CANADIAN ASSOCIATION OF GIFT PLANNERS (CAGP)

December 9, 2008

Getting Cold Yet? Hot Policies for Hot Gifts!

By Theresa L.M. Man, B. Sc., M.Mus., LL.B., LL.M.

CARTERS PROFESSIONAL CORPORATION
Société professionnelle Carters
Barristers, Solicitors & Trade-mark Agents
Affiliated with **Fasken Martineau DuMoulin LLP**
Avocats et agents de marques de commerce
Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux
Ottawa (613) 235-4774
Mississauga (416) 675-3766
Orangeville (519) 942-0001
Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous
Toronto (416) 675-3766
London (519) 937-2333
Vancouver (877) 942-0001
www.charitylaw.ca

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BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with Fasken Martineau DuMoulin LLP
Offices in Ottawa, Mississauga & Orangeville
Locations also in Toronto, London, Guelph & Vancouver
Toll Free: 1-877-942-0001
www.carters.ca
www.charitylaw.ca

INTRODUCTION

- Important for charities to develop a gift acceptance policy on the acceptance and receipting of gifts in order to have an effective planned giving program
- Each policy should be customized to the needs and circumstances for each charity
- This presentation reviews:
  - Purposes of a gift acceptance policy
  - How to develop a gift acceptance policy
  - Key considerations for topics to be included in a gift acceptance policy

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PURPOSES OF A GIFT ACCEPTANCE POLICY

- Facilitates gift solicitation and management
  - Provides the staff and/or volunteer with guidelines when and how to accept and receipt various types of gifts
  - Provides guidelines on how to track and manage gifts and gift restrictions
  - Provides guidelines on when and how to decline a gift

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- Ensures legal compliance and risk management
  - Ensures compliance with the law in Canada, including case law and the requirements of the *Income Tax Act* (Canada)
  - Evidence due diligence as a defence in the event of litigation
  - Avoid unexpected surprises and costs

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- Manages donor relations
  - Ensures transparency of process and policy with donors
  - Ensures compliance with donor restrictions
  - Assures donors of sound management of their gifts
  - Avoids misunderstanding with donors
  - Manages donor expectations
  - Have answers "ready" to respond to donor's enquiries

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- Enhances effective operational management
  - Ensures consistency in administration of policies and procedures
  - Avoids case-by-case subjective scenarios
  - Assists staff and volunteer training
  - Sets out code of conduct for staff and volunteers
  - Promotes credibility of the charity
  - Manages expectation of directors, staff and volunteers

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APPLICATION OF THE POLICY

- The policy must be consistent with the charity's charitable purposes and mission statement
- The policy must reflect the requirements of the *Income Tax Act* (Canada), CRA, and common law
- The policy only provides a general guideline, it is not comprehensive or exhaustive
- Seek legal and accounting advice where the application of the policy to a particular scenario is not clear

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PROCESS INVOLVED WHEN DEVELOPING THE POLICY

- Review the charity's current planned giving program
- Review the charity's current procedures for gift acceptance
- Review the charity's planned giving goals
- Review current legal requirements for gift acceptance
- Undertake staff consultation
- Seek legal advice
- Circulate draft policy to staff for comments and inputs

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- Develop a written policy, instead of tradition or practice
- Drafting issues
  - Organize the policy into sections by topics
  - Outline step-by-step procedures for staff and volunteers to follow
  - Develop templates for bequest language and gift agreements to be attached to the policy
  - User-friendly and practical language

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WHAT TO DO AFTER HAVING DEVELOPED A POLICY

- **Approval by the board of directors**
- **Thorough implementation with regular reviews and evaluation**
- **Staff and volunteer training**
- **Coordinate with other departments of the charity to ensure consistent implementation, e.g. marketing department, public communications department**

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- **Regularly review, evaluate and update the policy to reflect current law and practice of the charity – it is a living document that grows with the charity**
- **Have one person or a committee responsible for constant monitoring – internal performance and donor satisfaction**

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GIFT PLANNING COMMITTEE

- **Consider establishing a Gift Planning Committee to oversee the gift planning program**
- **Examples of possible duties of the committee can include:**
  - **Develop guidelines for the gift planning program, e.g. what type of gifts to accept and what not to accept, strategies for donor recognition, review new donation product strategies, etc.**

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– **Oversee the gift planning program**
– **Oversee the implementation of the gift acceptance policy**
– **Regularly review and update the gift acceptance policy**
– **Assist in developing a gift planning marketing plan, and review marketing and other publications promoting the gift planning program**

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- **Establishing the committee will require:**
  – **Preparation and board approval of terms of reference for the committee**
  – **Regular meetings of the committee**
  – **Regular reports from the committee**
  – **Regular communication between the committee with gift planning staff**

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TOPICS TO BE INCLUDED IN A GIFT ACCEPTANCE POLICY

- **Outline duties of the directors regarding charitable gifts**
- **Outline the role of parallel foundation (if applicable)**
- **Explain basic rules that apply to receipting for reference by staff and volunteers**
- **Explain restrictions that may be imposed by donors on gifts**

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- **Explain endowment and long term funds and donor advised funds**
- **Explain policies for various types of gifts**
- **Special issues**
- **Gift agreements, gift acknowledgement, and other donor related issues**
- **Declining and returning a gift**

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1. **Outline duties of the directors regarding charitable gifts**

- **To apply the assets of the charity to further its charitable purposes**
- **To protect charitable property and invest surplus funds**
- **To comply with legal requirements involving receipting and management of gifts**
- **To comply with directions or other restrictions imposed by the donors**

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2. **Outline the role of parallel foundation (if applicable)**

- **Is the foundation to be the exclusive source of fundraising?**
- **How is the foundation and the charity to co-ordinate their fundraising initiative?**
- **What is the protocol for inter-charity transfer of gifts?**
- **Is there an agreement between the charity and the foundation?**

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3. Explain basic rules that apply to receipting for reference by staff and volunteers

- Split-receipting rules
- *De minimis* rule on receipting
- Intention to donate
- How to establish fair market value
- When and how to obtain appraisals
- Deeming of fair market value
- Due diligence required in determining the eligible amount of a gift

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- Preparation and contents of receipts
- Control of receipts
- Lost, spoiled or stolen receipts
- Facsimile signatures on receipts
- Date of issue and date of donation
- Computer generated receipts
- Name on receipts

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4. Explain restrictions that may be imposed by donors on gifts

- Donors may impose restrictions on a gift at the time when the gift is made, but cannot impose additional restrictions or remove the restrictions after having made the gift
- Restrictions can include:
  - Purpose for which the gift may be used
  - When the gift may be used
  - How the gift may be managed

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- Restrictions imposed on a gift should be set out in a written document (e.g. deed of gift or gift agreement)
- Charities must comply with the restrictions imposed by donors
- Before accepting the gift, the charity must review whether the restrictions imposed by the donor is reasonable, and whether the charity is able to comply with them

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- Charities must carefully track restrictions that apply to each gift to ensure compliance
- A gift that is subject to donor restrictions will need to be held as an externally restricted fund, and be managed in accordance with the common law and regulations under the *Charities Accounting Act* (Ontario) concerning when restricted gifts can be commingled for investment purposes

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5. Explain endowment and long term funds and donor advised funds

- Endowment and long term funds are created where the donor impose a restriction on when the gift may be used
- Perpetual endowment funds - the capital of the fund donated be held in perpetuity, with the income to be used at the discretion of the board of directors or for a specific purpose designated by the donor
- Long term funds - the capital to be held for a long period of time, rather than to be held in perpetuity

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- **Ten-year gifts**
  - **A term in the *Income Tax Act***
  - **A donation is made by a donor subject to the donor's written trust or direction that the property given, or property substituted therefor, be held by a registered charity for 10 years or more**
  - **Long term funds and perpetual endowment funds are examples of ten-year gifts**
  - **It is a type of enduring property, which is subject to special rules under the *Income Tax Act* with respect to the calculation of the disbursement quota**

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- **Policy considerations for endowed and long-term gifts**
  - **Should have written gift agreements**
  - **Minimum amount required to set up a named endowment fund?**
  - **How much income to pay out to apply towards the charitable purpose?**
  - **Right to encroach realized capital gains?**
  - **Right to encroach the capital after 10 years for an endowed gift?**
  - **Right to charge a reasonable administrative fee to fund the cost of its administration?**

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  - **Right to apply gift to another purpose if the stated charitable purpose is not possible?**
  - **How to make future contributions to the fund?**
- **Donor advised funds**
  - **After having made a gift, the donor may provide non-binding advice (but not control) on how the charity may apply and/or manage the gift**
  - **Gift agreement may set out how advice is to be provided by the donor, e.g. periodic consultation, periodic reporting, etc.**

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6. **Explain policies for various types of gifts**

- **For each type of gift, set out the charity's policy on**
  - **Gift acceptance requirements**
  - **Gift processing and management**
  - **Donor acknowledgment**
  - **Receipting**
- **Sets out the types of gifts the charity is not prepared to accept**

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- **Cash and near cash**
  - **Online donation issues, e.g. privacy and security**
- **Bequests**
  - **Sample language in wills for donors and their advisors**
  - **Not to get involved in the preparation or execution of the wills**
  - **Explain how the charity may work with the estate in relation to the gifts**
  - **Tracking system for bequests**

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- **Life insurance**
  - **A donor may name a charity as a beneficiary of a life insurance policy**
  - **A donor may irrevocably assign the ownership and beneficiary rights of a life insurance policy to a charity**
    - **Has the policy been fully paid-up or premium remains to be paid?**
    - **Who will pay the premium?**
    - **What if the donor stops paying the premium?**

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– Can the charity cash out the policy before the donor's death?
– Receipting issues
  - Assurance of future payment of premium by donor
  - Paid-up whole life
  - Fair market value issues
– Will the gift affect the disbursement quota: ten-year gift direction needed?

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- Registered retirement plans
  – Includes direct designation of a charity as a beneficiary to receive the proceeds of RRSPs or RRIFs on the death of the donor
  – Also can gift to a charity the proceeds of RRSPs or RRIFs on the death of the donor by way of bequest

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- Publicly-listed securities
  – No capital gains tax on donation of publicly-listed shares to registered charitites
  – Will the shares be sold immediately?
  – Will the shares be held for investment purposes?
  – Are the shares marketable?
  – Fair market value determination issues
  – Who to pay the transfer costs?

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– **Transfer issues – physical delivery of share certificate vs. electronic transfer, what process to follow**
– **Must comply with the *Charitable Gifts Act* (Ontario) – Charities may not own more than 10% interest in a business, and must divest interest in excess of 10% within seven years**
– **New excess corporate holdings rules apply to shares held by private foundations**

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- **Private securities and other business interests**
  – **Complicated rules on when receipts may be issued - rules on non-qualifying securities and loan backs**
  – **Subject to the rules under the *Charitable Gifts Act* (Ontario)**
  – **New excess corporate holdings rules apply to shares held by private foundations**
  – **Appraisal issues**
  – **Who to pay transfer costs?**

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- **Flow-through shares**
  – **Flow-through shares (FTS) are tax-based financing incentives available to the oil and gas, as well as mining sectors**
  – **The purchase and donation of FTS to charities would be a tax shelter where the FTS are promoted together with making a gift to a charity**
  – **Attractive because elimination of capital gains tax on charitable donation of publicly-listed shares**

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- **Issues**
  - **Hold periods - If a charity received the FTS that are subject to a hold period and the charity cannot sell and liquidate the FTS until the end of the hold period**
    - **Is the length of the hold period reasonable?**
    - **Will the FTS retain their value and be marketable at the end of the hold period?**
  - **Valuation issue**

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- **Voluntariness issue where a donor enters into an arrangement that requires the donor to donate the FTS to a charity**
- **If the charity is required to hold the FTS for a period of time, is the ownership of the FTS during the hold period an appropriate investment**
- **Carefully track and monitor FTS received to avoid inadvertently holding the FTS as though they are regular publicly-traded securities**
- **Carefully review accuracy of representations and legal/accounting opinions in tax shelter materials**

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- **Gifts-in-kind**
  - **Gift of property other than cash, e.g.**
    - **Capital property**
    - **Leasehold interest**
    - **Residual interest**
    - **A right of any kind**
    - **Inventory of a business**
    - **Certified cultural property**
  - **Does not include a gift of services**

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- Issues
  - Valuation and appraisal
  - CRA policies on many of these types of gifts
  - Good and marketable title - e.g. Does the donor own the property being donated?
  - Due diligence searches
  - Does the charity intend to sell the capital property or to retain the property?

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- If the gift is to be sold, what is marketability of the gift? - Can the gift be easily sold to realize cash for the charity?
- Are there any types of capital property that the charity does not wish to accept? e.g.
  - Property that cannot easily be sold and the charity has no use of the property- e.g. gift of large art work that the charity has no space to display
  - Property not consistent with the mission of the charity

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- Real estate
  - Gifts of real estate may include
    - Outright gifts
    - Residual interest in a property - where a property is conveyed to the charity, with the donor retaining the use of the property for the donor's life time or for a period of time
    - Real property to fund a charitable remainder trust

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– **Issues**
  - **Valuation and appraisal**
  - **CRA policies on many of these types of gifts**
  - **Good and marketable title - e.g. Does the donor own the property being donated?**
  - **Due diligence and title searches**
  - **Title Insurance**
  - **Discharge of mortgage on the property**

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- **Concerns related to land ownership, e.g. environmental contaminants, oil tank leakage, conservation restrictions, use restrictions, property tax, up-to-date survey, zoning, safety, etc.**
- **Does the charity intend to sell the property or to retain the property?**
- **If the charity is to retain the property, is it to be used for charitable purpose or rented as an investment property?**

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– **Must comply with *Charities Accounting Act* (Ontario)**
  - **A charity may not hold land that is not used for the purpose of actual use or occupation of the land for the charitable purpose for more than 3 years**
  - **If not, the Ontario Public Guardian and Trustee may sell the land and apply the proceeds of sale to the charitable purposes of the charity**
  - **A charity may apply for a court order to re-vest and sanction retention of the property for further 3 year periods**

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- **Residual interests**
  - **Conveying property to a charity, with the donor retaining the use of the property for the donor's life time or for a period of time**
  - **May be real property or personal property (e.g. art work)**
  - **Same issues as gifts of capital property and real estate, e.g.**
    - **Due diligence and title searches**
    - ***Charities Accounting Act* (Ontario) issues**

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- **Additional issues**
  - **Valuation and appraisal – fair market value less the value of the interest retained by the donor**
  - **Protect the charity's interest in the property during the donor's use**
  - **Maintenance, up-keep and insurance of property – who to do and who to pay?**
  - **Value and marketability of property after donor's use**

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- **Charity to inspect property periodically during donor's use**
- **Does anyone else has any other rights or entitlements to the property? e.g. Donor's spouse and/or dependent children?**
- **Liabilities issues during donor's use of property**
- **Minimum age of donor required? (in order to limit the time period the donor may use the property)**

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- **Charitable remainder trusts (CRT)**
  - **Generally involves a donor (settlor) transferring property to a trust for a trustee to manage the property**
  - **The donor or a beneficiary (usually a family member of the donor) (usually referred to as a "life tenant") retains a life or income interest in the trust but an irrevocable gift of the residual interest in the trust is made to a registered charity**

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- **The charity would receive the trust property when the trust is collapsed at the end of the interest of the life tenant**
- **Can issue a charitable donation receipt for the present value of the charity's remainder interest in the property**
- **Issues**
  - **What property would be used to fund the CRT? - e.g. Real estate, securities, or cash?**
  - **Any minimum contribution required?**
  - **Who will act as trustee?**

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- **If real estate is used to fund the CRT – same issues as above re gifts of real estates**
- **Valuation and appraisals - How to calculate the present value of the gift?**
- **Same issues regarding gifts of residual interest as above**
- **Who to draft the trust document and who to pay for the cost?**

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- Charitable gift annuities
  - A charitable gift annuity is generally an arrangement under which a donor irrevocably transfers property to a charitable organization in exchange for immediate guaranteed payments for life at a specified rate depending on life expectancy or for a fixed term
  - A portion of the property is used to purchase a commercial prescribed annuity from a licensed issuer

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- The remainder of the property is an outright gift to the charity
- Upon death of the donor, the charity receives any remaining guaranteed income from the annuity, unless the donor has specified otherwise

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- Charitable foundations cannot enter into arrangements to issue annuities – because an undertaking to make an annuity payment may be considered a debt, which is a ground for revocation
- Issues
  - Any minimum contribution required?
  - Which commercial insurance company to retain?
  - Is the charity authorized and able to administer the program?
  - Receipting issues

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- **Other gifts**
  - **Types of gifts that may be donated evolve with new ways of planned giving from time to time, e.g.**
    - **Time-share recreational property**
    - **Airline premium points**
  - **Not possible to anticipate every new type of gift and include every type of these gifts in the policy – the policy needs to be up-dated from time to time**

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7. Special issues

- **Explain the rules concerning disbursement quota and enduring property**
  - **80% D.Q.**
  - **Exemption for enduring property from the 80% D.Q.**
  - **3.5% D.Q.**

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- **Gifts from other registered charities**
  - **Disbursement quota issues on inter-charity transfers**
    - **Ordinary gift**
    - **Specified gift**
    - **Gift of enduring property**
  - **Transfer of restricted gifts – deed of trust required?**

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- **Corporate sponsorships**
  - **When and how to receipt?**
  - **Donation or business/advertising expenses?**
    - **Affects whether to issue receipts**
    - **Corporation to obtain own legal, tax and accounting advice**
  - **Sponsorship agreements should be entered into**
- **Donation of inventory by businesses**
  - **When and how to receipt?**
- **Gift certificates – CRA's policies**

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- **Donation of services**
  - **No receipts for donation of services**
  - **Can pay for services and the person makes donation in return**
- **Donation tax shelters issues**
  - **A charity must not become involved in donation tax shelters**
  - **A charity needs to be cautious before deciding to accept flow through shares**
  - **What process and policy to follow – e.g. review committee to review potential gift, seek legal advice, etc.**

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- **Appraisals**
  - **When to obtain appraisals?**
  - **Who pays for the appraisals?**
  - **Which appraiser to retain? – must be qualified individuals**
  - **How many appraisals to obtain?**
  - **What if 2 appraisals obtained and the values are different?**
  - **CRA's $1000 FMV appraisals threshold – valuation can be made by a staff member of the charity, provided that the staff member is knowledgeable in the field and is qualified to establish the value of the gift**

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- Compliance with the charity's investment policy and disbursement policy
- Compliance with Canada's anti-terrorism legislation
- Communication with donors, e.g. no persuasion or pressure, confidentiality, no advice to donors, no conflict of interest, etc.

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8. Gift agreements, gift acknowledgement, and other donor related issues

- Gift agreements
  - When to enter into gift agreement with donors?
  - What are the provisions to be included in gift agreements?
  - Attach sample gift agreements to policy
- Gift acknowledgment and donor recognition
  - When and how to acknowledge gifts?
  - Who to acknowledge gifts?
  - What process and timing to follow?

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  - Type of donor recognition
    - e.g. Named gifts, donor wall, donor appreciation dinners
    - May affect receipting (e.g. naming rights)
    - Minimum level of donation required for different types of recognition
- Donors encouraged to obtain independent legal, tax, and accounting advice

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- Set out internal process
  - Timely deposit of donation cheques and preparation of receipts
  - Donor communications – who, when, how?
  - Tracking and monitoring compliance with gift restrictions
  - Maintaining data base – privacy, confidentiality and security issues

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9. Declining and returning a gift

- Needs to establish a process to review gifts that the charity may wish to decline
- Needs to establish a process to communicate with donors why a certain gift is declined
- Set out in the policy a non-exhaustive list of circumstances under which the charity intends to decline a gift, e.g.
  - Restrictions imposed by the donor are not reasonable
  - Restrictions imposed by the donor that are contrary to the objectives, values, and goals of the charity

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- The gift or terms of a gift is illegal, discriminatory or violates any federal, provincial or municipal laws or regulations
- The gift that may expose the charity to liability or embarrassment
- The gift may require any action on the part of the charity which is unacceptable to the charity
- The donor relies on an appraised value that is inaccurate or unreliable and differs from the appraised value obtained by the charity

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– The gift is made by an individual, corporation or organization whose philosophy and values are inconsistent with the overall philosophy and values of the charity
– The value of the gift cannot be determined
– The gift could improperly benefit any individual that is not permitted under the *Income Tax Act* or by CRA

• Once a gift has been received by a charity and a charitable donation receipt issued, the property becomes a charitable asset and cannot be returned to the donor without a court order

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CONCLUSION

• A gift acceptance policy can
  – Facilitate gift solicitation and management
  – Ensure legal compliance and risk management
  – Manage donor relations
  – Enhance effective operational management help
• A gift acceptance policy is a living document that needs to be constantly up-dated

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