16th Annual
2009 National CAGP-ACPDP™ Conference

Niagara Falls – April 23, 2009

Developing a Gift Acceptance Policy

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

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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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