THE 2007 ANNUAL
CHURCH & CHARITY LAW™ SEMINAR

Toronto – November 7, 2007

Planned Giving and Gift Acceptance Policies

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
and Theresa L.M. Man, B.Sc., M.Mus., LL.B.

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INTRODUCTION

- It is important for charities to develop a gift acceptance policy to set out its policy in the acceptance and receipting of gifts in order to effectively establish a planned giving program
- Each policy should be customized to the needs and circumstances for each charity
- This presentation reviews:
  - The purposes of a gift acceptance policy
  - Key issues concerning a gift acceptance policy
  - Key topics to be included in a gift acceptance policy

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PURPOSES OF A GIFT ACCEPTANCE POLICY

- Provides the staff and/or volunteer of the charity with general guidelines and procedures when accepting and receipting various types of gifts
- Ensures the acceptance of gifts complies with the law in Canada, including case law and the requirements of the *Income Tax Act* (Canada)
- Identifies various means of charitable giving that the charity is willing to accept and the specific policy related to acceptance of such gifts

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KEY ISSUES CONCERNING A GIFT ACCEPTANCE POLICY

- **The policy must be in keeping 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, once developed, should be adopted by the board of the charity and carefully implemented**

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- **The policy needs to be reviewed and updated from time to time**
- **In situations where the application of the policy to a particular gift is not clear, the staff of the charity should review the application of the policy with legal and accounting advisors where necessary**
- **The policy only provides a general guideline, it is not comprehensive or exhaustive (because the law in relation to the acceptance and receipting of gifts changes from time to time, and the application of the policy to gifts may vary as a result of the particular circumstances surrounding each gift)**

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KEY TOPICS TO BE INCLUDED IN A GIFT ACCEPTANCE POLICY

1. Outlines the Duties of Directors' Duties, e.g.

- **To apply the assets of the charity to further its charitable purposes**
- **To comply with legal requirements involving receipting of gifts and fundraising**
- **To comply with the limitations, conditions, terms of reference, directions or other restrictions imposed by the donors**

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2. Outlines the Role of the Parallel Foundation If Applicable

- **e.g. Is the foundation to be the exclusive source of fundraising?**
- **If not, how is the foundation and the charity to co-ordinate their fundraising initiative?**
- **What is the protocol for inter-charity transfer of gifts?**
  - **Who is to receive what and ability to transfer**

3. Explains the Basic Law Relating To Receipting of Gifts, e.g.

- **General rules that applies to receipting**
- **Split-receipting rules**

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- ***De minimis* rule on receipting**
- **Intention to donate**
- **How to establish fair market value**
- **Deeming of fair market value**

4. Explains the Key Issues In Receipting

- **Exercise of due diligence when issuing receipts**
- **Preparation and contents of receipts**
- **Control of receipts**
- **Lost, spoiled or stolen receipts**
- **Facsimile signatures**
- **Date of issue and date of donation**
- **Computer generated receipts**
- **Name on receipts**

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5. Explains Restrictions That May Be Imposed On Gifts

- **Explains how restrictions may be imposed on gifts and their ramifications**
  - **It is possible for a donor to impose conditions and restrictions on a gift when the gift is made, but it is not open for the donor to impose additional restrictions or to remove the restrictions at a later time**
  - **The directors of the charity are required to comply with the limitations, conditions, terms of reference, directions or other restrictions imposed by donors**

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- The conditions or restrictions imposed on a gift should be set out in a gift agreement with the donor
- A gift that is subject to donor restrictions will be held by the charity as an externally restricted fund, and be managed by the charity in accordance with the requirements of common law and regulations under the *Charities Accounting Act* (Ontario)

- Explains the meaning and ramifications of the following:
  - 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

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- Long term funds - a donor may establish a fund with the capital to be held for a long period of time, rather than to be held in perpetuity
- Ten-year gifts – a term in the *Income Tax Act* whereby a donation is made by a donor subject to the donor's written trust or direction that the property given, or property substituted therefore, be held by a registered charity for 10 years or more
  - A long term fund, where a donor requires a fund to be held for ten years or more would be a ten-year gift

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  - A perpetual endowment fund is a type of ten-year gift

A ten-year gift 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

- Donor advised funds – after having made a gift, a donor may provide non-binding advice (but not control) on how the charity may apply and/or manage the gift

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6. Types of Gifts

- **Explains the charity's policy for accepting, processing, acknowledging, and receipting various types of gifts**
- **Cash and near cash**
  - **e.g. Cash, cheque, money order and credit card**
- **Bequests**
  - **Gifts from estates**
  - **Can be a specific amount of gift, a percentage of the residue, a gift contingent on a prior interest**

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  - **Explain how the charity may work with the estate in relation to the gifts**
- **Life insurance**
  - **A donor may irrevocably assign the ownership and beneficiary rights of a paid-up life insurance policy to the charity**
  - **Irrevocably assign the ownership and beneficiary rights of a life insurance policy to the charity on which premiums remain to be paid; or**
  - **Naming the charity as a beneficiary of a life insurance policy**

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  - **Explain the circumstances under which the charity issues receipts for gifts of life insurance**
    - **Assurance of future payment**
    - **Paid-up whole life**
- **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**
  - **Elimination of capital gains tax on donation of publicly-listed shares to charitable organizations and public foundations made after May 1, 2006; and to private foundations after March 18, 2007**
  - **Key issues include how shares may be received, valuated and receipted, e.g. will the shares be liquidated immediately after they have been received by the charity, or be held for a certain period of time for investment purposes?**

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- **Must comply with the *Charitable Gifts Act* (Ontario) – Charities may own less than 10% interest in a business. Charities must divest its interest in excess of 10% within seven years of having received ownership of the interest**
- **New excess business holding rules applies to the ownership of shares by private foundations**

- **Private securities and other business interests**
  - **Very complicated rules on when receipts may be issued, e.g. rule on non-qualifying securities and loan backs**

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- **Subject to the rules under the *Charitable Gifts Act* (Ontario)**
- **New excess business holding rules applies to the ownership of any shares by private foundations**

- **Gifts-in-kind**
  - **i.e. Gift of property other than cash, e.g. includes capital property, depreciable property, personal-use property, a leasehold interest, a residual interest, a right of any kind, a licence, a share, a chose in action, inventory of a business, and certified cultural property; but does not include a gift of services**

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- **Special consideration issues concerning the acceptance of gifts-in-kind include valuation, tax shelter rules, goods and marketable title issues, etc.**

- **Real estate**
  - **Gifts of real estate may be outright gifts, residual interest in a property (i.e. 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), or real property to fund a charitable remainder trust**

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- **Special consideration issues concerning the acceptance of gift of real estate include valuation and marketable title issues, etc.**
- **Must comply with *Charities Accounting Act* (Ontario)**
  - **A charity may only hold land that is used for the purpose of actual use or occupation of the land for the charitable purpose**
  - **The *Charities Accounting Act* prohibits a charity from owning lands for non-charitable purposes for longer than three years**

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- **Further, if land is no longer required for the charitable purposes and is no longer occupied as such, it must be disposed of within three 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 three year periods**

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- **Residual interests**
  - **Involves 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)**
- **Charitable remainder trusts**
  - **Generally involves a donor (settlor) transferring property (e.g. real estate, securities, or cash, etc.) to a trust for a trustee to manage the property**

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- **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**
- **The charity would receive the trust property when the trust is collapsed at the end of the interest of the life tenant. Such a gift may be made through a testamentary trust or an *inter vivo* trust**
- **A registered charity can issue a charitable donation receipt for the present value of the charity's remainder interest in the property**

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- **Charitable gift annuities**
  - **Generally, a charitable gift annuity is 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**
  - **The cost of the annuity is based on the donor's age and income requirements**

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- The remainder of the property not required to purchase the annuity is considered an outright gift to the charity
- The licensed issuer or the annuity pays the donor a guaranteed income for a specific time or for the remainder of the donor's life
- Upon death of the donor, the charity receives any remaining guaranteed income from the annuity, unless the donor has specified otherwise
- Charitable foundations may not be able to enter into arrangements to issue annuities, since an undertaking to make an annuity payment may be considered a debt, which is a ground for revocation under the *Income Tax Act*

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- Other gifts
  - Types of gifts that may be donated evolve with new ways of planned giving from time to time. Examples of these gifts include gifts of flow–through shares, time-share recreational property, airline premium points, etc.
  - It is not possible to anticipate every new type of gift and include every type of these gifts in a gift acceptance policy

7. Special Issues

- Gifts from other registered charities
  - Disbursement quota issues on inter-charity transfers
    - Ordinary gift
    - Specified gift
    - Gift of enduring property

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- Receipting issues regarding
  - Gifts from businesses and sponsorship fees
  - Donation of inventory by businesses
  - Gift certificates
  - Donation of services – no receipts
  - Fundraising events – e.g. fundraising dinners, charity auctions, lotteries, raffles, draws, concerts, shows and sporting events, golf tournaments
- The charity's policy concerning involvement in donation tax shelters
  - A charity must not become involved in donation tax shelters
  - A charity needs to be cautious before deciding to accept flow through shares

    (see presentation by Karen Cooper)

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- **Explain the basic rules concerning disbursement quota and enduring property**
  - **80% D.Q.**
  - **Exemption for enduring property from the 80% D.Q.**
  - **3.5% D.Q.**
- **Pass through gifts – A charity can not act as a conduit for funds to third parties to which Canadian donors could not directly make a gift eligible for tax relief. Therefore, a charity must not accept a gift a donor has directed the charity to give the funds to a specified person or family member**
- **Appraisals – what are the charity's policy on determining the value of donated gifts, e.g. who pays for the appraisal, when to obtain an appraisal, etc?**

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- **Compliance with the charity's investment policy and disbursement policy**
- **Compliance with Canada's anti-terrorism legislation**

8. Gift Agreement, Gift Acknowledgement, and Other Donor Related Issues

- **When to enter into gift agreement with donors, the provisions to be included in gift agreements, etc.**
- **When and how to acknowledge gifts received from donors, donor recognition (e.g. named gifts, donor wall, donor appreciation dinners, etc.), minimum donation required in order to establish a named endowment fund, etc.**

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- **Communication with donors, e.g. no persuasion or pressure, confidentiality, no advice to donors, no conflict of interest, etc.**

9. Declining and Returning a Gift

- **Explain the circumstances under which a gift may be declined, e.g.**
  - **There may be features to or restrictions of the gift that are contrary with the objectives, values, and goals of the charity and therefore may require that the gift be declined**
  - **e.g. The gift or terms of a gift is illegal, discriminatory or violates any federal, provincial or municipal laws or regulations**
  - **e.g. The charity is unable to honour the terms or restrictions of the gift**

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- e.g. The gift could expose the charity to liability or embarrassment
- e.g. 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

- Once a gift has been received by a charity and a charitable donation receipt issued, the property becomes a charitable assets and cannot be returned to the donor without a court order
- However, income tax considerations for the donor would need to be addressed

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