
**CANADIAN COUNCIL OF CHRISTIAN CHARITIES
2010 CONFERENCE**

Winnipeg – September 29, 2010

**Special Considerations in Gift Planning for
Christian Charities**

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OVERVIEW OF TOPICS

- Preliminary Comments
- Special Considerations Involving “Advancement of Religion”
- Special Statutory Treatment Afforded to Religious Charities
- Transferring Funds Outside of Canada by Religious Charities
- Donor Restricted Charitable Gifts to Religious Charities
- Inter-charity Transfers Involving Religious Charities

A. PRELIMINARY COMMENTS

- Religious charities make up in excess of 40% of all registered charities in Canada
- Generally, the rules that apply to religious charities are the same as those that apply to all charities, unlike in the United States where, generally, churches are automatically considered tax exempt and are not required to apply for and obtain tax exempt status from the IRS
- In Canada, all charities - including religious charities - are subject to the relevant provisions of the *Income Tax Act* (“ITA”)

- However, some of the ITA’s provisions in particular merit special consideration by gift planners, as they can have a unique application to gifts to religious charities
- In addition, there are unique provisions under various provincial and federal statutes which have specific application to religious charities
- As well, there are unique considerations in the way in which religious charities operate that gift planners need to be familiar with in planning gifts to religious charities
- As such, it is important for gift planners and executives who work with religious charities to be aware of the special considerations that arise when making gifts to religious charities

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- B. SPECIAL CONSIDERATIONS INVOLVING “ADVANCEMENT OF RELIGION”**
- 1. Preliminary Comments**
- It is important for gift planners to understand the requirements imposed on organizations seeking or maintaining charitable status under the “advancement of religion” head of charity
 - Gift planners providing advice to donors need to understand which religious purposes will be charitable under the *ITA*
 - As well, donors may want to restrict the use of their gift for a particular religious purpose, or establish their own charitable foundation for a particular religious purpose

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- In order to qualify and maintain status as a registered charity under the ITA, an organization must be able to fit its objects and activities within one or more of the four “heads of charity” recognized by the courts and the Canada Revenue Agency (CRA):
 - Relief of poverty
 - Advancement of education
 - Advancement of religion
 - Other purposes beneficial to the community
- In order to fit under the third head of advancement of religion, it is necessary to show that the organization is both (1) practicing a “religion” and (2) that is involved in “advancing” that religion

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- CRA is expected to produce a draft Policy Guidance on “Advancement of Religion” but the release date is not yet known
- In the meantime, there is a text available dated March 27, 2009, and the companion Power Point presented by the then Director General of the CRA Charities Directorate during a presentation at “Modernizing Charity Law” at Queensland University of Technology, in Brisbane, Australia on April 17, 2009
- The slides that follow reflect those materials together with updates of recent dealings with CRA

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2. Definition of Religion

- Intention of donors or founders of the religion is irrelevant
- It is rather a legal than a theological definition
- CRA, though, does not assess the truth or value of a particular religion
- No precise legal definition, only a general description of characteristics or attributes as set out in the following sections

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3. Attributes of Religion

- The courts have identified three key attributes of religion:
 - Faith in a “higher unseen power” such as God, a Supreme Being or Entity;
 - Worship/ reverence; and
 - A particular and comprehensive system of doctrines and observances

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4. A Particular and Comprehensive System of Faith

- Religion in the charitable sense requires some form of structure, community and public identity (note that the IRS in the U.S. has recently disallowed an internet church)
- Established doctrine, practices and observances are required
- Should include some of the following components: creed, statement of faith, teachings, pastoral programs, forms of worship or ritual, regular services, a form of leadership

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5. Advancement of Religion

- Not everything done in the name of religion necessarily advances religion within the meaning of charity law
- A religion must be advanced in order for it to be charitable
- Advancement of religion involves promoting and manifesting spiritual teachings, doctrines, observances, and practices
- CRA seems to be taking the position that advancement of religion means actively promoting the religion rather than just living one's faith day to day

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6. Advancement Can Be Done In a Wide Variety of Ways

- Case law has decided that religion may be advanced in a "wide variety of ways"
- The common law states that advancement means both the sustaining the faith of adherents and/or seeking new followers
- Advancement relates to both internal and external works, to faith and worship and practical expressions of the religion's doctrines

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7. Advancement Through Separate Organizations

- A religious organization need not advance all aspects of the teachings of the religion
- Separate organizations may exist to focus on
 - Certain demographics (e.g. youth, seniors, women/men); or
 - On a particular pastoral program (e.g. scripture study, visiting the sick); or
- Separate organizations may be necessary because of liability concerns (e.g. food bank, student residences)

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- However, the organization will need to make the connection between the activities and the religion by demonstrating how it is a means of advancing the religion
 - i.e. part of a program to promote and manifest doctrine, observances and practices
- The organization will therefore also have to provide evidence of faith and practice

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8. Indicia of Faith and Practice

- Elements of worship built into the activities
- Published statement of faith
- Public mission statements that express beliefs
- Identification with a religion
- Faith based resources
- Involvement by people of faith in governance and operations

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- **Links to other religious organizations**
- **Provision in governing documents for assets to go to another organization on dissolution**
- **It is not expected that the worship be as elaborate as what might be done in a weekly service at a house of worship or that promotion of doctrine be as direct as it might be in a weekly worship service**

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9. Promoting One or Two Tenets of a Religion

- **Case law supports that it is also possible for an organization to focus on one or two tenets or precepts of religious belief but not all**
- **The more narrow the focus in relation to the wider teachings the greater the expectation for a clear connection between its activities and the stated religious purpose**

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10. Pastoral/Religious Work v. Social Work/Secular Work - Is There a Difference?

- **While there are no inherently religious or secular activities, it can be said that some activities are more explicitly or obviously religious or secular than others**
- **SCC in Vancouver Society decision has stated that the focus must be on the purpose, not the activity**
- **Many religious organizations advance their religion through programs that are similar to those performed by non religious or secular groups (e.g. humanitarian work, health care)**

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- Where such activities are undertaken in a way that advances religion, what might otherwise appear to be secular activities may be done to advance a religious purpose
- If the organization wishes to be registered or maintain status under the category of advancing religion, there must be a clear connection between its activities and the stated religious purpose
- The means chosen to advance the religion need not be a precise obligation of the religion but must have a reasonable connection with the religion in the sense that they can be seen as a practical expression of the religion

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11. Unstated Non-charitable Collateral Purpose

- A registered charity must be constituted exclusively for charitable purposes
- CRA states that the nature of its activities may indicate whether the charity has other unstated or collateral purposes
- This is particularly the case where the organization may be preoccupied with a single activity or ancillary activities to the extent that these have become an end in themselves
- When CRA will consider such activities to be a collateral purpose is not clear and therefore might involve the charity having to track the number of hours of religious activities

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12. Related Social Activities

- The courts have held that regular community building social activities associated with religious organizations, are allowable, provided that they are ancillary and incidental to the main purpose of advancing religion
 - e.g. A coffee hour after a service
 - e.g. A meal, a dance or a festival
- Query when such social activities might become a collateral purpose

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C. SPECIAL STATUTORY TREATMENT AFFORDED TO RELIGIOUS CHARITIES

- Donors who want to contribute to or establish a religious charity need to be aware of various special legislative provisions which may have specific implications for charities with purposes that fall under the head of “advancement of religion”
- The following are some of the special statutory treatment afforded to religious charities in Canada

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1. Income Tax Act

a) Same Sex Marriage

- Many groups expressed concern that earlier versions of the *Civil Marriage Act* did not provide sufficient protection for, among other things, the charitable status of religious organizations if they expressed opposition to the legal recognition of same-sex marriage, arguably because to do so would be against the accepted public policy of the government of Canada
- In response, certain amendments were made, including what is now s. 149.1(6.21) of the *ITA*

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- “...a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*” – s. 149.1(6.21)
- Important for gift planners to advise potential donors that this protection only applies to charities that fall under the advancement of religion head of charity

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- As a result of this section, it is unlikely that a religious charity will be at risk of losing its charitable status for teaching its beliefs regarding its understanding of marriage and same-sex marriage
- However, religious groups with charitable status must be careful that the way in which they address the same-sex marriage issue is not interpreted as being partisan, as this could give the CRA grounds for revoking their charitable status for having engaged in prohibited political activities
- For more information see Church Law Bulletin No. 12: *Implications of Recent Amendments to Civil Marriage Act for Religious Groups and Officials*, online at <http://www.carters.ca/pub/bulletin/church/2005/chchlb12.htm>

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b) Special Tax Treatment

- Gift planners should be aware of various special tax treatment available to religious charities:
 - **Clergy Housing:** A person who is employed, or has an office, as a member of the clergy or a religious order or as a regular minister of a religious denomination may be entitled to claim a clergy residence deduction in respect of his or her residence, when calculating the income from that employment or office – see s. 8(1)(c)
 - For more information see Tax IT-141R, *Clergy Residence Deduction* available online at <http://www.cra-arc.gc.ca/E/pub/tp/it141r-consolid/README.html>
 - May need to review bylaw provisions in order for clergy housing to be available

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- **Vows of Poverty:** Where, during a taxation year, an individual is a member of a religious order and has taken a vow of perpetual poverty, the individual may deduct in computing taxable income an amount equal to the total of their superannuation or pension benefits and earned income for the year, if that amount is paid in the year to the order – see s. 110(2)
 - For more information see Income Tax Interpretation Bulletin IT-86R, *Vow of Perpetual Poverty* available online at <http://www.cra-arc.gc.ca/E/pub/tp/it86r/it86r-e.html>

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c) Exemption from Financial Information under T3010

- S. 220(2.1) of the *ITA* grants the Minister discretion in waiving the filing of a prescribed form under reasonable circumstances
- CRA exercises this discretion to exempt certain religious orders from completing the publicly accessible portion of the *Registered Charity Information Return* (form T3010), including questions about the charity's financial information, compensation of employees, and gifts to qualified donees
- To qualify for the exemption, a religious order must have:

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- Existed on December 31, 1977,
- Never issued any receipts for tax purposes, and
- Have never, directly or indirectly, received a gift from another registered charity which has issued official donation receipts since December 31, 1977
- New religious charities may qualify for this exemption "as long as they are logical outgrowths of formerly exempted organizations"
- For more information, see *CRA Policy Commentary CPC-016* at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcv/cpc/cpc-016-eng.html>

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d) Contributions to Religious Schools

- Generally tuition fees paid to an educational institution are not considered to be a charitable donation and official donation receipts may not be issued (even though the institution may be a registered charity)
- Two exceptions exist where a portion or all of an amount paid to a school, other than a post-secondary institution or a designated educational institution, may be considered as a charitable donation:
 - Schools which teach exclusively religion
 - Schools which operate in a dual capacity providing both secular (academic) and religious education

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- If a school teaches exclusively religion and operates solely for the advancement of religion, payments for students that attend are not considered tuition fees but valid donations
- A school that provides both secular and religious education may, under certain circumstances, issue receipts for charitable donations for a portion of the amount paid to attend the school that can be allocated to religious education based upon the cost of operations
- For more information, see CRA Information Circular IC75-23 at <http://www.cra-arc.gc.ca/E/pub/tp/ic75-23/README.html>

2. Anti-Terrorism Legislation

- The definition of what may constitute a “terrorist activity” under s. 83.01(1) of the *Criminal Code of Canada*, as revised by the *Anti-Terrorism Act*, includes an act or omission committed “in whole or in part for a political, religious or ideological purpose, objective or cause” that leads to injury, substantial property damage or a serious disruption of essential services
- Obviously, a political, religious, or ideological motivation should not be a defence to engaging in terrorist activities
- However, incorporating such considerations as an integral part of the definition of the offence itself is both significant and concerning

- When applied to “political, religious or ideological purposes or causes,” the definition of “terrorist activity” could potentially deter dissident views that in and of themselves have been and should continue to be tolerated in a free and democratic society
- Under this legislation, charities with political, religious and ideological purposes may now become inherently suspect because they in part could meet the definition of “terrorist activity.”
- As a result, religious charities may be scrutinized more than other charities, possibly resulting in discrimination against charities that have religious purposes

- **Anti-terrorism Legislation impacts charities from three technical perspectives:**
 - “*Super Criminal Code*” terrorist offences under the *Anti-terrorism Act*
 - New certificate process for the deregistration of charities under the *Charities Registration (Security Information) Act* (“CRSIA”)
 - Money laundering legislation extended to include terrorist financing under *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”)
- For more information, see www.antiterrorismlaw.ca for article entitled “*The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for Balance*”

- **Gift planners should have a basic working knowledge of the anti-terrorism legislation in advising donors on making a gift to charities working in an international context, and should enquire whether the recipient charity has implemented a due diligence response by:**
 - Establishing a due diligence anti-terrorism policy to comply with the law
 - Conducting due diligence review of directors, officers, and key individuals
 - Monitoring how monies are being raised and disbursed
 - Reviewing and monitoring international relationships with third parties

3. Religious Organizations’ Land Act (Ontario) - ROLA

- In Ontario, an unincorporated religious organization, unlike other unincorporated organizations, can own real property through its trustees, notwithstanding that individual trustees may change (s. 2 of ROLA)
- Amendments to ROLA in December 2009 removed the 40 year limitation on leasing land
- As well, the *Charities Accounting Act* was also amended in December 2009 to remove the restriction on charities holding surplus land for longer than three years

4. Provincial Legislation for Religious Societies

- Provincial legislation in Alberta, B.C., Manitoba, and Saskatchewan permits a religious society, as defined, to appoint trustees to acquire and hold land in trust for the society (similar to *ROLA*)
- Acreage limitations are applicable:
 - In Manitoba, trustees can hold no more than 300 acres for the site of a church, etc., and 20 acres for the site of a cemetery
 - *Religious Societies' Lands Act* (Manitoba), s. 3(1)
 - In Alberta, societies/congregations can hold no more than 320 acres under the *Religious Societies' Land Act* – s. 3(4)

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- In Alberta, a religious denomination or congregation may be incorporated for the purpose of dealing with real or personal property by passing a declaration of incorporation in the prescribed form by a majority of its members (*Religious Societies' Land Act*, s. 12)
- In Alberta, an incorporated congregation under the *Religious Societies' Land Act* may acquire real and personal property by:
 - Purchase or gift, or
 - By devise or bequest made at least six months before the death of the testator

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5. Assessment Act (Ontario)

- All real property in Ontario is subject to real property tax, subject to certain exemptions, as is the case in most other provinces
- Those exemptions include:
 - Land that is owned by a church or religious organization or leased to it by another church or religious organization (and is used for certain purposes) – s. 3(1)(3)
 - Land owned, used and occupied solely by a religious or educational seminary of learning – s. 3(1)5
 - Land owned by a religious organization and occupied and used solely for recreational purposes if named in the Act's Regulations or a municipal by-law – s. 4

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6. *Local Health System Integration Act, 2006* (Ontario)

- The management of local health services in Ontario have devolved to a series of 14 local health integration networks (“LHINs”)
- LHINs and the Minister of Health and Long-Term Care are empowered to exercise prescribed authority over entities, including some charities, that come within the definition of “Health Service Provider”

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- A LHIN can make a decision requiring one or more Health Service Providers to which it provides funding to, among other things, transfer property to or to receive property from another person or entity – s. 26(1)
- A LHIN cannot unjustifiably, as determined under section 1 of the *Charter*, require a Health Service Provider that is a “religious organization” to provide a service that is contrary to the religion related to the organization – s. 26(2)
- Gift planners should also consider ways to enforce donor intent to a health service provider, i.e. narrowly structure a gift in such a way that any future transfer order will render the gift defeated

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- An example of such a restricted gift in a religious context might be a gift to a Catholic Hospital with a restriction that the funds in question must only be used within a Catholic Health Service Provider and in a manner that is not contrary to the teachings of the Catholic Church
- Donors should also consider giving to a parallel foundation or community foundation instead of directly to a Health Service Provider, since otherwise the gift may be subject to a future “integration decision”

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7. *Canada Not-for-Profit Corporations Act (CNCA)*

a) **Membership rights**

- CNCA provides for an increase in membership rights, such as rights to submit proposals to amend bylaws and rights to access corporate records
- Also, there are increased member’s remedies, such as the right to seek an oppression remedy against the corporation, or right to seek order for derivative action, or court order winding-up and dissolution

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- Special exemption for “religious corporation” where act or conduct is based on a tenet of faith held by members of the corporation and it was reasonable to base the decision on a tenet of faith having regards to the activities of the corporation
 - However, no definition of what a “religious corporation” is
 - Therefore, determination of a “religious corporation” will likely be left to the courts
- b) **Non-voting member rights**
- All classes of members, including non-voting members, are entitled to vote separately as a class on certain amendments to articles and by-laws, amalgamation, continuance and substantial sales

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- These new rights could result in non-voting members having a potential veto right over fundamental changes being adopted by the religious corporation
- As such, religious corporation may want to consider eliminating non-voting members by utilizing alternate wording for the current non-voting members, such as “congregants” or “supporters”

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8. Special Legislation for Denominations

- Parliament and provincial legislatures have passed numerous private acts dealing with specific denominations and congregations
 - i.e. *The Anglican Church of Canada Act, 1979*
 - i.e. *The United Church of Canada Act (1925)*
- Gift planners should investigate whether such special legislation exists when advising donors on making gifts to any particular church or denomination

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- Where there is a conflict between private legislation and public legislation of general application, the private legislation will take precedent
 - *In Re Incorporated Synod of the Diocese of Toronto*, the Diocese was allowed to lease land for ninety-nine years because its own act contained no provision for restrictions on its powers to lease real property
- Gift planners should also consult applicable special legislation to ensure the donor is transferring the gift to the proper named corporate entity

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D. TRANSFERRING FUNDS OUTSIDE OF CANADA BY RELIGIOUS CHARITIES

1. Preliminary Comments

- Donors may wish to contribute to international charitable projects, such as missionary work
- Gift planners therefore need to be aware of the rules that govern the transfer of funds for international charitable operations
- A Canadian religious charity can carry on its activities outside of Canada without jeopardizing its registered status, provided it meets certain requirements

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2. Carrying Out Charitable Purposes

The ITA permits a registered charity to carry out its charitable purposes, both inside and outside of Canada, in one of only two ways:

a) Gifts to Qualified Donees

- A registered charity can make gifts to other organizations that are on the list of qualified donees as set out in the ITA
- Qualified donees include, but are not limited to, other Canadian registered charities, certain universities outside Canada, the United Nations and its agencies, and a foreign charity that the Canadian Government has made a gift to in the preceding 12 months

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b) Carrying on Its Own Charitable Activities

- The carrying on of its own charitable activities requires a charity to be actively involved in programs and projects that are intended to achieve its charitable purposes
- This can be done by the charity directly funding its own employees and/or volunteers in carrying out its programs
- It is not permissible for a registered charity to carry out its charitable purposes by merely giving monies, grants or other resources to an organization that is not a qualified donee, regardless of whether the donee is inside or outside Canada

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- However, where a registered charity does not have its own employees or volunteers to carry out a project, it can work with another organization as an intermediary regardless of whether that organization is a Canadian registered charity
- In order to comply with the ITA, the registered charity must use structured arrangements which allow it to retain direction and control over the program, as well as the resources that it contributes to the program

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3. Carrying on Charitable Activities Through Intermediaries

- There are two ways that a registered charity can work with other organizations as intermediaries in order to achieve its charitable purposes:
 - Working through intermediaries by means of an agency or contractual relationship
 - Working jointly with intermediaries by means of a joint venture or co-operative participant arrangement
- These arrangements will require the registered charity and other organization to enter into a formal agreement to evidence control

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4. Potential Problems for Religious Charities Involved with Funding Foreign Activities

- Issues of flow-through liability from agency relationship and resulting concerns about insurance coverage
- Issues of compliance with local law
- Need to disclose name of intermediaries on public portion of T3010B
- Issues of safety concerns for intermediaries arising from public disclosure requirements
- The \$1,000 exemption from requirement for an agreement is helpful but too low

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- The *de minimis* threshold (lesser of \$5,000 or 5%) for tithes and membership fees if too low
- The need for the intermediaries to produce receipts or vouchers (preferably originals) is often impossible or impractical
- For more information see CRA Guidance *Canadian Registered Charities Carrying Out Activities Outside Canada* available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plev/cgd/tsd-cnd-eng.html>

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E. DONOR RESTRICTED CHARITABLE GIFTS TO RELIGIOUS CHARITIES

1. Preliminary Comments

- Donors often wish to restrict their gifts to a specific religious purpose within a religious organization
- Gift planners need to be aware of general legal principals surrounding donor restricted gifts to religious charities in order to ensure that a donor’s intent to benefit a specific religious purpose can be fulfilled and preserved

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- What is an unrestricted charitable gift?
 - It is a gift at law to be applied towards the general charitable purposes of a charity that is not subject to any restriction by the donor
- What is a donor restricted charitable gift?
 - It is a gift at law that is subject to restrictions imposed by the donor that constrain how a charity can use the gift
 - It is very important for a gift planner to understand the nature of the restriction that has been imposed and the need to comply with those restrictions
 - There are different forms of legal restrictions with corresponding distinct legal consequences

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2. Examples of Donor Restricted Charitable Gifts

- Time Restricted Gifts
 - Recent 2010 Budget removed 10 year gift requirement
 - Now have flexibility in deciding time restrictions between short, long term or in perpetuity
- Restricted Use Gifts
 - The total capital and earned income to be expended either immediately or over a period of time
 - But will be applied in accordance with certain specific charitable purpose trust restrictions, such as a building program for a church

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- **Restricted Charitable Trust Property**
 - Real estate that is acquired subject to certain terms of trust contained in the deed of the property that will act as a type of an endowment
 - Three general categories of real estate restrictions:
 - Pertaining to religious use
 - Pertaining to religious doctrine
 - Limiting the use of the property to those who follow a particular religious practice

- **Implied Restricted Charitable Purpose Trust**
 - Courts are prepared to consider extrinsic evidence concerning whether the donor intended to create a restricted charitable purpose trust
 - e.g. Where a gift to a religious denomination was presumed to create an endowment but the terms of the gift do not reflect the intent of a trust, the denomination would need to look at what the donor may have said extrinsically in letters and e-mails to it and in discussions with the charity
 - It is therefore very important to encourage donors to carefully craft restricted gifts to religious charities

- **Precatory Trusts/Designated Gifts and Donor-Advised Funds**
 - Precatory trust is a non-binding request of the donor and is sometimes called a designated gift, missing support
 - They do not have any enforceable restrictions associated with them
 - There is only a moral obligation on the religious charity receiving such a gift
 - A donor advised fund is a form of designated giving whereby the donor makes a gift to a charity and then periodically makes nonbinding recommendations as to the distribution of assets from the fund

3. Examples of Unacceptable Donor Restrictions

- Certain types of donor restrictions are unacceptable and will invalidate the gift
 - Restrictions contrary to public policy
 - Restrictions that are illegal or immoral
 - Restrictions that are impossible to fulfill
- As well, if a donor retains too much control over the gift, it will no longer be considered a gift at law, and cannot be receipted under the ITA
- For more information, see the article entitled “Donor Restricted Charitable Gifts Revisited: A Practical Overview II” at <http://www.carters.ca/pub/article/charity/2006/tsc0421.pdf>

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Restrictions contrary to public policy

- Restrictions that are contrary to public policy cannot be enforced
- Example (*Canada Trustco*): Foundation provided scholarships that were restricted to “persons who were white Protestants of British nationality or parentage”
 - Ontario Court of Appeal found that it violated public policy because it was “premised on notions of racism and religious superiority”
 - Court limited the application of its decision: “public policy should be invoked only in clear cases... and does not depend on the idiosyncratic inferences of a few judicial minds”

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- Restrictions on gifts cannot be discriminatory, but it is unclear which religious restrictions are and are not acceptable
- Contrast *Canada TrustCo* with *University of Victoria Foundation* decision where the B.C. court upheld a scholarship restricted to Roman Catholic students: “it is not offensive in and of itself for an individual to establish a charitable trust to benefit adherents of one’s faith”
- Donors need to consider whether any restrictions or conditions attached to a proposed gift have the potential of running afoul of the sources of public policy, such as the *Charter* and provincial human rights legislation
- *Christian Horizon* decision (Ontario) shows difficulties with Christian codes of conduct

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Restrictions that are illegal or immoral

- **Illegal restrictions, such as supporting terrorism, will not be enforceable**
- **Query whether “illegal” includes not only acts that are illegal in Canada but illegal in other jurisdictions, in which the charity operates**
 - **This could have a serious impact on religious charities carrying on missionary work in countries where proselytizing is illegal**

Restrictions that are impossible to fulfill

- **e.g. A requirement that a charity use the gifted funds to build a church and but there are insufficient funds to do so**
- **Need to provide authority for the charity to vary the restrictions otherwise will need to obtain *cypres* court order**

F. INTER-CHARITY TRANSFERS INVOLVING RELIGIOUS CHARITIES

- **Gift planners should be aware of the tax and other legal implications involved in the transfer of assets between religious charities**
- **For example, a donor may wish to make a gift to a local church and direct that a portion of the gift be transferred by the local church to the denomination**
- **The following are some considerations in this regard**

1. Tax Considerations

a) Highlights of 2010 Budget DQ Reform

- **2010 Budget released March 4, 2010**
- **Draft legislation released on August 27, 2010**
- **Provides for significant reform of the DQ regime as set out below**
- **Repeal of 80% DQ**
- **Repeal of 80% DQ related concepts**
 - **Enduring property (including ten-year gifts)**
 - **Capital gains pool**
 - **Specified gifts**

- **Increased threshold for 3.5% DQ to \$100,000 for charitable organizations (but remains at \$25,000 for foundations)**
- **However, expanded anti-avoidance provisions stated to achieve the following**
 - **Extend existing anti-avoidance rules to situations where it can reasonably be considered that purpose of a “transaction” was to unduly delay or avoid application of DQ**
 - **To ensure amounts transferred between non-arm’s length charities will be used to satisfy the DQ of only one charity**

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- **Specific of anti-avoidance provisions**
 - **A charity enters into a transaction (not defined) and it may reasonably be considered that a purpose of the transaction is to avoid or unduly delay expenditures on charitable activities**
 - **“Transaction” includes gifts to other charities**
 - **May be grounds for revocation**
 - **110% penalty of expenditure delayed or avoided can be imposed**
 - **Where gift to another charity - both charities are jointly and severally, or solitarily, liable for the penalty**

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- **100% of the fair market value of property received from non-arm’s length charity will need to be expended by end of the next taxation year (in addition to its 3.5% DQ)**
 - **Unless the transferor charity elects that gift will not count toward satisfying its own 3.5% DQ (“designated gift”)**
 - **Otherwise may be grounds for revocation**
 - **As well, 110% penalty of fmv of the property that exceeds the amount expended can be imposed**

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- b) Implication of DQ Reform on Inter-Charity Transfers**
- May need to use “designated gift” option with transfers between non-arm’s length charities in order to avoid immediate 100% disbursement quota requirement for transferee charity
 - Need to be satisfied that the transfer will not constitute a “transaction” where “a purpose” of the transaction may be to “avoid or unduly delay expenditures” on charitable activities
 - Notwithstanding the repeal of the 10 year gift provision along with the 80% DQ, if a gift being transferred is a 10 year gift, the transferee charity will still need to comply with the 10 year gift restriction as a matter of trust law

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2. The Corporate Authority of the Transferor/Transferee

- It is important to ensure that the transferor charity has the required corporate authority to transfer charitable assets
- Need to refer to both letters patent, by-law, and authorizing resolution of the directors, and in some situations may even a resolution of the corporate members depending upon the terms of the by-law
- Similarly, the transferee charity would need to ensure that it has the requisite corporate authority to receive the transfer of assets and then apply those assets toward its intended purpose

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3. Need to Document the Transfer of Assets Through a Deed of Gift

- Deed of Gift evidences transfer of title of the charitable assets (i.e. from one religious charity to another, such as a local church to a denomination)
- Deed of Gift will identify whether the transfer is to the transferee charity as a subsequent trustee of donor restricted gifts
- The Deed of Gift should identify what investment powers will apply to the funds being transferred
- The Deed of Gift should identify whether the gift consists of donor restricted gifts, and if so, that it will ensure compliance with any restrictions by the transferee charity

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- The Deed of Gift can identify whether unrestricted funds are to become restricted for a particular purpose in the transfer to the transferee charity
- The Deed of Gift should include a *cy près* clause for variations for newly created restricted gifts
- The Deed of Gift should provide for compliance with applicable anti-terrorism legislation by the transferee charity
- The Deed of Gift should address issues of anti-avoidance issues as part of inter-charity transfers

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- The Deed of Gift can authorize a later transfer of the gifts to a subsequent transferee
4. Commingling of Restricted Gifts
- Commingling of restricted gifts must be done in Ontario in accordance with requirements of the Regulations under the *Charities Accounting Act* (Ontario) and avoiding commingling with general charitable funds
 - Deed of Gift should therefore ensure compliance with rules regarding the commingling of restricted gifts

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