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**15<sup>TH</sup> ANNUAL CAGP-ACPDPT<sup>TM</sup> CONFERENCE  
RISING WITH THE TIDE**

**Vancouver – April 25, 2008**

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**Special Considerations in Gift Planning  
for Religious Charities**

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**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent**

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**OVERVIEW OF TOPICS**

- **Preliminary Comments**
- **Special Considerations Involving  
“Advancement of Religion”**
- **Special Statutory Treatment Afforded to  
Religious Charities**
- **Donor Restricted Charitable Gifts to Religious  
Charities**
- **Moving Monies outside of Canada by Religious  
Charities**
- **Inter-charity Transfers Involving Religious  
Charities**

**A. PRELIMINARY COMMENTS**

- **Religious charities make up in excess of 40% of all registered charities in Canada**
- **Generally, the rules that apply to religious charities are the same as those that apply to all charities, unlike in the United States where, generally, churches are automatically considered tax exempt and are not required to apply for and obtain tax exempt status from the IRS**
- **In Canada, all charities - including religious charities - are subject to the relevant provisions of the *Income Tax Act* (“ITA”)**

3

- **However, some of the ITA’s provisions in particular merit special consideration by gift planners, as they can have a unique application to gifts to religious charities**
- **In addition, there are unique provisions under various provincial and federal statutes which have specific application to religious charities**
- **As well, there are unique considerations in the way in which religious charities operate that gift planners should be familiar with in planning gifts to religious charities**
- **As such, it is important for gift planners who work with religious charities to be aware of the special considerations that arise when making gifts to religious charities**

4

**B. SPECIAL CONSIDERATIONS INVOLVING  
“ADVANCEMENT OF RELIGION”**

**1. Preliminary Comments**

- **It is important for gift planners to understand the requirements imposed on organizations seeking charitable status under the “advancement of religion” head of charity**
  - **Gift planners providing advice to donors need to understand which religious purposes will be charitable under the *ITA***
  - **As well, donors may want to restrict the use of their gift for a particular religious purpose, or establish their own charitable foundation for a particular religious purpose**

5

- **In order to qualify as a registered charity under the *ITA*, an organization must be able to fit its objects and activities within one or more of the four “heads of charity” recognized by the courts and the Canada Revenue Agency (CRA):**
  - **Relief of poverty**
  - **Advancement of education**
  - **Advancement of religion**
  - **Other purposes beneficial to the community**
- **For this presentation, we are only focused on “advancement of religion”**

6

**2. What Constitutes a Religious Purpose?**

- **For a prospective charity to qualify under advancement of religion, it must carry on a religious purpose which permits faith in a God and worship of that God**
- **The charity must also demonstrate that it is advancing a *bona fide* religion**
  - **Courts are generally willing to defer to sincerely held religious beliefs, including those on the fringe of a particular religious faith, and are reluctant to distinguish between various religious beliefs (*Thornton v. Howe*)**

7

- **Public v. private religious observance**
  - **A debate has arisen whether a distinction should be drawn between public worship and private worship when determining whether a public benefit exists**
  - **In *Gilmour v. Coates*, a gift to a contemplative order was held not to be charitable, as it did not provide a discernable public benefit**
  - **However, in *Neville Estates Ltd. V. Madden*, the fact that a synagogue was theoretically open to the public and that the members lived their lives in the world was found to be worshiping in a sufficiently public way**

8

– *Holy Theotokos Convent (2007)* – Ontario court held that tax exemption under the *Assessment Act* “does not apply to the worship activities confined solely to the devotional life of members of a religious order...The exemption does apply to places of worship inside the convent grounds open to members of the public for some formal worship services.”

**3. How Far Does a Religious Purpose Extend?**

- Religious purposes deemed by the Courts to be charitable include:
  - The promotion of spiritual teachings

9

- Maintenance of doctrines and spiritual observances
- Organization and provision of religious instruction
- Performance of pastoral and missionary work
- Establishment and maintenance of buildings for worship and other religious use
- Ancillary activities, i.e. ancillary projects connected to the church’s main activities (*Re Armstrong*)

10

- **Areas of concern for CRA in determining whether a religious purpose is charitable:**
  - Social and moral issues
  - Political purposes
  - Whether religion is actually being advanced
  - Single issue religious organizations
- **Gift planners should be aware of each of these areas of concern, which are discussed below, in structuring conditions and restrictions for charitable gifts to religious charities**

11

- **Social and Moral Issues**
  - Advancing religion can involve speaking out on social, moral and ethical issues
  - “the promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances which serve to promote and manifest it – not merely a foundation or cause to which it can be related.” *Keren Kayemeth Le Jisroel Ltd. V. IRC* as followed in *Re Anderson*

12



- **Examples of social and moral related religious activities that would likely be considered to be charitable:**
  - **A sermon on the importance of New Testament teaching on relieving human suffering**
  - **A minister speaking out on abortion or same sex marriage from a Biblical context but without a call to political action**

13

- **Note, however, the CRA’s comments in a recently released Guide entitled *Charitable Work and Ethnocultural Communities*:**
  - **“Teaching ethics or morals is not enough to qualify as a charity in the advancement-of-religion category. For example, a Web site that states the opinions of an individual or group about what they think is right or wrong does not qualify as advancement of religion. There has to be a spiritual element to the teachings, and the religious activities have to serve the public good.”**
- **Query whether stating biblical authority for the opinion would suffice to meet CRA’s requirement**

14

- **Political Issues**

- **In the U.S., where political and economic positions are often fundamental to a religious organization’s religious teachings, such political and economic positions are considered to be part of its religious teachings. *Holy Spirit Association v. Tax Commission of N.Y.***
- **However, CRA does not follow this approach in Canada, as evidenced by the above CRA Guideline on Charitable Work**
- **As a result, it is necessary to look at what the common law has held to be acceptable examples of advancement of religion over the years**

15

- ***Re Scowcroft*, a gift of a reading room “to be maintained for the furtherance of Conservative principles and religious and mental improvement” was found to be charitable**
- ***Re Hood*, a gift that was made to spread Christianity by encouraging others to take active steps to stop the drinking of alcohol was found to be a charitable gift**
- ***Ontario (Public Trustee) v. Toronto Humane Society*, the Ontario court held that a charity was permitted to engage in political activities as long as they were ancillary and incidental to charitable purposes**

16

- **Whether religion is actually being advanced**
  - **CRA’s reluctance to grant charitable status to religious organizations that define their objects too broadly where it is not clear that they are advancing religion**
  - **Example: *Fuaran Foundation* decision**
    - **Pamphlet invited people to come to Christian retreat centre “for a day of quiet or for a day of creativity using your hidden talents to produce a drawing, painting, wood carving, cut gemstone, icon or photograph”**
    - **Attendees had complete discretion whether or not to participate in religious activities**
    - **Court upheld CRA’s denial of registration**

17

- **Single Issue Religious Organizations**
  - **Definition: “a religious organization that has as its main activity something that in itself may not be intrinsically religious, but is done for a religious purpose”**
  - **CRA suggests single issue religious organizations cannot be charitable in itself – “the pursuit of one object which is not intrinsically religious and that may be pursued equally for religious and secular purposes is not charitable as advancing religion”**
  - **Examples would be promoting peace as a Christian mandate or religious food preparation**

18

- **CRA looks at the character of the activities engaged in, not the motivation behind the formation of the group, when assessing charitable status**
- **In order to be charitable for CRA, a religious organization must involve a “significant element of religion” and be able to pass the “religious substance” test:**
  - **Is the activity accepted in the writings or by a majority of the followers of that faith as central to the pursuit of that particular religion?**

19

- **Does it fit directly or by analogy into one of the categories of activities historically considered to advance religion, such as:**
  - **The maintenance and promotion of public worship, including the building and repair of churches**
  - **The orderly administration of divine services – support of clergy**
  - **Spreading religion**
- **As a result of this policy, a single issue religious charity would have to show it meets the criteria for one of the other three heads of charity in order to qualify for charitable status**

20

- **CRA’s position that motives behind the formation of a group are irrelevant is at odds with the Supreme Court of Canada’s *Vancouver Society* decision**
- **The “religious substance” test is very restrictive and is inconsistent with tests used by courts**
- **CRA’s test appears to only recognize mainstream religious groups engaging in public worship**
- **A more rational approach to the issue would be to look for indicia of a nexus between the activity taking place and the advancement of religion**

21

- **Nevertheless, gift planners need to be conscious of CRA’s policy in advising donors who want to contribute to or establish a charity that could be considered a “single issue religious organization”**
- **For more information about the “advancement of religion” head of charity, see a paper by the author entitled “*The Advancement of Religion: What are the Boundaries?*” at [http://www.carters.ca/pub/article/church/2006/advrel\\_oct06.pdf](http://www.carters.ca/pub/article/church/2006/advrel_oct06.pdf)**
- **CRA is currently reviewing advancement of religion as a head of charity and is expected to release a policy within the next year**

22

**C. SPECIAL STATUTORY TREATMENT AFFORDED TO RELIGIOUS CHARITIES**

- **Donors who want to contribute to or establish a religious charity need to be aware of various special legislative provisions which may have specific implications for charities with purposes that fall under the head of “advancement of religion”**
- **The following are a few examples of special statutory treatment afforded to religious charities**

23

***1. Income Tax Act***

**a) Same Sex Marriage**

- **Many groups expressed concern that earlier versions of the *Civil Marriage Act* did not provide sufficient protection for, among other things, the charitable status of religious organizations if they expressed opposition to the legal recognition of same-sex marriage, arguably because to do so would be against the accepted public policy of the government of Canada**
- **In response, certain amendments were made, including what is now s. 149.1(6.21) of the *ITA***

24

- **“...a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*” – s. 149.1(6.21)**
- **Important for gift planners to advise potential donors that this protection only applies to charities that fall under the advancement of religion head of charity**

25

- **As a result of this section, it is unlikely that a religious charity will be at risk of losing its charitable status for teaching its beliefs regarding its understanding of marriage and same-sex marriage**
- **However, religious groups with charitable status must be careful that the way in which they address the same-sex marriage issue is not interpreted as being partisan, as this could give the CRA grounds for revoking their charitable status for having engaged in prohibited political activities**
- **For more information see Church Law Bulletin No. 12: *Implications of Recent Amendments to Civil Marriage Act for Religious Groups and Officials*, online at <http://www.carters.ca/pub/bulletin/church/2005/chchlb12.htm>**

26

**b) Special Tax Treatment**

- **Gift planners should be aware of various special tax treatment available to religious charities:**
  - **Clergy Housing**: A person who is employed, or has an office, as a member of the clergy or a religious order or as a regular minister of a religious denomination may be entitled to claim a clergy residence deduction in respect of his or her residence, when calculating the income from that employment or office – see s. 8(1)(c)
    - **For more information see Income Tax Interpretation Bulletin IT-141R, *Clergy Residence Deduction* available online at <http://www.cra-arc.gc.ca/E/pub/tp/it141r-consolid/README.html>**

27

- **Vows of Poverty**: Where, during a taxation year, an individual is a member of a religious order and has taken a vow of perpetual poverty, the individual may deduct in computing taxable income an amount equal to the total of their superannuation or pension benefits and earned income for the year, if that amount is paid in the year to the order – see s. 110(2)
  - **For more information see Income Tax Interpretation Bulletin IT-86R, *Vow of Perpetual Poverty* available online at <http://www.cra-arc.gc.ca/E/pub/tp/it86r/it86r-e.html>**

28



- c) Exemption from Financial Information under T3010**
- **S. 220(2.1) of the *ITA* grants the Minister discretion in waiving the filing of a prescribed form under reasonable circumstances**
  - **CRA exercises this discretion to exempt certain religious orders from completing the publicly accessible portion of the *Registered Charity Information Return* (form T3010), including questions about the charity’s financial information, compensation of employees, and gifts to qualified donees**
  - **To qualify for the exemption, a religious order must have:**

29

- **Existed on December 31, 1977,**
- **Never issued any receipts for tax purposes, and**
- **Have never, directly or indirectly, received a gift from another registered charity which has issued official donation receipts since December 31, 1977**
- **New religious charities may qualify for this exemption “as long as they are logical outgrowths of formerly exempted organizations”**
- **For more information, see *CRA Policy Commentary CPC-016* at <http://cra-arc.gc.ca/tax/charities/policy/cpc/cpc-016-e.html>**

30

**d) Contributions to Religious Schools**

- **Generally tuition fees paid to an educational institution are not considered to be a charitable donation and official donation receipts may not be issued (even though the institution may be a registered charity)**
- **Two exceptions exist where a portion or all of an amount paid to a school, other than a post-secondary institution or a designated educational institution, may be considered as a charitable donation:**
  - **Schools which teach exclusively religion**
  - **Schools which operate in a dual capacity providing both secular (academic) and religious education**

31

- **If a school teaches exclusively religion and operates solely for the advancement of religion, payments for students that attend are not considered tuition fees but valid donations**
- **A school that provides both secular and religious education may, under certain circumstances, issue receipts for charitable donations for a portion of the amount paid to attend the school that can be allocated to religious education based upon the cost of operations**
- **For more information, see CRA Information Circular IC75-23 at <http://www.cra-arc.gc.ca/E/pub/tp/ic75-23/README.html>**

32

## 2. Anti-Terrorism Legislation

- The definition of what may constitute a “terrorist activity” under s. 83.01(1) of the *Criminal Code of Canada*, as revised by the *Anti-Terrorism Act*, includes an act or omission committed “in whole or in part for a political, religious or ideological purpose, objective or cause” that leads to injury, substantial property damage or a serious disruption of essential services
- Obviously, a political, religious, or ideological motivation should not be a defence to engaging in terrorist activities
- However, incorporating such considerations as an integral part of the definition of the offence itself is both significant and concerning

33

- When applied to “political, religious or ideological purposes or causes,” the definition of “terrorist activity” could potentially deter dissident views that in and of themselves have been and should continue to be tolerated in a free and democratic society
- Under this legislation, charities with political, religious and ideological purposes may now become inherently suspect because they in part could meet the definition of “terrorist activity.”
- As a result, religious charities may be scrutinized more than other charities, possibly resulting in discrimination against charities that have religious purposes

34

- **Religious charities, along with all other charities, will also be impacted as a result of:**
  - **Broadly worded “Super Criminal Code” terrorist offences under the *Anti-terrorism Act***
  - **A new certificate process for the deregistration of charities under the *Charities Registration (Security Information) Act***
  - **Money laundering legislation extended to include terrorist financing under *Proceeds of Crime (Money Laundering) and Terrorist Financing Act***
- **For more information, see [www.antiterrorism.ca](http://www.antiterrorism.ca) for Submission to the Air India Inquiry entitled “*The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance*”**

35

- **Gift planners should have a basic working knowledge of the anti-terrorism legislation in advising donors on making a gift to charities working in an international context, and should enquire whether the recipient charity has implemented a due diligence response by:**
  - **Establishing a due diligence anti-terrorism policy to comply with the law**
  - **Conducting due diligence review of directors, officers, and key individuals**
  - **Monitoring how monies are being raised and disbursed**
  - **Reviewing and monitoring international relationships with third parties**

36

**3. *Religious Organizations' Land Act (Ontario) - ROLA***

- **In Ontario, an unincorporated religious organization, unlike other unincorporated organizations, can own real property through its trustees, notwithstanding that individual trustees may change (s. 2)**
- **Under *ROLA*, the religious organization can lease land that is no longer required for its purposes for up to 40 years (s. 10)**
- **In contrast, the *Charities Accounting Act* (which applies to other charities in Ontario) only allows surplus lands to be leased for a maximum of 3 years (s. 8)**

37

**4. Provincial Legislation for Religious Societies**

- **Provincial legislation in Alberta, B.C., Manitoba, and Saskatchewan permits a religious society, as defined, to appoint trustees to acquire and hold land in trust for the society (similar to *ROLA*)**
- **Acreage limitations are applicable:**
  - **In Manitoba, trustees can hold no more than 300 acres for the site of a church, etc., and 20 acres for the site of a cemetery**
    - ***Religious Societies' Lands Act* (Manitoba), s. 3(1)**
  - **In Alberta, societies/congregations can hold no more than 320 acres under the *Religious Societies' Land Act* – s. 3(4)**

38

- **In Alberta, a religious denomination or congregation may be incorporated for the purpose of dealing with real or personal property by passing a declaration of incorporation in the prescribed form by a majority of its members (*Religious Societies' Land Act*, s. 12)**
- **In Alberta, an incorporated congregation under the *Religious Societies' Land Act* may acquire real and personal property by:**
  - **Purchase or gift, or**
  - **By devise or bequest made at least six months before the death of the testator**

39

**5. *Assessment Act* (Ontario)**

- **All real property in Ontario is subject to real property tax, subject to certain exemptions**
- **Those exemptions include:**
  - **Land that is owned by a church or religious organization or leased to it by another church or religious organization (and is used for certain purposes) – s. 3(1)(3)**
  - **Land owned, used and occupied solely by a religious or educational seminary of learning – s. 3(1)5**
  - **Land owned by a religious organization and occupied and used solely for recreational purposes, if named in the Act's Regulations or a municipal by-law – s. 4**

40

**6. *Charitable Gifts Act (Ontario)***

- **Charities in Ontario are prohibited from owning more than a 10% interest in any business (s. 2(1))**
- **Charities must divest their excess interest in a business within 7 years**
- **The general prohibition “does not apply to an interest in a business given to or vested in any organization of any religious denomination” (s. 2(2))**
- **Therefore a religious denomination can be gifted more than a 10% interest in business whereas other charities in Ontario cannot**
- **However, no definition of what a religious denomination is**

41

**7. *Local Health System Integration Act, 2006 (Ontario)***

- **Provides for community-based model of health care in order to better respond to local health care needs**
- **The management of local health services in Ontario have devolved to a series of 14 local health integration networks (“LHINs”)**
- **LHINs and the Minister of Health and Long-Term Care are empowered to exercise prescribed authority over entities, including some charities, that come within the definition of “Health Service Provider”**

42

- **A LHIN can make a decision requiring one or more Health Service Providers to which it provides funding to, among other things, transfer property to or to receive property from another person or entity – s. 26(1)**
- **A LHIN can not unjustifiably, as determined under section 1 of the *Charter*, require a Health Service Provider that is a religious organization to provide a service that is contrary to the religion related to the organization – s. 26(2)**
- **Similar powers and restrictions are vested in the Minister of Health and Long Term Care (s. 28)**

43

- **Gift planners should advise potential donors of the impact of this legislation on religious charities that fall under the definition of “Health Service Providers”**
- **Donors should consider giving to a parallel foundation or community foundation instead of directly to a Health Service Provider, since otherwise the gift may be subject to a future “integration decision”**
- **Gift planners should also consider ways to enforce donor intent, i.e. narrowly structure a gift in such a way that any future transfer order will render the gift defeated**

44



- **An example of such a restricted gift in a religious context might be a gift to a Catholic Hospital with a restriction that the funds in question must only be used within a Catholic Health Service Provider and in a manner that is not contrary to the teachings of the Catholic Church**
- **For more information see Charity Law Bulletin No. 90: *Implications of New Ontario Health Legislation for Charities*, online at <http://www.carters.ca/pub/bulletin/church/2006/chylb90.htm>**

45

## **8. Special Legislation for Denominations**

- **Parliament and provincial legislatures have passed numerous private acts dealing with specific denominations and congregations**
  - *i.e. The Anglican Church of Canada Act, 1979*
  - *i.e. The United Church of Canada Act (1925)*
- **Gift planners should investigate whether such special legislation exists when advising donors on making gifts to any particular church or denomination**

46

- **Where there is a conflict between private legislation and public legislation of general application, the private legislation will take precedent**
  - ***In Re Incorporated Synod of the Diocese of Toronto*, the Diocese was allowed to lease land for ninety-nine years because its own act contained no provision for restrictions on its powers to lease real property**
- **Gift planners should also consult applicable special legislation to ensure the donor is transferring the gift to the proper named corporate entity**

47

## **D. DONOR RESTRICTED CHARITABLE GIFTS TO RELIGIOUS CHARITIES**

### **1. Preliminary Comments**

- **Donors often wish to restrict their gifts to a specific religious purpose within a religious organization**
- **Gift planners need to be aware of general legal principals surrounding donor restricted gifts to religious charities in order to ensure that a donor's intent to benefit a specific religious purpose can be fulfilled and preserved**

48

- **What is an unrestricted charitable gift?**
  - It is a gift at law to be applied towards the general charitable purposes of a charity that is not subject to any restriction by the donor
- **What is a donor restricted charitable gift?**
  - It is a gift at law that is subject to restrictions imposed by the donor that constrain how a charity can use the gift
  - It is very important for a gift planner to understand the nature of the restriction that has been imposed and the need to comply with those restrictions
  - There are different forms of legal restrictions with corresponding distinct legal consequences

49

## **2. Examples of Donor Restricted Charitable Gifts**

- **Endowment Funds**
  - An endowment is a gift where the capital is held for at least 10 years and extending beyond for any period of time up to in perpetuity
  - An example would be an endowment to support missionary activities
- **Restricted Use Funds**
  - The total capital and earned income to be expended either immediately or over a period of time rather than being held for 10 years or more
  - Will be applied in accordance with certain specific charitable purpose restrictions, such as a building program for a church or synagogue

50

- **Restricted Charitable Trust Property**
  - **Real estate that is acquired subject to certain terms of trust contained in the deed of the property that can act as a type of an endowment**
  - **Three general categories of real estate restrictions:**
    - **Pertaining to religious use**
    - **Pertaining to religious doctrine**
    - **Limiting the use of the property to those who follow a particular religious practice**

51

- **Implied Restricted Charitable Gifts**
  - **Courts are prepared to consider extrinsic evidence concerning whether the donor intended to create a restricted charitable gift**
  - **e.g. Where a gift to a religious denomination was intended to create an endowment but the terms of the gift do not reflect the intent, the denomination would need to look at what the donor may have said in letters to it and in discussions with the charity**
  - **It is very important to encourage donors to carefully craft restricted gifts to religious charities**

52

- **Precatory Trusts/Designated Gifts and Donor-Advised Funds**
  - **Precatory trust is a non-binding request of the donor and is sometimes called a designated gift**
  - **Do not have any enforceable restrictions associated with them**
  - **There is only a moral obligation on the charity receiving such a gift**
  - **A 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**

53

### **3. Examples of Unacceptable Donor Restrictions**

- **Certain types of donor restrictions are unacceptable and will invalidate the gift**
  - **Restrictions contrary to public policy**
  - **Restrictions that are illegal or immoral**
  - **Restrictions that are impossible to fulfill**
- **As well, if a donor retains too much control over the gift, it will no longer be considered a gift at law, and cannot be receipted under the ITA**
- **For more information, see the two part article entitled “*Donor Restricted Charitable Gifts Revisited: A Practical Overview II*” at <http://www.carters.ca/news/2003/Philanth/vol18no1.pdf> and <http://www.carters.ca/news/2003/Philanth/vol18no2.pdf>**

54

**Restrictions contrary to public policy**

- **Restrictions that are contrary to public policy cannot be enforced**
- **Example (*Canada Trustco*): Foundation provided scholarships that were restricted to “persons who were White Protestants of British nationality or parentage”**
  - **Ontario Court of Appeal found that it violated public policy because it was “premised on notions of racism and religious superiority”**
  - **Court limited the application of its decision: “public policy should be invoked only in clear cases... and does not depend on the idiosyncratic inferences of a few judicial minds”**

55

- **Restrictions on gifts can not be discriminatory, but it is unclear which religious restrictions are and are not acceptable**
- **Contrast *Canada TrustCo* with *University of Victoria Foundation* decision where the B.C. court upheld a scholarship restricted to Roman Catholic students: “it is not offensive in and of itself for an individual to establish a charitable trust to benefit adherents of one’s faith”**
- **Donors need to consider whether any restrictions or conditions attached to a proposed gift have the potential of running afoul of the sources of public policy, such as the *Charter*, and human rights legislation**

56

**Restrictions that are illegal or immoral**

- **Illegal restrictions, such as supporting terrorism, will not be enforceable**
- **On occasion, CRA has raised the question whether “illegal” includes not only acts that are illegal in Canada but illegal in other jurisdictions in which the charity operates**
  - **This could have a serious impact on religious charities carrying on missionary work in countries where proselytizing is illegal**

**Restrictions that are impossible to fulfill**

- **e.g. A requirement that a charity use the gifted funds to build a church and but there are insufficient funds to do so**
- **If it is clear that the donor intended for the restrictions to only operate if a certain state of facts existed (which do not or can not actually exist) the gift will take effect as if there was no restriction**

57

**E. MOVING MONIES OUTSIDE OF CANADA BY RELIGIOUS CHARITIES**

**1. Preliminary Comments**

- **Donors may wish to contribute to international charitable projects, such as missionary work**
- **Gift planners therefore need to be aware of the rules that govern the transfer of funds for international charitable operations**
- **A Canadian religious charity can carry on its activities outside of Canada without jeopardizing its registered status, provided it meets certain requirements**

58

**2. Carrying Out Charitable Purposes**

**The ITA permits a registered charity to carry out its charitable purposes, both inside and outside of Canada, in one of only two ways:**

**a) Gifts to Qualified Donees**

- **A registered charity can make gifts to other organizations that are on the list of qualified donees as set out in the ITA**
- **Qualified donees include, but are not limited to, other Canadian registered charities, certain universities outside Canada, the United Nations and its agencies, and a foreign charity that the Canadian Government has made a gift to in the preceding 12 months**

59

**b) Carrying on Its Own Charitable Activities**

- **The carrying on of its own charitable activities requires a charity to be actively involved in programs and projects that are intended to achieve its charitable purposes**
- **This can be done by the charity directly funding its own employees and/or volunteers in carrying out its programs**
- **It is not permissible for a registered charity to carry out its charitable purposes by merely giving monies or other resources to an organization that is not a qualified donee, regardless of whether the donee is inside or outside Canada**

60



- **However, where a registered charity does not have its own employees or volunteers to carry out a project, it can work with another organization regardless of whether that organization is a Canadian registered charity**
- **In order to comply with the ITA, the registered charity must use structured arrangements which allow it to retain direction and control over the program, as well as the resources that it contributes to the program**

61

### **3. Carrying on Charitable Activities Through Intermediaries**

#### **Overview of Options**

- **There are two ways that a registered charity can work with other organizations to achieve its charitable purposes:**
  - **Working through intermediaries, such as an agent or a contractor**
  - **Working jointly with others**
- **These arrangements will require the registered charity and other organization to enter into a formal agreement**

62

### **Co-operative Partnership**

- **Co-operative partnerships are used where a registered charity wishes to work alongside other organizations and with beneficiaries for the purpose of all of the parties carrying out a specific project**
- **However, there is joint and several liability for all partners involved in a co-operative partnership**

63

### **Joint Venture**

- **A registered charity and other organizations can pool together their resources to establish and operate a charitable program or project as a joint venture pursuant to a joint venture agreement**
- **Generally, a joint venture management committee is required to establish, conduct and oversee the joint venture**
- **However, it is often the case that the joint venture committee that is required is either never established or, if it is established, then it is not consistently utilized for the full term of the joint venture**
- **Members of a joint venture are generally jointly and severally liable for the project**

64

### **Agency Relationship**

- **In an agency agreement, a registered charity can appoint an agent to act as its representative in carrying out a project on behalf of the charity, and in doing so, transfer some of its charitable monies to the agent for the project**
- **In order for the registered charity to retain control over the project being carried out by the agent, the monies or resources transferred to the agent have to be segregated**

65

- **The actions of the agent are deemed to be actions of the principal and, as a result, the principal is vicariously liable for the actions of the agent (which may be concerning for insurers)**
- **By appointing agents to carry out a registered charity's charitable work, the assets provided to the agents for the identified projects would continue to be assets of the registered charity and would need to be reflected in the financial statements of the charity**
- **It is for this reason that CRA requires agents to segregate funds provided to the agent by the Canadian registered charity from the agent's own funds, and to keep separate books and records, among other requirements**

66

**Contract for Service**

- **A registered charity can also carry out its charitable activities by contracting with an organization or individual in another country to provide specific goods and/or services**
- **Any liability associated with the work being carried out by the third party contractor under the contract for service is generally limited to the said contractor under the contract and, therefore, should not extend back to the charity**

67

- **Once assets have been transferred to third party contractors under a contract for service, they are considered to have been expended for the purposes of the registered charity's disbursement quota and do not need to be reflected in the charity's financial statement**

**Involvement of Gift Planners**

- **Gift planners should be aware of the advantages and disadvantages of each type of arrangement discussed above in advising donors who wish to fund international charitable work in order to ask the appropriate questions of the charity**

68

**F. INTER-CHARITY TRANSFERS  
INVOLVING RELIGIOUS CHARITIES**

- **Gift planners should be aware of the tax and other legal implications involved in the transfer of assets between religious charities**
- **For example, a donor may wish to make a gift to a local church and direct that a portion of the gift be transferred by the local church to the denomination**

69

**1. Tax Considerations**

**Basic Rule**

- **All transfers of funds from one registered charity to another, including transfers to a charitable organization (but excluding transfers of enduring property) are now subject to a 80% disbursement obligation, i.e. 80% of the gift must be expended in the following taxation year**
- **The traditional exception for a “specified gift” continues to apply**

70

**Three categories of property transfers**

- **Ordinary gifts (i.e. not specified gifts, nor enduring property)**
- **Specified gifts**
- **Enduring property that has not been designated as specified gifts by the transferor charity**

**Transfer of ordinary gifts**

- **i.e. Neither specified gifts, nor enduring property**
- **For the transferor charity, the transfer can be used to satisfy its DQ obligation**
- **For the transferee charity, there will be an obligation to expend the gift in the following year**

71

- **If the transferee charity is either a charitable organization or a public foundation, the DQ obligation is 80% of the gift**
- **If the transferee charity is a private foundation, the DQ obligation is 100% of the gift**
- **As a result of proposed amendments in October 2007 to the ITA, it is not clear whether the amount to be included in the DQ calculation involving the transfer of property that is subject to a debt, such as a mortgage, is to be the gross amount of the FMV of the gift or the net amount after deducting the debt**

72

**Transfer of specified gifts**

- **For the transferor charity, the transfer cannot be used to satisfy its DQ obligation**
- **For the transferee charity, there is no obligation to expend the specified gift in the following year**
- **A specified gift is therefore a benefit to the transferee charity for DQ purposes**
- **A specified gift can be an effective way to transfer a DQ surplus from the transferor charity to the transferee charity**

73

**Transfer of enduring property**

- **The transfer of enduring property (i.e., 10 year gifts, such as endowed gifts, or estate gifts) 10 Year Gifts will be treated as a neutral transfer for DQ purposes**
- **For the transferor charity, there will be a DQ obligation to expend 100% of the enduring property in the year, but the DQ obligation is met by the transfer itself**
- **For the transferee charity, there is no obligation to expend the enduring property in the following year, but there will be an 80% inclusion in DQ obligation in the year that the gift is disbursed**

74

**2. The Corporate Authority of the Transferor/Transferee**

- **It is important to ensure that the transferor charity has the required corporate authority to transfer charitable assets**
- **Need to refer to both letters patent and authorizing resolution of the directors, and in some situations even a resolution of the corporate members**
- **Similarly, the transferee charity would need to ensure that it has the requisite corporate authority to receive the transfer of assets and apply those assets toward its intended purpose**

75

**3. Need to Document the Transfer of Assets Through a Deed of Gift**

- **Deed of Gift evidences transfer of title of the charitable assets (i.e. from one religious charity to another, such as a local church to a denomination)**
- **Deed of Gift will identify whether the transfer is to the transferee charity as a subsequent trustee of donor restricted gifts**
- **The Deed of Gift should identify what investment powers will apply to the funds being transferred**
- **The Deed of Gift should identify whether the gift consists of donor restricted gifts, and if so, that it will ensure compliance with any restrictions by the transferee charity**

76



- **The Deed of Gift can identify whether unrestricted funds are to become restricted for a particular purpose in the transfer to the transferee charity**
- **The Deed of Gift should include a *cy près* clause for variations for newly created restricted gifts**
- **The Deed of Gift may provide protection from future insolvency through the inclusion of a determinable gift provision**
- **The Deed of Gift should provide for compliance with applicable Anti-terrorism Legislation**

77

- **The Deed of Gift should address issues of inter-charity disbursement quota issues discussed above**
  - **The Deed of Gift can authorize a later transfer of the gifts to a subsequent transferee**
- 4. Commingling of Restricted Gifts**
- **Commingling of restricted gifts must be done in Ontario in accordance with requirements of the Regulations under the *Charities Accounting Act* (Ontario)**
  - **Deed of Gift should therefore ensure compliance with rules regarding the commingling of restricted gifts**

78

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