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WHEN IS A GIFT NOT A GIFT? AND WHAT TO DO WHEN GIFTS GO BAD?


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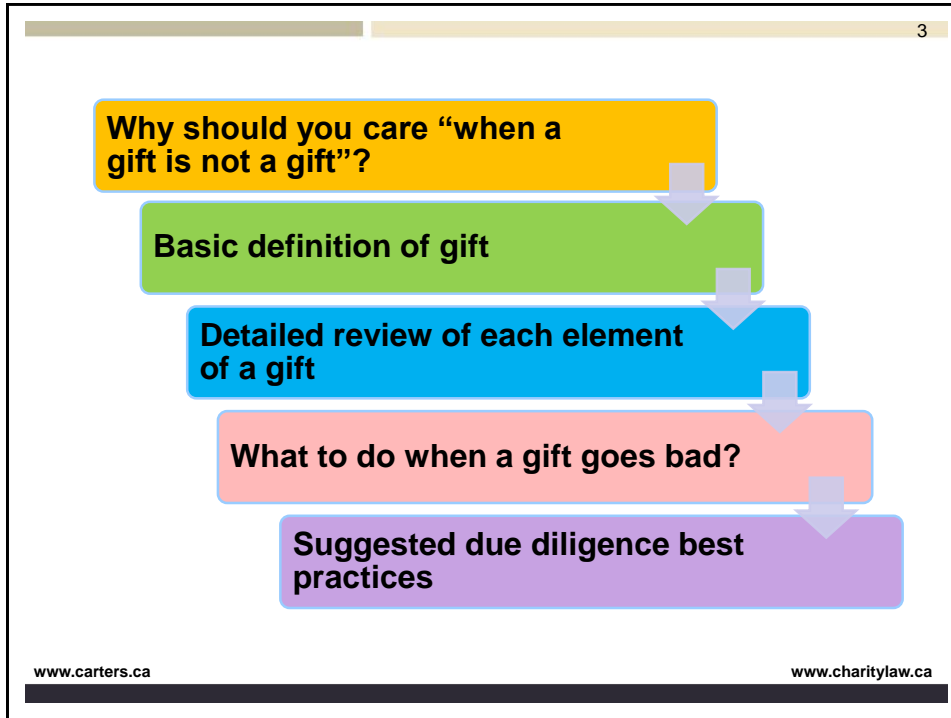
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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Carters/Fasken Martineau Healthcare Philanthropy Checkup 2016 June 23, 2016</p>
<p>When Is A Gift Not A Gift? and What to Do When Gifts Go Bad?</p> <p>By Terrance S. Carter and Theresa L.M. Man tcarter@carters.ca and tman@carters.ca 1-877-942-0001 © 2016 Carters Professional Corporation</p>	
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<p>A. OVERVIEW</p> <ul style="list-style-type: none">• Gift planning is premised on the assumption that a gift will be made• There may be circumstances where a charity cannot accept a gift, there may be situations where a charity may not want a gift that is otherwise a valid gift at law• Important to know when a gift is not a gift and what to do when gifts go bad• This presentation reviews selected receipting issues, not all special types of gifts under the ITA are discussed, eg., non-qualifying security, certified cultural gifts	
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- ## B. WHY SHOULD YOU CARE?
- Only gifts that meet the requirements in the *Income Tax Act* (“ITA”) can be receipted
 - Receiving and receipting a gift that does not meet ITA requirements may have serious consequences for the charity, its directors/senior management, and its donors
- ### 1. Charity
- A charity that has to return improper gifts to a donor creates a bad situation for donor relations and/or can lead to bad press for the charity
 - Charities need to ensure compliance with ITA rules
 - Charities need to ensure donation receipts issued for gifts comply with ITA rules
 - Compliance with the ITA is the responsibility of the charity, not the donor
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- A charity that receipted a gift that does not meet ITA requirements may be subject to CRA sanctions or revocation
 - If a receipt includes incorrect information - penalty of 5% of the eligible amount on the receipt, increases to 10% penalty for a repeat infraction within 5 years
 - If a receipt includes false information
 - If the total <\$25,000 - penalty of 125% of the eligible amount on the receipt
 - If the total >\$25,000 - penalty of 125% and the suspension of tax-receipting privileges
 - May be subject to revocation on repeated contraventions

2. Directors/Officers/Senior Management

- Improper receipting of gifts may lead to revocation of charitable status
- “Ineligible individuals” include persons who controlled or managed a charity whose charitable status was revoked in the last 5 years for serious breach of the ITA
 - Issuing improper receipts may be a serious breach
 - If an ineligible individual is a board member or controls or manages an organization, CRA may refuse its application for charitable status or revoke its charitable status
 - See CRA Guidance CG-024
- Can impact the reputation of board members/officers and the future employability of senior management

3. Donors

- Charities need to ensure gifts made are valid, so that they will not fail or be ruled invalid by a court
- Avoid CRA re-assessing income tax returns
- If a reassessment of a donor occurs, then CRA may reassess other aspects of the donor's tax return
- A donor could therefore be annoyed with the charity and could even seek compensation from the charity for the results of the reassessment and associated penalties and interests (e.g., class action law suits by donors from tax shelter cases)

C. BASIC DEFINITION OF A GIFT

- CRA adopts the traditional common law definition of a gift = a voluntary transfer of property without consideration
- However, split-receipting rules under the ITA allow donors to receive an **advantage** (consideration/benefit) in return for having made a gift



- A material benefit associated with a gift could disqualify a gift for income tax purposes
- Gift for income tax purposes is not the same as gift at common law
- Donors who intend for their donations to receive tax benefits under the ITA should ensure that the donations will qualify as gifts both at common law and under the ITA

- Sometimes, what constitutes a gift at common law may not be a gift under the ITA - e.g., *Neville v National Foundation for Christian Leadership* case
 - Nevilles donated to charity in 2002; their daughter received scholarships from charity
 - Court found that donations were not gifts for income tax purposes because the donors knew or ought to have known that their children would receive a bursary or scholarship from the charity if they made a donation
 - Nevilles sued charity to return the donations, arguing that the gifts should be returned because they were not gifts for ITA purposes – also lost
 - Court held that donations were gifts at common law – with donative intent, delivery, and acceptance

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D. ELEMENTS OF A GIFT

Gift	}	<ul style="list-style-type: none"> “Property” is gifted ITA - Value of property is ascertainable Gift is not against public policy
Donor	}	<ul style="list-style-type: none"> Donor intends to make gift Donor makes the gift voluntarily Donor transfers/delivers property to charity Property must be owned by donor ITA - Donor may receive partial consideration/advantage with ascertainable value
Charity	}	<ul style="list-style-type: none"> Charity is the intended recipient of the gift Charity accepts the gift

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1. “Property” Is Gifted

- In order to have a gift, **property** must be gifted
- Under the ITA, property means property of any kind whatsoever, whether real or personal
- Examples of property - cash, computers, furniture, shares, art work, real estate, copyright, trademarks
- Examples that are not property
 - Services (e.g., free time, labour)
 - Free accommodation (free rent or use of property) - However, charity can pay rent and then landlord can make a free-will donation
 - Free use of time share units
 - Promise to provide a property (i.e., a pledge) -there is no gift until the pledge is fulfilled

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2. Donative Intent

- Donor must have a clear intent to make a gift
- Donor must have the mental power to make a gift
 - Needs to ensure that the donor has requisite capacity at law to make a gift, particularly when the donor is elderly
 - Gift could be declared invalid if donor lacks requisite capacity
- Under the ITA, donative intent will generally be presumed if the FMV of the advantage does not exceed 80% of the value of the gift
- If the amount of advantage exceeds 80% of the FMV of the gift, then the donor will have the onus to prove to CRA that he/she intends to donate the property

- Examples where there is no donative intent
 - Donor is mentally incompetent
 - Donor is acting under duress
 - Donor made a gift to charity A, mistaking that it is charity B (where the names of the two charities are very similar)
 - Donor has participated in a tax shelter arrangement
 - Donor has participated in a donation receipt fraudulent arrangement with a tax preparer
 - Value of the FMV of the advantage exceeds 80% of the gift unless evidence is provided to the contrary

3. Voluntary Gift

- Donor must make the gift voluntarily
- Donor cannot be under any legal obligation or coercion to make a gift
- Examples of gift not voluntarily made
 - Court ordered donation
 - Gift made as a contractual obligation (e.g., a person wanting to become a member of a charity and is required to make \$X donation to the charity)
 - Gift made as a condition precedent to obtain goods or services (e.g., a retailer would not sell an item to a person unless that person first makes a gift to a named charity)

4. Transfer/Delivery to Charity

- Property must be “transferred” or “delivered” to the charity
- Need evidence of the donor “delivering” the property
 - Sometimes the simplest evidence is to have a deed of gift or some other documents
 - Sometimes other actions are required, e.g.;
 - Registering shares in the name of the charity
 - Registering title to donate cottage in the name of the charity
 - Physically delivering an art work to the charity

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- Donor cannot retain control or possession of the gift once given to charity
 - Donor must “divest” himself/herself of the donated property
 - Excessive on-going control by a donor may defeat/negate a gift
 - Important to ensure that “donor advised fund” is totally non-binding and would not constitute de facto control by donor
- Even delivery of cash gifts should be clearly evidenced
 - For example, 5 cases in 2014: *Ampomah, McCalla, Akinbo, Imoh, Bello*

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- Pledge is not a gift
 - Since there is no delivery of gift until it has been “given” to the charity
 - Terms “gift agreement” and “pledge agreement” are often used interchangeably, particularly when a gift agreement for a current gift includes a pledge to make a future contribution - but beware of the pitfalls
 - A **gift agreement** provides documented evidence of a gift having been made by a donor to a charity and is legally enforceable on the charity when the gift involves restrictions
 - A **pledge agreement** is an agreement that records a commitment by a donor to make a gift at a future time

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- A pledge agreement is generally not enforceable at law unless any of the following applies
 - There is some type of consideration, even a nominal amount of two dollars (It may be possible that (i) naming rights or (ii) the charity agreeing to a project or a restriction may constitute sufficient consideration)
 - The charity can establish that it has acted to its detriment as a result of the pledge (i.e. detrimental reliance)
 - The pledge falls within the provisions of “Public Subscription” legislation in Nova Scotia or the Statute of Frauds in P.E.I.

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- The *Brantford General Hospital Foundation and Marquis Estate* case (2003) is the most recent decision on pledges, but case law is not usually clear in this area
- Important to include testamentary provision in a will to ensure that any outstanding pledge is fulfilled
- Since a pledge may not be enforceable, it should not be considered and counted as a gift until the pledge is actually received, or alternatively it should only be identified as a “pledge” as opposed to an actual gift received

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- Important to determine whether that portion of a gift agreement that includes a future pledge is intended to be
 - Enforceable - i.e., with consideration which can be treated akin to a gift received, or
 - Unenforceable - i.e., which amounts to generally only a hope of a gift to come
- With a pledge for a future gift, whether enforceable or not, it is important to determine the timeframe in which the gift is to be paid (e.g., 2, 5, or 10 years)
- If there are naming rights associated with a pledge agreement, needs to decide at what point the naming rights would come into effect; e.g. at 25%, 50%, or more of the gift, etc.
- Once the pledge is fulfilled, then the terms of the pledge agreement will become the basis of an enforceable gift agreement for the charity

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- Gift certificates donated involves special rules
 - Gift certificate is a promise from a merchant to supply goods and/or services in an amount equal to the dollar value of the certificate
 - Gift certificate constitutes property and a right, but only if the promise is enforceable - i.e., only when the certificate is issued for consideration
 - Charities cannot issue donation receipts for gift certificates they receive directly from the issuer for no consideration, however receipts can be issued when gift certificates are redeemed for property
 - Receipt should specify the property the charity received in exchange for the gift certificate
 - See CRA Guidance CG-007

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- Other examples of no delivery
 - Gift of shares but the shares were not registered in the name of the charity
 - Gift of money to charity but the donor wants to have the power to tell the charity what to do with the funds (donor can only have advisory role if desired, but not control)
 - Loans to charity (but once a loan is forgiven by the lender, the forgiven loan can be a gift)

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- Payment to purchase goods and services - for example
 - Purchase of bread at bake sale
 - Concert tickets for concert put on by orchestra that is a charity
 - Accommodation costs at seniors home charity
 - University tuition
 - Fees for advertising in charity's newsletter
 - Lottery ticket or other payment for a chance to win a prize

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5. Donor “Owns” Property Gifted

- Property must be owned by the donor in order to be able to gift it
- It is the responsibility of the charity to be satisfied that it will own the gifted property - charity cannot own the gifted property unless it is gifted by someone who owns it in the first place
- Donor cannot give property owned by someone else
 - Charities need to vet who the “true” donor is
 - Donation receipt can only be issued to “true” donor
 - If a donation is provided by a cheque from an account held jointly by spouses (i.e., both names appear on the cheque), CRA accepts that the charity can issue the receipt in either or both names, regardless of how the cheque is endorsed

- If a charity receives a cheque from a company and is subsequently asked to issue the donation receipt in the name of an individual who controls the corporation (e.g., shareholder)
 - Charity generally must issue donation receipt to the company
 - CRA accepts that the charity may issue a receipt to the individual if there is evidence to show that the individual is the true donor - e.g., the company accounts for the donation from a shareholder in the shareholder's account
- Similar rule applies to a gift from a partnership in which both spouses are business partners.

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- If a person provides a gift and asks the charity to issue a donation receipt in another person's name and there is no obvious indication as to the true donor
 - Charity generally must issue donation receipt to the person who provided the gift
 - CRA accepts that the charity may issue a receipt to the other person if it is reasonably sure that the name it records on the receipt is that of the true donor - and CRA indicates that the charity should request a written declaration as to the identity of the true donor from the person who provided the donation

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- Gifts from anonymous donors
 - Generally, charities can accept gifts from anonymous donors (e.g., cash gifts dropped into a donation box in church or offering plate)
 - However, a charity cannot issue donation receipt for anonymous gifts
 - CRA accepts that a taxpayer can claim a tax credit or deduction for an anonymous donation, provided that the following is followed
 - Donor appoints an agent, directs the agent to hold funds in trust for the donor, donor directs agent to make a gift to a charity on behalf of donor; agent makes the gift; agent directs the charity to issue donation receipt in the name of the agent in trust; agent gives the receipt to the donor

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6. Gift Is Intended for the “Charity”

- Charity that received the gift must be the intended recipient, not another charity
 - Avoid case of “mistaken identity”
 - For example “ABC Foundation of Toronto” vs “ABCD Foundation of Toronto”
 - Charity needs to ensure name of charity named in Will bequests and testamentary gift clauses is accurate
 - Charity needs to protect the branding and goodwill of the charity to ensure the public is not confused about which charity is which
 - For example, a gift given to a hospital cannot be deposited into the bank account of and receipted by the hospital foundation

- Charity cannot accept a directed gift
 - Charity cannot accept a gift where the donor directs charity to give the funds to a specified person or family - in reality, such a gift is made to the person or family and not to the charity
 - However, a gift made to a charity subject to a general direction from a donor that the gift be used in a particular program operated by a charity (which may include certain persons as beneficiaries) are acceptable - provided that decisions regarding utilization of the donation within a program rest with the charity and not with the donor

- Charity cannot accept a flow-through gift intended for another entity that is not a qualified donee
 - Examples
 - Gift to charity A intended to be transferred to organization B that is applying for charitable status
 - Gift to charity X intended to be transferred to organization Y that is a tax-exempt 501(c)3 organization in the U.S.
 - Gift to charity D intended to be transferred to separate program in a developing country where charity D does not exercise bona fide direction and control over that program conducted through an intermediary

7. Value of Gift is Ascertainable

- Split-receipting rules require the FMV of a gift be ascertainable in order for a donation receipt to be issued
- Charities have duty to accurately determine FMV of donated property
- FMV generally means the highest price, expressed in dollars, that a property would bring in an open and unrestricted market, between a willing buyer and a willing seller, both of whom are knowledgeable, informed, and prudent, and who are acting independently of each other

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- Generally, if the FMV is less than \$1,000, CRA's policy is that a member of the charity, or another individual, with sufficient knowledge of the property may determine its value
 - Person who determines the FMV should be competent and qualified to evaluate the property
 - However, if multiple items are donated each being less than \$1,000, CRA may take the view that the gift is a collection of items valuing over \$1,000
- If the FMV is expected to be more than \$1,000, CRA strongly recommends that the property be professionally appraised by a third party
 - If the property is appraised, the name and address of the appraiser must be included on the official donation receipt

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- Deemed FMV rule
 - Split-receipting rules sometimes requires the FMV be deemed to be a certain amount under some circumstances
 - Result of the government's attempt to curtail abusive tax shelter donation schemes
 - FMV of gift is deemed to be the lesser of
 - FMV of the property
 - Cost (or the adjusted cost base) of the property to the tax-payer immediately before the gift is made

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- Deeming rules apply to gifts made after Dec 20, 2002, if any of the following applies - where the donor acquired property
 - through a gifting arrangement (donation tax shelter)
 - less than 3 years before making the gift
 - less than 10 years before making the gift, and it was reasonable to conclude that when donor acquired the property, one of the main reasons for the acquisition was to make a gift
- Deeming rules do not apply to gifts made as a consequence of donor's death, inventory, real property in Canada, publicly traded shares, ecological gifts, and certain rollover circumstances
- Deeming rules do not apply to a gift of certified cultural property unless it was part of tax shelter and was gifted after Feb 10, 2014 (2014 budget)

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- Examples of where FMV of gifts is not ascertainable (and therefore no donation receipts)
 - Art work (over \$1000) that is not supported by a qualified appraisal
 - Items that have a purported appraisal but its actual value is proven to be much lower, e.g., gifts of rare wine from a wine auction where the auctioned price is significantly lower than the appraised value

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8. Advantage Received is Ascertainable and Within Limit

- ITA split-receipting rules allow donors to receive advantage (consideration/benefit) in return for having made a gift
- This overrides the common law requirement that the donor cannot receive any benefit
- Recent FCA decision in *French v. Canada* (Feb 29/2016) raises the possibility that civil law concept of split receipting may have application in common law jurisdictions
- Under the ITA, a donation receipt can only be issued if (a) the value of the advantage can be ascertained and (b) the value does not exceed 80% of the FMV of the gift

- Advantage is very broadly defined
- Advantage is the total value of all property, services, compensation, use or other benefits ...
 - To which the donor, or a person not dealing at arms length with the donor
 - Has received or obtained or is entitled to receive (either immediately or in the future)
 - As partial consideration of or in gratitude of the gift or that is in any other way related to the gift
- Advantage can be received prior to, at the same time as, or subsequent to the making of the gift
- Advantage does not require a causal relationship between the making of the gift and the receiving of the advantage, as long as the advantage is in some way related to the gift

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- Advantage can be provided by the charity that received the gift or by third parties unbeknownst to the charity
- CRA's administrative exemption applies where there is a token advantage of the lesser of 10% of the value of the gift and \$75 (*de minimis* threshold)
- If donor does not tell charity of an advantage received, eligible amount of gift would be deemed to be nil
- Naming rights of persons are generally not advantages if there is no prospective economic benefit associated with the naming rights - However, excessive "glorification" of a donor's name and reputation contained in binding gift agreement may suggest naming has value to donor
- Naming rights for businesses may suggest sponsorship, not gift (see slides below)

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- Sponsorship
 - "Sponsorship" is not defined in the ITA
 - CRA takes the view that generally sponsorship fees are not gifts and charitable receipts cannot be issued for sponsorship fees because the sponsor receives something in exchange and they are usually paid to support a charity event in return for advertising or other type of consideration

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- A business may deduct 100% of a sponsorship fee as a business expense under section 18 of the ITA within the immediate fiscal year, provided that such payment meets six tests
 - It is of an income nature and not a capital expenditure
 - It is reasonable in amount
 - It is incurred for the purpose of earning income
 - It is not a personal expenditure
 - It is not expressly prohibited by the ITA
 - It does not constitute an “abusive tax avoidance”

- What is reasonable is a question of fact by comparing the expense in question with amounts paid in similar circumstances in comparable businesses
- E.g., - if a business received recognition as a donor in a charity’s monthly newsletter that is widely distributed in appreciation of a contribution made by the business, then the business may need to determine what a similar advertisement in a publication with similar circulation would cost in order to ensure that the amount is reasonable

– When to donate and when to sponsor?

Charitable donation	Sponsorship fee
A business may deduct the eligible amount of a gift up to 75% of net income, plus 25% of certain taxable capital gains, and 25% of any capital cost recapture	A business may deduct 100% of a sponsorship fee as a business expense under section 18 of the ITA
A charitable tax deduction can be carried forward for a period of five years	A sponsorship fee must usually be deducted within the fiscal year in which it was made

9. Gift is Not Against Public Policy

- A gift cannot be against public policy - i.e., gift or terms of the gift cannot be illegal, discriminatory or violate any federal, provincial or municipal laws or regulations
- Examples
 - Scholarship exclusively for white Christians of British nationality or parentage was struck down by Ontario Court of Appeal in 1990 because it was based on racism and religious superiority [*Canada Trust Co. v. Ontario Human Rights Commission* (ON CA)]
 - University of Saskatchewan declining an endowed gift of \$500,000 for “non-aboriginal students only” in 2009

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- More examples
 - Scholarship created by Will struck down by Ontario court in February 2016 because the eligibility criteria amounts to discrimination
 - Will created scholarships for white, single and heterosexual male students, not afraid of hard manual work, and does not play intercollegiate sports
 - Similar scholarship for hardworking, white, single women, who is “not a feminist or lesbian”
 - *Royal Trust Corporation of Canada v The University of Western* (estate for the testator, Dr. Victor Hugh Priebe)

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10. Acceptance by Charity

- There is no gift unless the charity agrees to accept the gifted property
- There may be many reasons why a charity may not want a gift that is otherwise valid
- **Reason - inconsistent with charity’s charitable purpose, philosophy or policy**
 - Gift contains features or restrictions on the gift that are inconsistent with the charity’s charitable purposes
 - e.g., endowment fund to a health care charity to run an art gallery

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- Gift is made by an individual, corporation or organization whose philosophy and values are inconsistent with the overall philosophy and values of the charity
 - e.g., gift from tobacco company to health care charity
 - e.g., gift to a Catholic hospital to assist in developing an assisted dying program or abortion clinic
- Gift may affect the reputation of the charity
 - e.g., gift to charity where funds are obtained from victims of fraud

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- **Reason - administration/operational issues**
 - Charity is unable to honour the terms or restrictions of the gift
 - e.g., gift to set up a scholarship requiring all income be disbursed each year but the university does not have suitable students to take the scholarship each year
 - Gift will be difficult to administer
 - e.g., charity and donor co-owns a condo that the donor lives in
 - e.g., donor wants to donate \$500 to set up a standalone endowed gift

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- Donor and charity cannot agree on value of the gift or advantage
 - E.g., donor relies on an appraisal or evaluation provided to the donor by third parties, which the charity believes is inaccurate or unreliable and donor refuse to let charity to obtain an independent appraisal
 - Difficult to determine the FMV of the gift or advantage or the determination results in unwarranted or unmanageable expense to the charity in determining such value
- Donor does not allow charity sufficient time to conduct due diligence
 - e.g., donor donates a cottage on a “rush” basis and wants donation receipt issued in 2 days

- **Reason - others**
 - Gift may require any action on the part of charity which is unacceptable to charity or violates charity’s policies
 - Gift is financially unsound or could expose the charity to liability
 - e.g., environmentally contaminated land
 - e.g., building subject to significant work orders or zoning violations
 - e.g., building that is designated as a heritage building and has substantial maintenance costs
 - e.g., gift of historic organ that requires expensive transportation and restoration costs

- Gift that may expose the charity to embarrassment
- Charity only gets partial interest in a property that the charity does not want to have
 - e.g., charity and donor co-owns a condo that the donor lives in
- Gift does not provide the charity with any benefit associated with its charitable purpose and cannot be easily liquidated

E. WHAT TO DO WHEN A GIFT GOES BAD

1. Do not accept the purported gift

2. Return the purported gift

3. Make voluntary disclosure of the purported gift

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1. Do not accept the purported gift

- Charity has no obligation to accept a gift
- Better to decline an inappropriate gift upfront rather than having to return it
- Develop gift acceptance policy and checklist on when a gift may be declined and how to decline it
- Document discussion with donor, reasons for declining the gift, and how the gift was declined

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2. Return the purported gift

- Sometimes a charity may want to return a gift
- For example, in 2010, a university returned a \$1 million gift and stripped the donor's name from its business school when the donor (a former corporate executive) pleaded guilty to corporate fraud
 - School felt its ethical credibility among students and their potential employers would be tainted if it kept the money in conjunction with the donor's name

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- But a large hospital chose to keep the gift and the name of another business executive who plead guilty to fraud
 - President of the hospital foundation stated that removing the donor's name would have required using current donors' money to return the donation, and that helping patients is what donors' money should be used for and not other matters
- No one-size-fits-all solution when dealing with policy issues involving return of a gift

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- As a general rule, a valid gift at common law cannot be returned
- Returning a valid gift could be a breach of trust for directors of a charity
 - To do so could result in the charity risking being challenged for paying charitable property to non-qualified donees for a non-charitable purpose and the directors being exposed to liability that may arise as a result of breach of trust
- A valid gift at common law may not be returned even if it is not a gift for ITA purposes (See Neville case above)

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- The circumstances under which a gift may be returned and the consequences faced by the charity and its directors involve a complex area of law
- There must be a clearly identifiable basis at law before a gift can be returned - e.g.
 - Gift was in fact not a valid gift
 - Gift restriction cannot be fulfilled by the charity and there is no gift over to another charity that can fulfil the gift restriction
 - Gift has a negative value to the charity
 - Gift involves aspects of criminality, such as terrorism

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- If a gift was returned by a charity to the donor after March 21, 2011, rules introduced in the 2011 Federal Budget requires the charity to file an information return if a donation receipt was issued for the original property, and if the FMV of the returned property is more than \$50
 - Information return must be filed within 90 days after the day the property is returned, copy must be provided to the donor
 - Donor may be reassessed by CRA and CRA may disallow a tax credit or deduction that was claimed in a prior year in relation to the returned property
 - According to CRA, the “information return” required by the ITA is simply a letter to CRA

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- If a gift needs to be returned
 - Charity’s board of directors carefully consider all options
 - Legal advice should be sought
 - Communications with donors need to be carefully planned and documented
 - CRA would need to be contacted, information return filed, and copy of return provided to donors
 - Charity should monitor and control public communications about the return of the gift

3. Make voluntary disclosure of the purported gift

- If a charity found that it has issued a donation receipt inappropriately (e.g., the purported gift is not a gift or the donation receipt reflects an inflated amount), the charity should seek legal advice and consider the possibility of making a voluntary disclosure to CRA
- Generally better to disclose the error by the charity as part of a voluntary disclosure than run the risk of CRA finding the error on a subsequent CRA audit

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F. DUE DILIGENCE BEST PRACTICE SUGGESTIONS

1. Develop and implement a gift acceptance policy
2. Use checklists
3. Discussion with donors before a gift is made
4. Clear communications with donors and public
5. Suggest sample bequest language
6. Develop template gift agreements

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1. Develop and implement a gift acceptance policy

- A gift acceptance policy can
 - Facilitate gift solicitation and management
 - Ensure legal compliance and risk management
 - Manage donor relations
 - Enhance effective operational management help
 - Evidence due diligence by board and senior management of the charity
- However, a gift acceptance policy that is not implemented is worse than not having a policy at all

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- Topics to be included in a gift acceptance policy
 - Outline duties of directors regarding charitable gifts
 - Outline role of parallel foundation (if applicable)
 - Explain basic receipting rules for reference by staff and volunteers
 - Explain restrictions that may be imposed by donors on gifts
 - 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
 - When the charity may decline or return a gift

- What to do after having developed a policy
 - Approval by the board of directors
 - Thorough implementation
 - Staff and volunteer training
 - Coordinate with other departments of the charity to ensure consistent implementation, e.g. marketing, public communications
 - Regularly review, evaluate and update the policy to reflect current law and practice of the charity
 - Have one person or a committee responsible for constant monitoring - internal performance and donor satisfaction
 - Consider establishing a Gift Planning Committee to oversee the gift planning program

2. Use checklists

- Ensures nothing is missed
- Ensures consistent treatment of gifts
- Ensures the checklist is followed and update from time to time

3. Discussion with donors before a gift is made

- Offer alternative terms and arrangements
- Stop things early on if there are issues, rather than dealing with aftermath
- Better to decline an inappropriate gift upfront, rather than having to return it
- Do the necessary due diligence so that the charity can issue donation receipt that can withstand scrutiny by CRA

4. Clear communications with donors and public

- When a charity is seeking funds for a special project, CRA recommends that the charity clearly inform donors, and/or state in its fundraising material, before accepting any donations, what it will do with the money if the project cannot be carried out or if more money is collected than the project requires
- Otherwise, the charity may be required to seek court direction concerning what to do with the gift or face possible allegation of breach of trust if the charity acts unilaterally without court authorization

5. Suggest sample bequest language


- Provide sample bequest language to donors & advisors
- Ensures charity is accurately named in Wills
- Ensures charity can fulfill gift restrictions
- Encourage donors and their advisors to discuss the gifts with the charity in advance of drafting testamentary language

6. Develop template gift agreements

- Ensures all gift terms properly documented and complies with all legal requirements
- Ensure consistent treatment of gifts
- Provide template to donors and their advisors
- Update templates from time to time to reflect changes in the law

G. CONCLUSION

- Knowing what is and what is not a gift requires a clear understanding of common law, ITA rules, and CRA policies
- By doing the necessary due diligence will help protect charities and their board of directors, officers and senior management, as well as donors, from unpleasant, unexpected surprises or potential liability

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