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# The 2003 Annual CHURCH & the LAW SEMINAR

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## Disbursement Quotas and Related Matters for Churches and Charities

(Power Point Presentation)

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**Overview**


- A. Disbursement Quota: Importance
- B. Disbursement Quota for Organizations and Foundations
- C. Inter Charity Gifts
- D. Ten Year Gifts
- E. Satisfying the Disbursement Quota
- F. Frequently Asked Questions
- G. Restricted Gifts
  - (a) appeal to donors
  - (b) is it a gift?
  - (c) duty of charity to comply with restrictions
  - (d) failure to comply
  - (e) other concerns
  - (f) avoiding restricted gifts
  - (g) documenting restricted gifts

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**A. Disbursement Quota: Importance**


- Important for Donors and Donees
- Nature of property gifted
- Nature of restrictions imposed
- Source of gift

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**B. Disbursement Quota for Organizations and Foundations**


- Organizations: 80% of receipted donations
- Exceptions:
  - Gifts of capital under a will
  - Gifts subject to trust or direction to hold for at least 10 years
  - Gifts from other charities
- Foundations:
  - Same rule re 80% (except for gifts from other charities) + 4.5% of the average value of investment property

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**C. Inter Charity Gifts**

- Gifts to charitable organization: not subject to DQ of organization
- Gifts to Foundation: Foundation must disburse 80% (Public) or 100% (Private) irrespective of whether receipt issued
- Exception:
  - Specified gifts

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## How Does the Issue Arise?

- Donor wishes to satisfy charitable pledge by gift from private foundation to public foundation
- Private Foundation wishes to wind up and transfer its property to community foundation
- Organization wants to set up parallel foundation for asset protection purposes

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## Specified Gifts

- Gifts from one charity to another designated by donor charity as a specified gift will not count toward satisfaction of DQ of donor charity
- Donee charity does not have to include amount of gift in its DQ
- Important for donee Foundation to make inquiries
- Also important for Organizations to ask because specified gifts not included in income of organizations which can't disburse more than 50% of their income to qualified donees
- Inter-charity transfers of 10 year gifts also problematic

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## D. 10 Year Gifts

- CCRA documentary requirements
- Trust or direction
- Disbursement quota issues if encroach on capital during 10 year hold; if encroach on capital after 10 year period
- Capital gains not considered "income"
- 4.5% disbursement quota still applies
- Inter charity transfers of 10 year gifts
- Low investment returns

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## E. Expenditures Which Count Toward Satisfaction of Disbursement Quota

- (i) funds expended by charity on own charitable activities or
- (ii) disbursed to qualified donees

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## Funds Expended Directly on Own Charitable Activities

- Includes salaries of those performing the charitable work and disbursements for equipment used in charitable activity
- Can use “agents” so long as guidelines are followed
- Does not include amounts spent on management, general administration and fund raising

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## F. Frequently Asked Questions

- Can charity disburse funds to an entity that does not contribute a qualified donee once its DQ is met?
- What if DQ is exceeded in a particular year?
- What if DQ is not met in a particular year?
- Can a charity accumulate funds for large scale projects and still meet its DQ?

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## G. Restricted Gifts

### (a) Appeal to Donors

- Certainty that specific objectives will be advanced
- Control
- Involvement
- Attempt to achieve benefit of private foundation while saving legal/accounting costs, and obtain access to expertise and advice of professionals

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### (b) Is it a Gift?

- When will excessive control defeat a gift?
  - Naming rights
  - Donor appointing nominee to Board
  - Agreement between donor and charity that charity will use gift for certain objectives
  - Excessive control by donor over investments or distributions or other limitations on charity's right to deal with gift may lead to conclusion that there has been no gift

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## (c) Duty of Charity Holding Restricted Gifts

- Comply with restrictions
- Invest
- Protect and conserve charitable property
- Keep accounts
- Apply for cy-près if necessary

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## (d) Consequences for Failure to Comply

- Personal liability for breach of tax
- Liability to account for accrued interest
- Return of gift to donor
- Accountability to public (PGT in Ontario)
- Deregistration of charity

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## (e) Other Concerns with Restricted Gifts

- If restriction on:
  - objects of the gift
  - investment powers
  - ability to spend capital
- If no flexibility to vary the terms, required to get court approval for variation
- Court's jurisdiction invoked if charitable purposes impossible or impractical
- Summary procedure available in Ontario under *Charities Accounting Act* (s.13) in certain circumstances
  - consent of all beneficiaries required
- Cases: Barnes, Killam Estate

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## (f) Avoiding Restricted Charitable Gifts

- Restricted gifts - legal responsibility and exposure to liability
- Encourage gifting of unrestricted gifts
- Encourage donor advised funds
- Instruct fundraisers to understand and identify differences between unrestricted and donor restricted gifts
- Fundraising materials should include statement to explain gifts will be considered to be given to further general charitable purposes unless donor specifies otherwise

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## (g) Documenting Restricted Gifts

- Public fundraising appeals
  - Include clear statement that any surplus funds remaining could be used to further general charitable purpose of charity
- Specify name of trust/endowment
- Specify purpose of restricted gift in clear language to avoid failure of gift for lack of certainty
- Ensure object of gift is within charitable objectives of donee charity
- Review and approve donor restrictions
- Include cy-près clause if primary purpose becomes impossible or impracticable

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## Documenting Restricted Gifts

- Incorporate by reference administrative powers in bylaws
- Expressly permit commingling
- Specify if capital encroachments allowed after period of time
- If direction to accumulate income, consider
  - disbursements quota implications
  - Accumulations Act considerations
- If only income to be spent, consider cy-près clause to permit income to be redirected if insufficient for original purpose

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## Documenting Restricted Gifts

- Clarify who has decision making powers and scope of any restrictions
- If absolute gift with some precatory donor input, clarify nature and extent of input and who can give input
- To ensure proper wording for testamentary gifts, develop precedent language and make available to general public; if advisor to donor, check with charity for proper name, precedent material
- Take care to ensure that fund is properly managed and invested in accordance with terms of the gift

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