRA) as a separate charitable organization
- Other names for “donor-restricted trust fund” include:
  - (1) charitable trust property
  - (2) special purpose fund
  - (3) endowment fund
  - (4) restricted fund

##### ◆ **Common law recognition of special purpose charitable trusts**

- *Christian Brothers- B.C.S.C.* (relying on several previous cases)

“a charitable corporation, such as C.B.I.C. generally holds property absolutely to be used for its charitable purposes, but may hold property as trustee for a specific charitable purpose.”

And further,

“a corporation can, however, hold property as a trustee for a charitable purpose, whether there are circumstances which show that the recipient is to take the gift as a trustee”

- Legal recognition of specific charitable purpose trust can also be found in *Re Bucks Constabulary Widows’ and Orphans’ Fund Friendly Society* and in the CAA

♦ **Implications of *Christian Brothers* case for specific purpose trusts**

- Facts of the case:
  - (1) Roman Catholic teaching order – operated Mount Cashel School, Vancouver College and St Thomas Moore Collegiate
  - (2) Incorporated by Special Act of Parliament in 1962
  - (3) Allegations made of sexual, physical and emotional abuse- Royal Commission appointed to investigate in 1989
  - (4) By 1999 aggregate claims \$67,000,000- claims for damages exceeded their general corporate assets
  - (5) Made application under *Winding-up and Restructuring Act*- were ordered wound-up and liquidator appointed.
  - (6) Liquidator asked court for advice about whether charities and their assets were immune from liability or were exigible to satisfy tort claims.
- **Courts held that:**
  - (1) The B.C. Supreme Court (also affirmed by Court of Appeal) held that the general corporate property of a charity is not immune from exigibility by tort creditors; however, property held as a special purpose charitable trust by a charity would not be available to compensate tort creditors of the charity unless the claims arose from a wrong perpetrated within the framework of the particular special purpose charitable trust in question.
  - (2) The Ontario Court of Appeal (O.C.A.) agreed that there is no general doctrine of charitable immunity applicable in Canada and it was therefore redundant to analyze whether special purpose charitable trusts were exigible to pay the claims of tort creditors. The O.C.A. held that all assets of a charity, whether they are owned beneficially or they are held pursuant to a special purpose charitable trust, are available to satisfy claims by tort victims upon the winding-up of the charity.
- **What the Courts said about special purpose trusts:**
  - (1) Feldman J.A. (O.C.A.) confirmed that charities can still hold specific property pursuant to a special purpose charitable trust and that a charity and its directors must hold and deal with these assets as charitable trust property, including obligation to seek judicial variation of a special purpose trust through a *cy-près* court order.
  - (2) The O.C.A. also confirmed that when a charity is wound up, “the obligation of the charity to sue assets held in trust for one or more of the trust purposes also ceases as it may no longer carry on.
  - (3) The O.C.A. distinguished between a “true” charitable purpose trust and gifts that are earmarked for some specific charitable purpose and are not trusts.
  - (4) A true charitable trust:
    - (5) Must be established in accordance with the general formal requirements of trust law:
      - Must be a settlor, a trustee, trust property and trust objects

- Must be three certainties- certainty of intention, certainty of subject matter and certainty of objects
- If purpose of trust is charitable and meets criteria above then charitable purpose trust is established
- (6) Gifts received by charity are assumed to be given for general charitable purposes, unless there is evidence that gives rise to creation of special purpose charitable trust
- (7) If donor has not formally expressed an intention sufficient to create a special purpose charitable trust will be deemed to be a “precatory trust”
- Levine J. (B.C.S.C.) adopts a more traditional approach to what is required to create a special purpose trust
- Quotes Waters *Trust Law in Canada*

There is no need for any technical word or expressions for the creation of a trust. Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention, a trust is set up.
- Factors that court will look at when determining the intention of the donor include:
  - (1) Contemporaneous documents and usage
  - (2) Circumstances surrounding the execution of trust document
  - (3) Donor’s contemporaneous acts
  - (4) Early application or distribution of the funds
  - (5) Construction placed on doubtful questions which arose in the early administration of the trust.

♦ **Commentary on *Christian Brothers* decision**

- **O.C.A. decision** constitutes a judicial erosion of special purpose charitable trust as it removes so many attributes of a special purpose charitable trust that it ends up being a trust in name only and imposes, at most, “trustee-like” obligations upon a charity concerning how it uses such “trust” property.
- Ignores the fact that special purpose charitable trust is a true trust at law
- Usual requirement that there be an identifiable beneficiary of a trust is not applicable to a charitable purpose trust, therefore recognized as benefiting public at large
- Purpose of special purpose trust should be enforceable by the courts as a complete trust in the same way as a private trust
- Therefore special purpose trust is as much a trust at law as a private trust with all of the attributes associated with a trust, including protection of trust property from creditors for the trustee personally
- Raises concerns about what evidence will be required to show that the donor had the requisite intent to create a special purpose trust
- Creates uncertainties for charities and donors

- Would be open for charity to argue that gift that donor had thought was a restricted gift was really only a precatory trust that amounted at most to a moral obligation
- Indicates a leaning by the courts against finding an implied charitable purpose trust.
- Prudent for charities and donors to
  - (1) Ensure that formalities required for creation of a trust are clearly articulated in document creating a restricted gift
  - (2) To categorize the gift as being a special purpose charitable trust by naming the charity as trustee, describing the property that constitutes the gift to be held “in trust” and explaining the specific purpose for which the property is to be used
- ◆ **Endowment Funds**
  - Endowment fund is a special purpose charitable trust through which the donor requires that the capital of the gift be held in trust in perpetuity
  - Allows charity to be able to accept gifts where the capital is held in trust on a perpetual basis
  - Can be established by the donor, by the charity, or by a combination of the charity and the donor (ex. Community foundations)
  - Not available to a non-profit organization, since non-profit organization is not a charitable purpose trust at law
  - Capital is to be invested in accordance with investment terms contained in the document creating endowment fund or in accordance with the investment powers of the charity set out in its constating documents
  - How income from endowment fund is used will depend on whether the donor has expressed a specific direction concerning disbursement in the endowment agreement or whether board has established terms of reference concerning how endowment income is to be applied
  - Board must ensure that income is applied only to charitable purposes
  - If board designates some of its unrestricted charitable funds to an endowment fund, can later re-designate those funds
- ◆ **Donor Restricted-Use Funds**
  - Capital and earned income expended over a period of time rather than being held in perpetuity
  - Can be applied in accordance with certain specific charitable purpose restrictions
  - Restrictions will eventually be fulfilled, thereby bringing the fund to an end
  - Can include time restriction that gift cannot be used until a certain time or that gift must be used over a certain number of years
  - Can impose purpose restrictions concerning how a gift will be applied such as a building program, or an operational purpose but the purpose must be within the charitable purposes set out in charity’s constating documents.
  - Donor can also impose restrictions on who can benefit from charity’s activities
  - Can be established by donor (*inter vivos* or testamentary) or by board

◆ **Restricted Charitable Trust Property**

- Real estate that is acquired subject to certain terms of trust contained in the deed of the property
- Board of charity must determine whether any of its property is subject to restricted charitable trusts and if so ensure that property is being used in accordance with restrictions
- Three categories of restrictions:
  - (1) Pertaining to religious doctrine
  - (2) Pertaining to use
  - (3) Limiting the use of the property to those who follow a particular religious practice
- Trust that is created is in perpetuity and charity cannot unilaterally vary the terms of trust without court authorization
- Grantor may include a reversionary clause stating that property is to revert to grantor in the event the terms of trust are not complied with
- If property subject to a restricted charitable trust is transferred then proceeds will remain subject to terms of trust
- *Attorney-General for Queensland v. Cathedral Church of Brisbane*
  - (1) Money raised for a hospital on land that church owned
  - (2) Court found that money given for hospital was a “special purpose charitable trust” there was no “implicit trust” to use the lands for that purpose
  - (3) Court implicitly recognized that once funds given for a special purpose charitable trust have been applied to their intended purpose, the special purpose charitable trust of the original gift comes to an end

◆ **Implied Special Purpose Charitable Trust Funds**

- Courts have been prepared to consider extrinsic evidence concerning whether the donor intended to create a special purpose trust and what the nature of the restrictions that would apply
- Circumstances where an implied special purpose charitable trust fund might be found include:
  - A public fundraising campaign for a specific purpose
  - Donor who gives money to a charity with no accompanying written documentation setting out intentions
- Assumption made that if donor making gift to parallel foundation, the gift will be used for the benefit of the parallel charity and using money for other purposes may result in breach of trust under s.6 or s.10 of CAA
- Doctrine of constructive notice: a 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
- Important for charity to include in its constating document a provision stating that the charity has the authority to transfer funds to “qualified donees” as defined in the *Income Tax Act* and that this power is communicated to its donors

◆ **Donor-advised funds and precatory trusts/ designated gifts**

- Do not have any enforceable restrictions associated with them



- Donor gives “suggested direction” which is an expressed preference, desire or request
- Moral obligation on charity receiving such a gift
- Precatory trust is a non-binding request of the donor and is also called a designated gift
- Donor advised fund is a form of designated giving whereby the donor makes a gift to a charity and then periodically makes nonbinding recommendations as to the distribution of assets from the fund
- Allows donor to receive immediate tax deduction for a charitable gift while deferring the ultimate disbursement of the gift for future charitable projects.
- According to CRA, donor can require gift to be used in a particular program provided that the decision regarding use of donation within the program rests with the charity
- If donor retains too much control over the gift it might no longer be considered a gift at law in which case it cannot be receipted under the ITA
- ◆ **Conditional Gifts**
  - A conditional gift involves the charity becoming the beneficial owner of the gift after a condition has been fulfilled or until a condition subsequent fails or occurs.
  - Operative words are clause of defeasance such as ‘but if’, “provided that” or “on condition that”
  - If condition precedent and condition not met then there is no gift
  - If condition subsequent and condition not met then gift subject to being defeated
  - Does not create a legal obligation to do something but establishes certain legal consequences if the condition is not fulfilled
  - Not exempt from modern rule against perpetuities
  - Cannot include a conditional gift and a special purpose trust in the same gift
  - If condition fails then should not issue charitable receipt and if one has been issued should advise CRA
  - *Cy-près* application to vary terms of gift not available if conditional gift
- ◆ **Determinable Gifts**
  - Gift of a limited interest which may eventually come to an end on the happening of a future event
  - Use terminology like “while”, “during”, “so long as” or “until”
  - When gift comes to an end the capital will normally revert to the donor
- ◆ **Gifts subject to donor restrictions under *Charities Accounting Act***
  - S.4(d) of the CAA provides mechanism whereby Public Guardian and Trustee (PGT) can seek a court order requiring charity to comply with directions of a donor.
  - PGT can seek court order to enforce a direction imposed by donor even if special purpose charitable trust has not been created
  - If a violation of s.4(d) of the CAA then directors can be found in breach of trust and exposed to a court imposed penalty or even face imprisonment
- ◆ **Ten-Year Gifts under the *Income Tax Act (ITA)* (Endowed Property)**
  - Gifts that qualify for an exemption from the 80 per cent disbursement quota



- Key elements of 10-year gift (part of “Enduring Property” under the ITA) are:
  - (1) Gift must be received subject to a trust or direction
  - (2) Gift must be held for a period of not less than 10 years
- Charities must respect the direction that gift be held for 10 years or may be in breach of trust or be subject to sanctions from the PGT

#### **E. EFFECT OF FAILURE OF A DONOR RESTRICTION**

##### ◆ **Donor restricted gifts will fail when**

- Restricted term becomes impossible or impractical
- Condition precedent or subsequent is unfulfilled
- Limited interest in a determinable gift comes to an end

##### ◆ **Failure of a Conditional Gift**

- If condition precedent not fulfilled then gift fails
- If condition subsequent not fulfilled then will revert back to donor
- If donor clearly states that gift will fail if condition not satisfies then court will not apply *cy-près* doctrine

##### ◆ **Failure of Condition for Other Reasons**

- If condition fails due to vagueness, impossibility, impracticality or general uncertainty court can intervene
- “no better rule than that a benignant construction will be placed upon charitable bequests” *Weir v. Crum-Brown*
- Courts take liberal interpretation
- Will look at donors’ words to “look for the true intention and, where possible, salvage the gift

##### ◆ **Failure of Special Purpose Charitable Trust**

- Will fail if donor restriction is impossible, impractical or can no longer be accomplished
- Charity can make *cy-près* application, or ask the court to impose an administrative scheme
- Only courts can vary terms of the donor-restricted trust, neither the charity, nor the donor have the ability to do this unilaterally
- Exception if gift reverts back to donor, in which case donor may be able to gift back to charity with new restriction

##### ◆ ***Cy-près* Scheme Making Power**

- Comes from phrase “*cy-près* comme possible”
- If initial failure, court can intervene and apply *cy-près* if it can find a general charitable intention of the donor
- Charity should state that surpluses resulting from fundraising campaign will be used to further the general charitable purpose of the charity
- If subsequent failure the court will apply *cy-près* if there is a supervening impracticality or impossibility, with or without a finding of general charitable intent

- ◆ **Examples of initial and subsequent failures**
  - Insufficiency of subject matter
  - No suitable site to carry out the program
  - Gift made to nonexistent charity
  - Gift made to misdescribed charity
  - Gift made to charity that has ceased to operate
  - Gift made to charity that has amalgamated with other charity
  - Gift made to charity that has changed its charitable objects
  - Trust property not suitable for charitable purpose
  - Gift is surplus to needs of charitable purpose
  - Gift is refused by charity
  - Charity is dissolved
- ◆ **When is *Cy-près* not available?**
  - if gift fails because of unfulfilled condition precedent or subsequent
  - if there is insufficient evidence of impracticality or impossibility
  - terms imposed by legislation which restrict use of *cy-près*
  - capital endowment fund
- ◆ **Administrative scheme making power**
  - Court will exercise this power if adherence to the administrative terms of a trust would disrupt the specific purpose of the charitable trust
  - Example: Barnes Foundation

**F. DUTIES ASSOCIATED WITH DONOR RESTRICTED CHARITABLE GIFTS**

- ◆ Duties of trustees / directors of charity similar to those of ordinary trustee
- ◆ Charitable purpose must be complied with instead of being accountable to beneficiaries
- ◆ Directors /trustees must carry out charitable purpose in accordance with charitable objects and applicable restrictions
- ◆ Directors/trustees must ensure that gifts that are not immediately expended are properly invested
- ◆ Gift must be invested in accordance with “specific investment power”
- ◆ Directors/trustees must protect and conserve trust property
- ◆ Must ensure that charitable trust property is not improperly alienated
- ◆ May require consent under s.13 of the CAA to authorize change in trustees
- ◆ Must protect funds from the seizure of creditors
- ◆ Duty to secure effective use by seeking a court order to impose *cy-près* or administrative scheme
- ◆ Must keep proper books of accounts with respect to the affairs of the charity
- ◆ If special purpose trust fund must track funds by segregated trust fund accounting and report on separate financial statement

◆ **Examples of breach of trust 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
- Concealing existence of charitable trust fund
- Placing funds into perpetual endowment fund when meant to be for short term use
- Mixing funds with another charity
- 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

**G. CONSEQUENCES OF FAILING TO COMPLY WITH DONOR RESTRICTIONS**

◆ **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

◆ **Liability for *ultra vires* or unauthorized charitable purposes**

- Gift used for purpose that is outside of authorized corporate objects of charitable corporation then board members can be held personally liable
- Could be held jointly and severally liable for any for any loss resulting from unauthorized activity

◆ **Liability for accrued interest**

- Applies if failure to comply with donor restriction on a special purpose charitable trust
- May be liable to pay interest that would have accrued on the amount of the principal from date of breach of trust

◆ **Liability for third party claims by donors/residual beneficiaries**

- Civil action could be brought by donors or residual beneficiaries for return of donated property
- If court unable to apply *cy-près* then gift will revert to residual beneficiaries (capital plus accrued interest)

◆ **Statutory liability**

- **Remedies under the *Charities Accounting Act*:**

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

- ***Income Tax Act***

- (1) Failure to comply with donor direction- especially 10 yr. gift, can be deregistered (s.149)
- ◆ **Criminal liability**
  - If failure to comply with restrictions was done with intent to defraud, directors could be exposed to charge under s.336 of *Criminal Code*
  - For this to apply must be conversion of charitable trustee for use in contravention of trust with an intent to defraud
- ◆ **What to do if liability suspected for breach of donor restriction:**
  - Retain legal counsel for charity to provide legal opinion
  - Determine whether restriction is “special purpose trust”
  - If so, inform directors that they could be jointly and severally liable for breach of trust
  - If directors potential personally liable should consider obtaining independent legal counsel so that counsel for charity can avoid conflict of interest
  - If charitable funds have been misdirected, misapplied or depleted must be replaced as soon as possible
  - Notify all members who were on the board at the time of the initial misapplication
  - If cannot be replaced then obtain consent order under s.13 of the CAA
  - If charitable funds cannot be used for intended purpose make application to court for *cy-près*

#### H. TAX CONSIDERATION FOR DONOR-RESTRICTED GIFTS

- ◆ 10 year gifts (Enduring Property)
  - Purpose of 10 year gift is to provide exemption from the 80 per cent disbursement quota
  - Review definition of 10 year gift in s.149.1(1) of ITA (now part of “enduring property” under the ITA)
  - Gift must be subject to trust or direction and held for a period of not less than 10 years
  - Must have been a receipt issued by charity to individual or corporation
  - Can include donor-directed gift or donor-restricted charitable trust
  - Following formal requirements must be met:
    - (1) Executed by the donor for each gift
    - (2) Clearly identify donee charity including name and registration number
    - (3) Amount of gift
    - (4) Date gift is made
    - (5) Name and address of donor
    - (6) Serial number of official receipt
    - (7) Attached to charity’s duplicate copy of receipt
  - 4.5 per cent disbursement quota (soon to be 3.5 per cent) imposed on private and public foundations applies to 10-year gift, and will also apply to charitable organizations
  - Disbursement cannot come from capital amount of gift

- Document creating 10-year gift must allow expenditure of income earned on 10 year gift
- If charity expends part or all of capital portion of ten-year gift before ten years has expired may constitute breach of trust:
  - PGT could apply for an order forcing charity to comply with donor's directions
  - Amount expended would be added to disbursement quota
  - Gradual disbursement of 10-year gift may be seen as misuse of 10 gift by CRA
- Gift subject to requirement that it be held for longer than ten years still constitutes 10 year gift
- Whether gift can be expended after 10 years depends on specific wording of the document creating the gift
- If 10-year gift transferred from one charity to another, gift will no longer be included in disbursement quota of transferor
- Should maintain each 10 year gift in a separate account, but can co-mingle under CAA
- Charity must be able to identify what original property of 10 year gift was, what property could be substituted for it and what capital gains have accrued on said property.
- ◆ **Conditional gifts**
  - If condition precedent then transfer of gift does not occur until condition met
  - Charity cannot issue tax receipt until after condition precedent fulfilled
  - If condition subsequent not fulfilled and gift reverts to donor charity should advise CRA of failure if have issued a receipt
  - More prudent to ask CRA's advice prior to issuing receipt if condition not fulfilled
- ◆ **Excessive donor control**
  - If too much control then gift can fail
  - Donor must absolutely part with his own interests
  - Charity must ensure that donor does not retain a material interest in the gift that would cause the gift to fail
  - Examples of excessive donor control include:
    - (1) Promotional materials or the statement about fund give impression that donor direction will be followed by charity
    - (2) Donor directs way gift is invested
    - (3) Donor requires that gift can only be invested in one fund
    - (4) Donor reserving right to approve recipients
    - (5) Donor reserving right to appoint or nominate persons to board of directors of the charity
    - (6) Donor reserving right to approve or remove a CEO of charity
  - In U.S. gift is not made unless and until:
    - (1) Donor has relinquished title, dominion and control of subject matter of the gift
    - (2) Donor has delivered gift to the donee organization

(3) Donee has accepted it

◆ **Donor restrictions that benefit the donor:**

- Donor can now receive a benefit from making a restricted gift, but subject to new split-receipting rule
- Name recognition is acceptable as long as it does not provide a commercial benefit to the donor
- If commercial benefit obtained then no receipt, but may be considered to be “sponsorship” and business can write this off as a business expense

**I. WHO CAN ENFORCE DONOR RESTRICTIONS?**

- ◆ Courts have inherent *parens patriae* responsibility over charities
- ◆ CAA gives PGT ability to ask for court assistance if charitable funds being misused or misapplied and to ask for judicial passing of accounts
- ◆ Barnes case- donor could not bring legal action against charity compelling them to honour conditions
- ◆ McMichael Canadian Collection- Ontario Court of Appeal- donor argued breach of contract
- ◆ Donor can make a complaint under s.6(1) of the CAA
- ◆ Two or more people can make complaint under s.10 of the CAA

**J. EXIGIBILITY OF SPECIAL PURPOSE CHARITABLE TRUSTS**

- ◆ In *Christian Brothers* decision court of appeal held that there is no doctrine of charitable immunity and found that all of charity’s assets were exigible
- ◆ As a result special purpose trusts may be exigible in the future
- ◆ May be avoided if special purpose charitable trust is given to arm’s length parallel foundation established for those purposes or to a community foundation or trust company that could hold trust for benefit of specific charity of by structuring trust as a determinable gift
- ◆ New B.C. Act provides statutory protection for restricted funds, but limited application

**K. MANAGEMENT OF DONOR RESTRICTED GIFTS**

- ◆ Ask the following questions:
  - Are the restrictions charitable?
  - Are restrictions within charitable purposes of charity?
  - Are restrictions acceptable to charity?
  - Are restrictions impossible or impractical?
- ◆ Deposit gift into bank account of charity used for the stated charitable purposes
- ◆ Invest in accordance with specific investment powers set out in the document
- ◆ Never borrow against donor-restricted charitable funds
- ◆ Each donor restricted fund must be held separately
- ◆ If testamentary – communicate with family members to confirm compliance
- ◆ If transferred to another charity must get written appointment- s.3 of *Trustee Act*

- ◆ Must account for proceeds of charitable trust sale

#### L. HOW TO AVOID DONOR-RESTRICTED CHARITABLE GIFTS

- ◆ Encourage donors to give unrestricted gifts
- ◆ Encourage donors to make suggestions rather than making binding restrictions on gift
- ◆ Encourage donors to focus on flexibility of unrestricted gift
- ◆ Fundraising materials should say that all gifts are considered to have been given to further the charitable purposes

#### M. OTHER WAYS OF AVOIDING LIABILITY

- ◆ When fundraising for a specific program contain clear statement that surplus money will be used to further the general charitable purposes of charity
- ◆ Suggest to donor that he/she should include a standard *cy-près* clause in gift
- ◆ Use clear language to identify the specific charitable purpose for which the monies are to be used and who beneficiary is
- ◆ If income from endowment fund to be used for operational purposes donor should place only general restrictions

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