

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>Carters/Fasken Martineau Healthcare Philanthropy Checkup 2018 Toronto - June 8, 2018</b></p>
<p><b>Due Diligence in Gift Documentation</b></p> <p>By <b>Theresa L.M. Man</b>, B.Sc., M.Mus., LL.B., LL.M and tman@carters.ca 1-877-942-0001</p> <p>© 2018 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Why keep gift documentation</li><li>• Types of gift-related documentation</li><li>• Gift agreement is the most important type of gift documentation</li><li>• Common problems if insufficient gift-related records are maintained</li><li>• Best practice due diligence documentation</li></ul>	
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## A. WHY KEEP GIFT DOCUMENTATION

- Ensures effective gift solicitation and management for each gifting process
  - Declining a gift
  - Negotiating and recording a gift
  - Receiving a gift
  - Managing a gift & complying with gift terms
  - Returning a gift

- Ensures legal compliance and risk management
  - Ensures compliance with the law, including case law and the requirements of the *Income Tax Act* (ITA)
  - Helps board of directors fulfill their fiduciary duties under common law to comply with the terms of a gift, failing which the directors could be held personally liable for any loss or damages
  - Ensures compliance with gift terms to avoid breach of trust
  - Demonstrates due diligence as a defence in the event of litigation
  - Avoids allegation of breach of trust
  - Avoids 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
  - Promotes credibility of the charity
  - Manages expectation of directors, staff and volunteers
  - Maintains corporate history
  - Discharges directors’ and officers’ duties
  - Complies with donor’s restrictions
  - Ensures operational efficiency
  - Mitigates legal risks
  - Assists future planning
  - Manages donor and public relations
  - Prepares for legal challenges, e.g., CRA audits, law suits, insurance claims

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- Complies with ITA requirements
  - Some gift-related documents may also be part of books and records required to be kept by charities under the ITA
  - Therefore must be held in the manner for the applicable statutory retention periods
- Complies with incorporating legislation requirements
  - Some gift-related documents may also be required to be kept under the incorporating legislation
  - Detailed requirements in each statute are different
- Complies with other requirements
  - There may be other specific records keeping requirements that an organization has to maintain - e.g., funders, certification bodies, umbrella organizations

## B. TYPES OF GIFT-RELATED DOCUMENTATION

### 1. Documents that Set Out Terms of Gifts

- Terms of gifts (limitations, conditions, terms of reference, directions or other restrictions imposed by the donors) may be set out expressly or be understood by implication
- Expressed gift terms is the best because it clearly documents donors' intent and may be contained in different documents, for example:
  - Gift agreements or deed of gift
  - Wills terms - testamentary gifts, fulfillment of pledges
  - Donor communications (e.g., emails, letters, phone calls, meeting notes)

- Implied gift terms reflect the terms as understood by the parties, not expressly written out, and may be contained in different documents, for example:
  - Fundraising materials (e.g., brochures, posters, pamphlets, newsletters, solicitation letters, etc.)
  - Fundraising materials of third party organizations
  - Website of the charity
  - Social media messaging
- Gift terms may also be set out in different types of contracts that may not be “gift agreements”, for example: sponsorship agreements, product supply agreements, funding agreements, side letters or agreements

## 2. Documents for Due Diligence of Proposed Gifts

- Before a gift is accepted, due diligence is required to ensure if the charity is willing to accept the gift
- For example: title searches of a gift of real property, reputation of the donor, whether purpose of gift is inconsistent with those of the charity, title documents of donation of shares, charity’s gift acceptance policy and other gift-related policies

## 3. Documents to Support Valid Gift at Common Law

- Need documents to evidence valid gift at common law, i.e., voluntary transfer of property without consideration
- For example: documents to show a “property” is donated, donor has the capacity to donate, donation is voluntary, charity accepts the gift, board resolution establishing a board initiated restricted fund

## 4. Documents for Appropriate Receipting

- In order for a gift to be receipted, the charity needs to support the receipt with proper documentation
- For example: appraisal of in-kind gifts, amount of advantage, valuation of donation of shares

## 5. Documents for Management of Gifts

- Need documents to show the charity complies with the terms of the gifts and effectively manages them
- For example: donors communications, gift reports, acknowledgement letters, appreciation letters, tracking of gift terms, tracking of amount of capital, encroachment of capital, disbursement of income, investment of gifts

## 6. Documents on Donor Information

- Donor information constitutes personal information that must be respected and protected by the charity
- Donor information can include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, financial information, name of business, place of employment, preferred donation restrictions and even health information
- Lots of documents may contain donor information, e.g., letters, receipts, computer data

## 7. Documents to Support Decline or Return of a Gift

- Need documents to show why and how a particular gift is declined or returned
- For example: letters to potential donor, board resolution

## C. GIFT AGREEMENT IS THE MOST IMPORTANT TYPE OF GIFT DOCUMENTATION

### 1. Basic Considerations

- Starting Point: A gift agreement is not a legal requirement in order to make a gift
- To establish a gift at common law simply involves the voluntary transfer of property without consideration
- However, a well-drafted gift agreement generally provides the best documentary evidence to avoid confusion at a later time concerning whether there was a gift and what the terms of the gift were

### 2. Difference Between Gift Agreement and Pledge Agreement

- The 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
- Gift agreement - documents a gift having been made by a donor to a charity and is legally enforceable on the charity when the gift involves restrictions
- Pledge agreement - records a commitment by a donor to make a gift at a future time

- Pledge is generally not enforceable at law unless at least one of the following is met
  - There is consideration, even a nominal amount of two dollars
  - Charity can establish that it has acted to its detriment as a result of the pledge (i.e., detrimental reliance)
  - Pledge is within the provisions of “Public Subscription” legislation in Nova Scotia or the Statute of Frauds in P.E.I.
- Important to include testamentary provision in a Will to ensure that any outstanding pledge is fulfilled
- Pledge should not be counted as a gift until the pledge is actually received, or it should only be identified as a “pledge” as opposed to an actual gift received

## D. COMMON PROBLEMS IF INSUFFICIENT GIFT-RELATED RECORDS ARE MAINTAINED

- See webinar presentation “When Is A Gift Not A Gift? And What to Do When Gifts Go Bad?” at Healthcare Philanthropy Check-Up on June 23, 2016 at <http://www.carters.ca/pub/seminar/charity/2016/Handout-When-is-a-Gift-Not-a-Gift.pdf>
- See presentation “Pitfalls in Drafting Gift Agreements” at STEP Conference on June 12, 2017 at <http://www.carters.ca/pub/article/charity/2017/STEP-Pitfalls-in-Drafting-Gift-Agreements-STEP-2017.pdf>



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- PROBLEM #1: Failure to document valid gift at common law
  - Need documents that there is valid gift at common law, i.e., a voluntary transfer of property without consideration
- PROBLEM #2: Failure to document eligible amount of gift at ITA
  - CRA adopts the traditional common law definition of a gift, however ITA split-receipting rules allow donors to receive an advantage (consideration or benefit) in return for having made a gift
  - Eligible Amount = FMV - Advantage

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- PROBLEM #3: Failure to document due diligence before gift is accepted
  - Gift not against public policy or policies of the charity
- PROBLEM #4: Failure to clearly document gift terms, e.g.
  - Gift restrictions, meaning of endowment, disbursement of funds, donor naming rights, investment power
- PROBLEM #5: Failure to properly draft gift agreements, e.g.
  - Drafting language, proper authorization, variation clause; admin fees

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## E. BEST PRACTICE DUE DILIGENCE DOCUMENTATION

- The following are due diligence tips in addition to the above section on avoiding common problems

### 1. Proper review of existing endowments

#### (a) Taking Inventory

- It is essential that the board of a charity maintain an up-to-date inventory of all endowments and other restricted funds, to be updated on a regular basis
- However, it is often difficult to locate original documentation that established the endowment because documentation may have been lost, was inadequate or is confusing

- Must go back to original source documents where possible to see what the terms of the endowment and other restrictions were, examples of source documents
  - Endowment agreements
  - Terms of wills
  - Notes in audited financial statements
  - Government contracts for matching funds
  - Board resolutions creating the endowment fund or attempting to change the fund
  - Donor letters or agreements attempting to change the terms of the endowment
  - Family members attempting to change the terms of the endowment
  - Notes to file about the endowment made by previous staff of the charity

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**(b) Identify Areas of Deficiencies**

- Needs to identify when terms of the endowment have not been complied with by the charity
- Non-compliance can occur in any area, but often tends to be where the charity has followed a total return strategy when there is no authority in the endowment agreement to do so or in a policy incorporated by reference into the gift agreement
- Non-compliance with terms of an endowment agreement can lead to exposure to liability for members of the board of directors, both past and present
- Where there has been evidence of non-compliance, it may be necessary to obtain a relieving court order on a consent basis from the Public Guardian and Trustee in Ontario under s. 13 of the *Charities Accounting Act*

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**(c) Transfer of Endowment Funds**

- If an endowment fund(s) is to be transferred to another charity, such as a parallel foundation, the charity must first take inventory of its endowments, and then determine what authority speaks to the issue of transferring the endowment funds
- The transfer of funds from one charity as trustee to another charity as subsequent trustee can be done by deed of appointment under trustee legislation, or by court order
- If recipient charity is not arm's length to the donor charity, then need to consider whether to identify the gift as a "designated gift" under the ITA for purposes of avoiding the 100% disbursement requirement by the recipient charity

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## 2. Keeping Adequate Records of Gift-Related Documents

### ITA requirements

- In general, there are three types of books and records - governance, financial and operational records
- Many gift-related documents are part of these records
- CRA requires registered charities to keep *adequate* books and records (including source documents) so that CRA can verify revenue, expenditures, resources spent on activities
- Books and records of registered charities must contain specific information such as (a) information related to any grounds for revocation, (b) duplicate receipts, and (c) Information to support the verification of donation tax credits and deductions

- “Records” are broadly defined in ITA to include an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing *containing information*, whether in writing or in any other form
- Webpage for charities *Books and Records*  
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/books-records.html>

## Key issues regarding record keeping

### (a) How to keep records

- Records must be kept safe and protected from
  - Fire, flood, mold, deterioration
  - Misfiling, loss, mishandling, tampering
- Separate permanent and working files
- Address privacy and confidentiality concerns

### (b) Electronic records

- Paper vs. electronic?
- Some corporate legislation (e.g., CNCA) contain rules on keeping electronic records
- ITA contains extensive rules on how charities may keep electronic records

### (c) Where to keep records

- Some corporate legislation (e.g., CNCA) contain rules on where records may be kept
- ITA contains rules that trump the rules in corporate legislations - Registered charities must keep their books and records in Canada at an address in Canada recorded with CRA, but does not permit electronic records to be kept outside Canada even if they can be accessed within Canada

### (d) What language must books and records be kept in

- CRA suggests, but does not state, that books and records should be kept in English or French and translated from a third language
- CRA may consider exceptions if translation requirements impose a “significant burden”

**(e) Who keeps records, Who has access**

- Privacy and confidentiality concerns?
- If a charity hires a third party to keep or maintain its records, the charity is still responsible

**(f) How and when to destroy records**

- Develop a plan for destroying old records
- Adhere to retention schedule
- Issues: privacy and confidentiality, permanent destruction, security (no unintended access by 3<sup>rd</sup> parties)

**(g) How long to keep records**

- Some legislation (e.g., CNCA) contain rules on how long records must be kept
- ITA has detailed requirements - Regulation 5800 and s. 230 set out the retention periods for keeping records

**Retention Periods for QDs' Books and Records**

TYPE OF BOOK OR RECORD	REGISTERED CHARITY, RCAA, & RNASO	OTHER QDS	RECOMMENDED RETENTION PERIOD
Governing documents	2 years after revocation or corporate dissolution	2 years after corporate dissolution or 6 years from end of tax year ceased to exist	10 years after revocation or 5 years after corporate dissolution
Minutes	2 years after revocation or corporate dissolution	2 years after corporate dissolution or 6 years after ceased to exist	5 years after corporate dissolution or revocation or 10 years after ceased to exist
General ledger or book of final entry	2 years after revocation or corporate dissolution or 6 years after ceased to exist	2 years after corporate dissolution or 6 years after ceased to exist	5 years after corporate dissolution or revocation or 10 years after ceased to exist
Duplicate receipts	2 years after year gift made	2 years after year gift made	5 years after year gift made

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**Retention Periods for QDs' Books and Records**

<b>TYPE OF BOOK OR RECORD</b>	<b>REGISTERED CHARITY (INCLUDING RCAA &amp; RNASO) &amp; OTHER QDS</b>	<b>RECOMMENDED RETENTION PERIOD</b>
Supporting status under ITA	2 years after corporate dissolution or 6 years after ceased to exist	5 years after corporate dissolution or 10 years after ceased to exist
Verification of donation tax credits and deductions	6 years after end of tax year related or 2 years after revocation or dissolution	10 years after tax year related or 5 years after revocation or dissolution or indefinitely for certain gifts and endowments
Information returns	6 years after end of tax year related or 2 years after revocation or dissolution	10 years after tax year related or 5 years after revocation or dissolution

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- Charities may want to retain certain books and records beyond the required periods for various reasons
    - Demonstrate due diligence in the event the charity or one of its donors is audited
    - Defend a lawsuit or support an insurance claim
    - Preserve organizational memory
    - Establish a paper trail to show directors' decisions were in line with restricted charitable purpose trusts
    - Compliance with donors' intent and gift restrictions
    - Limitation periods that a law suit can be commenced
    - Third party requirements, e.g., umbrella organization
    - Other statutory requirements, e.g., special records retention requirements for "public bodies" under the *Ontario Archives and Recordkeeping Act, 2006* (e.g., Ontario ministries, commissions)
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### 3. Developing Books and Records Policy

- Review requirements on what books and records are required to be kept
- Gather all records and categorize them in a logical manner - What if records were lost?
- Review applicable maintenance and retention requirements for each type of records
- Needs to strike balance - retain full and accurate records vs avoid perpetually retaining an ever-increasing number of records and comply with applicable legislation
- Develop a written policy, each organization is different, no one-size fits all policy, depends on the needs and circumstances of the organization

- Circulate draft policy to board, staff, IT, etc. for comments and input, seek legal advice
- Examples of key areas to be addressed in policy
  - State the purpose of policy
  - Define the scope of the policy - records management, retention and destruction
  - Define responsibility roles - who is responsible for various areas of compliance
  - Define key principles followed
  - Address records management, retention, destruction
  - Address litigation or investigation hold issues - certain circumstances may supersede policies authorizing destruction of records, including the authority granted in the retention schedule
  - Set out records retention schedule



## 4. Privacy Issues and Donor Information

- Donor information constitutes personal information that must be respected and protected by the charity
- Who are donors? In addition to those making donations, they can include members, employees, patients, and even customers where a gift is tied to a donation
- Donor information can include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, financial information, name of business, place of employment, preferred donation restrictions and even health information

- The primary statutory sources of privacy laws are
  - Federal private sector legislation, e.g., *Personal Information Protection and Electronic Documents Act*
  - Provincial private sector “substantially similar” legislation, e.g., Ontario *Personal Health Information Protection Act* and public sector privacy legislation, e.g., *Freedom of Information and Protection of Privacy Act*
  - *Canada’s Anti-Spam Legislation*
- Other related sources of law that may give rise to obligations when charities deal with donor information, e.g.,
  - Common Law
  - ITA disclosure and books and record obligations
  - National Do-Not-Call List
  - Anti-terrorism and anti-money laundering legislation
  - Sector standards and contractual obligations

- What can go wrong?
  - Good intention sharing of personal information with volunteers without appropriate restrictions
  - Intentional intrusion by employees
  - Cyber attacks
  - Information requests by CRA
  - Information requests by donor
  - Information requests by the press
- Canadian laws concerning the collection and use of donor personal information vary from province to province and are in an ongoing state of flux
- Consider developing privacy and anti-spam policies
- See webinar “Do’s and Don’ts of Donor Information” by Terrance Carter and Ryan Prendergast at <http://www.carters.ca/pub/webinar/2017/Dos-Donts-of-Donor-Information.pdf>

## 5. Develop and Implement Gift Acceptance and Other Gift-Related Policies

- 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
- Use similar approach for other gift-related policies, such as endowment policies, naming policy

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## 6. Use Checklists

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

## 7. Clear Discussion with Donors and Clear Communications with Public

- 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

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## 8. Develop template gift agreements and sample bequest language

- 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
- 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

## 9. What to do with legal opinions?

- Important to protect and not waive solicitor client privilege with regard to legal advice on creating gift documentation or other gifting issues
- Need to ensure legal opinions can be kept protected in the event of litigation over gift documentation or CRA audit
- Keep legal advice confidential, e.g., not provide copies to donors or anyone else

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