



# Testamentary Charitable Gifts: Tales, Traps, and Tips

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# Outline

## **1. Fiscal Framework of Testamentary Charitable Gifts:**

- Overview of tax treatment
- Who qualifies as a charitable donee?
- The main tax incentives

## **2. Testamentary Charitable Gifts are not Bullet-Proof – Mitigating the Risk:**

- Common Court Challenges Impacting the Gift:
  - Non-compliance with formalities
  - Mistakes and Misdescriptions
  - Changes in Charity's status or name
  - Dependent's Relief and other applications for Variation
- Tips on Mitigating the Risk



# **Fiscal Framework of Testamentary Charitable Gifts**

Jonathan M. Charron, LL.M. Tax, TEP

# ▼ Overview of Tax Treatment of Charitable Gifts by Will

- Starting point: “Death Tax”
  - A Canadian taxpayer is generally deemed to have disposed of all its assets at fair market value (“**FMV**”) immediately before death – triggering the crystallization and realization of all accrued gains

# Overview of Tax Treatment (Cont.)

- Capital gains tax rate depends on Province of residence prior to death:

2021 Combined Top Marginal Tax Rates by Province/Territory		
Province/Territory	Top Marginal Tax Rate	Capital gains rate (50%)
Nova Scotia	54.00%	27.00%
Ontario	53.53%	26.765%
British Columbia	53.50%	26.75%
Quebec	53.31%	26.655%
New Brunswick	53.30%	26.65%
Prince Edward Island	51.37%	25.685%
Newfoundland & Labrador	51.30%	25.65%
Manitoba	50.40%	25.20%
Alberta	48.00%	24.00%
Yukon	48.00%	24.00%
Saskatchewan	47.50%	23.75%
Northwest Territories	47.05%	23.525%
Nunavut	44.50%	22.25%

# ▼ Basic Notions with Respect to Charitable Gifting

- Notion of gift for tax purposes – eligible amount (split-receipt and value of advantage)
- Types of gifts:
  1. Cash
  2. Gift in-kind (for e.g. donation of work of art or private/public company shares)
  3. Residual interest in real property
  4. Equitable interest in a testamentary trust (charitable remainder trust)

# ▼ Basic Notions with Respect to Charitable Gifting

- Gifts to “qualified donees” – 149.1(1) ITA:
  - Registered charity
  - Federal or provincial government
  - Municipality in Canada
  - Registered Canadian amateur athletic association
  - United Nations
  - Prescribed university outside Canada
  - Charitable organization outside Canada to which Federal Government has made a gift (see CRA website)
  - Gift to U.S. organizations by Canadian resident commuters to U.S. – 118.1(9) ITA
  - U.S. tax-exempt organizations if Canadian taxpayer has U.S. source income (except for linked U.S. college or University) – Article XXI(7) Canada-U.S. Tax Convention



# ▼ Basic Notions with Respect to Charitable Gifting

- Charitable giving alternatives:
  - Direct gift to a charity
  - Gift to a public foundation (other than DAF)
  - Gift to a donor-advised fund
  - Gift to a private foundation
  - Gift to a charitable remainder trust
- Receipts and specified certificates

# ▼ Main Tax Incentives for Charitable Gifting on Death

- **Tax incentives** for charitable gifts on death:
  1. **Capital gains equal to nil:** no capital gains on deemed disposition resulting from death for donation of certain property to “qualified donees” (not all “qualified donees” – depends on type of property)
  2. **Donation tax credit** for charitable gifts made to “qualified donees” or other prescribed institutions or public authority
- Federal Budget 2014 (enacted into law on December of 2014) substantially changed tax rules applicable to gifts for deaths after 2015 to provide more certainty on tax treatment and flexibility as to who can claim the tax credit

# ▼ Main Tax Incentives for Charitable Gifting on Death

## 1. No capital gains realized on death

- No capital gains realized for deceased taxpayer on certain property donated by will, by estate or by direct designation (if made by a “graduated rate estate” (“**GRE**”) within 60 month of death – modified meaning of GRE):
  - a) Gift of publicly listed securities to a qualified donee
  - b) Gift of ecologically sensitive land to a government, municipality or registered charity (other than a private foundation)
  - c) Gift of certified cultural property to a Canadian institution or public authority

# ▼ Main Tax Incentives for Charitable Gifting on Death

## 2. Donation Tax Credit

- Amount of credit available:
  - Max. 33% of value of gift at the Federal level + “special” Provincial tax rate applicable depending on residence of deceased (some Provinces are using higher or lower rates than usual top marginal tax rate applicable to individuals)
- Annual income limitation (generally)
  - i. 100% of the deceased taxpayer’s net income in the year of death or prior year
  - ii. 75% of estate’s net income if claimed by estate

	2021 Highest Tax Credit Rate
<b>Federal</b>	33.00%
<b>Alberta</b>	21.00%
<b>British Columbia</b>	20.50%
<b>Ontario</b>	11.16%
<b>Quebec</b>	25.75%

# ▼ Main Tax Incentives for Charitable Gifting on Death

- Who is making the gift for tax purposes?
  - Rules applicable to deaths after 2015 (pre-2016 debate as to whether it was a gift by will or by the estate no longer relevant):
  - The following gifts are **deemed** to be made by the estate (and not by any other taxpayer):
    1. Gifts made by an individual through his or her will
    2. Gifts made by an individual's estate (GRE or not but GRE estates get more flexibility)
    3. A direct designation gift (for e.g. proceeds of life insurance, RRSP, RRIF or TFSA transferred to a charity as direct beneficiary)

# ▼ Main Tax Incentives for Charitable Gifting on Death

- When does the gift actually happen for tax purposes?
  - Gift deemed to be made at the **time of transfer** to the donee (not at the time of death) = value of gift at time of actual transfer is taken into account
  - **Exception:** Holding period in certain cases for “non-qualifying securities” – generally non-arm’s length private corporation securities
- Value of gifted property may have changed between time of death and actual transfer to donee – as such:
  - Increase in value = full value qualify as donation
  - Decrease in value = gift value is lower and estate may realize a loss - can be carried back to deceased’s terminal return if gift is made in the first year of estate.

# ▼ Main Tax Incentives for Charitable Gifting on Death

- Who can claim the donation tax credit? Deceased or estate?
- Flexibility – tax credit claim can be allocated among the following tax returns in order to maximize the benefit of the gift:
  - i. Claimed by the **estate**:
    - In year of actual gift;
    - In any year prior to the year in which the gift is made (if estate is a GRE for the year in which the credit is claimed); or
    - Carried forward by the estate for up to 5 years (10 years for ecological gifts)
  - ii. If a graduated rate estate (GRE) (modified meaning of GRE, i.e. gift made within 60 month of death) – tax credit may also be claimed by **deceased's individual**:
    - In his or her final personal tax return for the year of death; or
    - In his or her personal tax return for the taxation year immediately preceding the year of death

## ▼ Main Tax Incentives for Charitable Gifting on Death

- **If estate is no longer a GRE** (ex. gift made more than 60 months after death or if estate receives an offside contribution):
  - General donation credit rules apply to the gift = credit can only be claimed by the estate in the year of actual donation or within applicable carry forward period (5 or 10 years in the case of ecological sensitive lands).
- **CRA's long-standing policy to allow spouse or common-law partner** of a deceased individual to claim donation tax credit in respect of deceased's gift by will no longer applicable.





# **Testamentary Charitable Gifts are not Bullet-Proof – Mitigating Litigation Risks**

Eric B. Clavier,  
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# Overview

- Are testamentary charitable gifts bullet-proof?
- What are the risks?
  - Failure to comply with formalities
  - Mistakes and misdescriptions
  - Changes in charity's status or name
  - Dependents' relief
- How to mitigate risks when gifting?

# ▼ Effects of Challenges to a Will

- Charity dragged into a lawsuit
- Long delays
- Litigation costs
  - Estate
  - Beneficiaries
  - Charity
- Charitable gifts can be reduced or fall away

# ▼ Validity & Prescribed Formalities

- No such thing as a simple will
- Risks and issues with DIY/online will planning
  - Formalities in legislation across the country – non-compliance can be fatal and courts have limited ability to cure defects
  - Lack of clarity about what constitutes your will
    - Some jurisdictions allow for other documents to comprise all or a part of the will
  - Possible Wills Variation, Dependents' Claims, or other Wills Challenges

# ▼ Tip 1 – Always Seek Professional Advice

- Estate Planning Lawyer
- Accountant
- Financial Planner
- Combination

# ▼ Mistakes and Misdescriptions

- Difference between a mistake and a misdescription
- Only certain mistakes and misdescriptions can be rectified
  - Accidental mistakes of the solicitor
    - Mistakes of fact
    - Drafting errors
    - Execution of the wrong instrument
  - Only certain misdescriptions of the Testator

# ▼ Misdescription

- Only some misdescriptions can be cured by the doctrine of *falsa demonstratio non nocet, cure de corpore constat*
- This doctrine provides that if a will describes a certain person or thing with **sufficient certainty to enable a court to recognize the person or thing** intended by the testator, then the court will overlook any inaccuracy in the rest of the description.
  - Mackenzie, James. *Feeney's Canadian Law of Wills, Fourth Edition*. (Markam: Butterworths, 2000) ("Feeney's") at para. 12.2; *Re Hartum Estate*, [2002] A.J. No. 1037 at para. 35.

## ▼ Tip 2 – Avoiding and Fixing Mistakes

- Ensure charity's full and correct legal name
- Check charitable registration number with CRA
- Only some mistakes and misdescriptions can be remedied by the Court - seek professional advice on what mistakes and misdescriptions can be cured, how to fix mistakes and when you should seek the court's intervention



## ▼ Changes in the Name and Status of the Charity

- Some of the most litigated issues respecting charitable gifts:
  - Charity changes its name
  - Charity ceases to exist at the time of the Testator's death
- Does the charitable gift lapse?

# ▼ Changes in the Name and Status of the Charity

- *Cy-près* may assist but there are limitations
- What is the *cy-près* doctrine?
  - The *cy-près* doctrine can be roughly thought of as the "near to" doctrine.
  - It allows the court to apply funds which were intended for one charitable purpose (but for which distribution has now become impossible or impracticable) to instead apply those funds to another charity which has a "near to" charitable purpose.

# ▼ The Limitations of *Cy-près*

- Overview of the requirements for *cy-près*:
  - **Requires a charitable purpose:** Where a testator makes an immediate gift for charity and evinces a general intention to benefit charity, but the particular gift fails, through remoteness or for some other reason, the Court will nevertheless administer the trust in favour of charity...
  - This must be more than merely naming a charity, and the court will examine the entire will in finding a charitable purpose.
- *Schjaastad Estate, Re*, 1919 CarswellSask 212 at para 13.
- *Montréal Trust Co. v. Matthews*, 1979 CarswellBC 87 at para 38.
- *Roberts Estate, Re*, 1958 CarswellAlta 46 (Alta. C.A.) at paras 6-7.

# ▼ The Limitations of *Cy-près*

- **Requires that the gift be impossible or impractical:** The threshold requirement for invoking the *cy-près* doctrine is a finding that carrying out the existing trust terms is either impossible or impracticable.
- **Requires that the court minimize departure:** A *cy-près* order “must depart from the intentions of the [settlor] only to the extent required to remove the problem that has caused the future administration of the Trust to become impracticable.”

# ▼ Cy-près – Tales

- *Alberta (Public Trustee) v. St. Anne's Orphanage*, 1979 CarswellAlta 53 (Alta. Q.B.):
  - The deceased had left a legacy to an orphanage expressly for crippled children. Before his death, the orphanage had ceased to operate, although the order which had run the orphanage was operating another orphanage, situated in Saskatchewan.
  - The Court held that the gift had not lapsed. It was a gift to the order for a charitable purpose, namely, aiding the cause of crippled children and was paid to the Saskatchewan order.
- *Roberts Estate, Re*, 1958 CarswellAlta 46 (Alta. C.A.):
  - The Court was asked to determine whether a bequest to the “Ford Foundation” “for some form or forms of help not yet given in any institution for mentally disturbed people” had failed
  - The court found that a particular charitable intention was designated by the language of the will by application of the *cy-près* doctrine and appointed a substitute

# ▼ Cy-près – Tales

- *Montréal Trust Co. v. Matthews*, 1979 CarswellBC 87:
  - Here, the deceased did nothing more than name the foundation in the bequest and the Court held that no charitable purpose could be found, stating:
    - “Where a foundation is named and nothing more, whether or not the foundation is charitable, there can be no finding of a charitable intent and thus the cy-près doctrine does not apply. In addition, this is not a case where the foundation cannot be found. It has been found and has refused the bequest.”
- *Eberwein Estate v. Saleem*, 2012 CarswellBC 502 (B.C. S.C.):
  - One of the Will’s charitable beneficiaries ceased to exist prior to the making of the will
  - At issue was whether there was a general charitable intent, or an intention to benefit a specific charitable organization. The court cited the following:
    - “... a general charitable intent might be better described as a requirement of a paramount or overriding intention to give for the charitable purpose of which the particular object set out by the trust or absolute gift is merely one mode of furtherance.” *Waters’ Law of Trusts in Canada*.
  - The Court ruled that there was not a general charitable intent and the gift lapsed

## ▼ Tip 3 – Allow for Changes with the Charity's Status and Name

- When naming a charity in a will:
  - Include the charity's successor as a beneficiary
  - Specifically outline a general charitable intent in the event the charity ceases to exist
- If there are issues with a charity's status as beneficiary – seek professional advice as *Cy-près* may come to the rescue

# ▼ Testamentary Freedom

- Deeply entrenched common-law principle
- *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 1990 CanLII 6849

"the freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law."



# ▼ Restrictions on Testamentary Freedom

- There are exceptions to the concept of testamentary freedom
- E.g.:
  - Ontario (part V of *Succession Law Reform Act*)
  - Alberta (s. 93 of *Wills and Succession Act*)
  - BC (s. 60 of *Wills Estates & Succession Act*)
  - Other provinces with similar legislation

## ▼ ON - *Succession Law Reform Act*

- Obligation on a person making their Will to ensure that they have made **adequate provision** for the proper support of his/her dependants
- If not, any person who qualifies as “dependant” is entitled to commence a Court Application to address the issue
- Court can interfere with the deceased’s testamentary wishes and order that the dependant receive support out of estate

# ▼ ON – *Succession Law Reform Act*

- Who is a dependant?
  - Spouse of the deceased (incl. common-law spouses)
  - Parent of the deceased
  - Child of the deceased
  - Sibling of the deceased to whom the deceased was providing support or was under a legal obligation to provide support immediately prior to his or her death

# ▼ AB – Wills and Succession Act

- Dependants can bring applications for relief
- Must be given **adequate provision**
- Who can claim?
  - Spouses
  - Adult interdependent partners (common law spouses cohabiting 3+ years)
  - Dependent children (minors or dependant adults)

# ▼ BC – Wills Estates & Succession Act

- Court may alter a Will that, in the court's opinion, fails to make **adequate provision** for the proper maintenance and support of the will-maker's spouse or children
- Who can claim?
  - Spouse (incl. common law spouse)
  - Children (incl. adopted and adult independent children)

## ▼ Tip 4 – Consider Will Alternatives

Method of Giving	Probate Fees Payable?	Wills Variation / Dependents Concerns?
Will	Yes*	Yes
RRSP/RRIF	No*	No
Life Insurance Policy	No*	No
Through trust or foundation	No	No

## ▼ Changing or Managing Gifts *ex post facto*

- General principle is a person who has made a gift cannot later retract it, nor dictate to the trustee or donee how the property is to be used
- Donor who has made a gift cannot qualify, retract or alter the terms of the gift after it is complete
- Donor can only retain the power to change the terms of a gift or trust, or to give directions as to the further use of the funds that are gifted by reserving the right to do so **at the time the gift is made**

## ▼ Tip 5 – Use Clear Language to Establish Gift

- Important to clearly document terms intended to apply to transfer of charitable property
- Avoids potential misunderstandings and later disputes
- E.g., know what terms you wish to include for:
  - Gift uses
  - Ability to later change use or ask for gift back
- Consequences of failure to do so
  - *Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation*, 2020 BCCA 80



# Overview

- Litigation costs often borne by the Estate
- Protect your Tax Savings and Prevent Depletion of The Estate by Avoiding:
  - Dependants' Relief and Other Applications for Variation
  - Common Court Challenges, including:
    - Mistakes, Misdescription and Non-compliance with Formalities
    - Changes with the Charity's Status and Name



# Q&A

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# Disclaimer

The information in this presentation is intended to provide general comments on legal issues. The information in this presentation is not intended to provide legal advice. Participants should seek out legal advice on issues specific to them before acting on any information provided in this presentation. We would be pleased to provide additional information upon request.

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