FASKEN MARTINEAU

Trusts, Wills, Estates and Charities Bulletin

April 2009 Fasken Martineau DuMoulin LLP

Enforcing Charitable Pledges and Restricted Charitable Gifts in Recessionary Times: Pitfalls and Possibilities

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As the economic horizon darkens, both charities and donors may become increasingly concerned with the enforceability of restricted charitable gifts and charitable pledges.

Charities may be concerned that donors, feeling the pinch at their pocketbooks, will walk away from charitable pledge agreements made when times were flush, leaving the charities which were relying on such pledges in the lurch. Donors may feel daunted at the thought of having to overextend to meet charitable pledges that they can no longer afford and will want reassurances as to the legal consequences of walking away from existing pledge agreements.

Donors (or the families of donors) may become concerned that charities will no longer want to, or in certain circumstances be able to, abide by restrictions placed on charitable gifts, particularly those that protect the capital of such gifts for perpetuity or those that restrict the use of capital (or income) to relatively narrow charitable purposes. Charities may want to do away with restrictions imposed upon existing charitable gifts in order to provide for more expansive capital encroachment powers or to broaden the charitable purposes for which the charitable gifts can be used in order to allow for flexibility in lean times.

This article will provide a brief overview of some of the issues pertaining to the legal enforceability of charitable pledge agreements and restricted charitable gifts and outline some of the potential pitfalls and possibilities that are available to donors and charities as a result. It is not designed to provide an in depth analysis of the relevant legal issues but instead to highlight some issues of concern.

Charitable Pledges

The question of whether a charitable pledge agreement is potentially enforceable is determined by the common law, which seeks to differentiate between those charitable pledges that are simply unenforceable "naked promises" and those that are contracts enforceable at law. Canadian courts have generally taken the position, reflected in the decision of *Brantford General Hospital Foundation* v. *Marquis Estate*,[1] that in order for a charitable pledge agreement to be enforceable, consideration must have been

[1] [2003] O.J. No. 6141 (Ontario Superior Court of Justice).

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given. As Justice Milanetti commented in the *Brantford* decision at para. 19:

> "While the American courts appear to be more willing to consider enforcement of these promises to pay, our courts have tended to follow the English law and that is defined that a promise to subscribe to charity is not enforceable in the absence of a bargain."

The *Brantford* case suggests that relatively nominal consideration, such as a naming opportunity requested by the donor and granted by the charity in exchange for the charitable pledge, may be sufficient to create an enforceable contract.

However, what complicates this issue in the charitable context is the question of whether such consideration will, for the purposes of the charitable receipting rules in the *Income Tax Act* (Canada), negate the making of a true "gift" by the donor, which for the purposes of the common law has generally been defined to be a voluntary transfer of property made without consideration.

The new split receipting regime established pursuant to the provisions of the *Income Tax Act* (Canada) generally provides that the eligible amount of a gift for charitable receipting purposes is the fair market value of the gift less the "advantage" flowing back to the donor. This regime therefore allows for donative intent to be presumed notwithstanding that the donor receives consideration for his or her gift, provided that the value of such consideration is not greater than eighty percent of the property gifted. Whether a gift made pursuant to an enforceable charitable pledge agreement is truly "voluntary" is another issue, although the Canada Revenue Agency (the "CRA") has suggested in policy statements that payments made pursuant to contractually binding charitable pledge agreements will be considered gifts.[2]

It can also be argued that charitable pledge agreements are enforceable as a result of the doctrine of detrimental reliance or promissory estoppel; that is, the charity has relied upon the donor's promise and suffered damages when the promise was not fulfilled. However, these arguments are unlikely to be successful for the purposes of Canadian law, as the doctrine requires a pre-existing legal relationship to exist between the parties, as well as a finding that the charity relied on the pledge to its detriment. In addition, any such arguments would have to get around the characterization of the doctrine of promissory estoppel as an equitable defence for the purposes of Canadian law, i.e., that it can only be a "shield" and not a "sword".[3]

Based upon the foregoing, when entering into charitable pledge agreements, charities and donors should be aware of the relevant indicia that may lead to a finding of enforceability so that disagreements do not emerge in the future as to the legal status of the arrangements made. First and foremost, enforceability of the charitable pledge agreement will be more likely in the event that the donor is receiving consideration (even nominal consideration

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2 See Canada Revenue Agency, Interpretation Bulletin IT-110R3 *Gifts and Official Donation Receipts*, June 20, 1997: "Generally, any legal obligation on the payor to make a donation would cause the donation to lose its status as a gift. However, where a taxpayer honours a personal guarantee concerning a loan made to a charity or honours a pledge, the amount can be considered to be a gift despite its having being (*sic*) paid to honour an obligation, if the obligation was entered into voluntarily and without consideration."

3 For a more extensive analysis of these issues, please see Sarah Bradley, "Á Promise you can take to the Bank: Legally Enforceable Pledge Agreements for Canadian Charities" (2006) 25:3 *Estates, Trusts and Pensions Journal* p. 291.

such as personal naming rights), especially when such consideration is described in the charitable pledge agreement as a specific condition of the payment of the donation.

Secondly, a statement in a charitable pledge agreement that the charity is relying, to its potential detriment, on the donor's pledge will be more likely to lend support to a claim under the doctrine of promissory estoppel, particularly if the specific activities which the charity will be undertaking in reliance on the donor's pledge are outlined in the agreement and then specifically carried out.

Donor Restricted Gifts

The enforceability of restrictions imposed upon charitable gifts by donors will depend on the manner in which such restrictions are imposed. If the restrictions are made by the donor pursuant to precatory language that merely expresses the donor's non-legally binding wish and/or desire as to the manner in which the gift will be dealt with, then the charity has no legal obligation to follow through with the restrictions. However, moral obligations and/or donor stewardship concerns may compel the charity to comply with the restrictions nonetheless.

If the restrictions are drafted in such a manner so as to impose upon the charity (and its directors) trust obligations, then the charity (and its directors) will have a fiduciary obligation to ensure that the restrictions governing the gift, whether they be with respect to the period of time in which the capital of the gift is to be retained or the specific charitable purposes for which the income and capital of the gift are to be applied, are complied with at all times.

The restrictions cannot be unilaterally amended by the charity unless the agreement establishing the gift allows the charity to do so. Furthermore, when dealing with a restricted charitable gift made by will, the restrictions cannot be bilaterally changed by the charity and the estate trustees of the deceased person's estate. Instead, in such situations, the charity must make an application to court to vary the provisions of the gift pursuant to the *cy-pres* doctrine. In Ontario, a simplified procedure is available with respect to such applications pursuant to the provisions of section 13 of the *Charities Accounting Act* (Ontario).

In the event that a charity fails to comply with the restrictions imposed upon a charitable gift, a donor has legal remedies available to attempt to enforce such restrictions. Firstly, the donor could launch an action claiming a breach of trust of the terms of the special charitable trust that was established by the terms of the restricted donation. Secondly, there may be potential for a claim of negligent misrepresentation, in that the charity, its staff or directors negligently misrepresented to the donor what they intended to do with the gift.

Finally, a donor also has the option of filing a complaint with the regulators who oversee the activities of charities, such as the Canada Revenue Agency or the Public Guardian and Trustee (Ontario). For example, section 6 of the *Charities Accounting Act* (Ontario) allows a donor to lodge a complaint against a charity's fundraising practices with any judge of the Superior Court of Justice, who may then order an investigation by the Public Guardian and Trustee (Ontario). Furthermore, section 10 of the *Charities Accounting Act* (Ontario) provides that "where any two or more persons allege a breach of a trust created for a charitable purpose…they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law."

Although the *Income Tax Act* (Canada) does not provide any specific rights of enforcement to donors, in the event that a donor launches a complaint to the CRA regarding the practices of a registered charity, the response of the CRA may be to launch an audit

of the charity's practices, an outcome that is unlikely to be welcomed by the charity in question.

Based upon the foregoing, donors and charities should be aware of the potential difficulties that can arise for both charities and donors in the event that the donor-imposed restrictions are not complied with or become impossible or impractical to carry out in the future. When the terms of such charitable gifts are being established, either by Will or pursuant to negotiated gift agreements, it is important to ensure that donors' intentions are satisfied without stifling the future ability of the charity to have flexibility to deal with the gifted assets when circumstances change. To this end, provided that the donor's intentions can be satisfied, it is important to ensure that the specific charitable purposes for which the gift is to be applied are as general and flexible as possible, especially with respect to a long term or perpetual gift, and that the terms of the gift provide the ability to amend the charitable purposes if such purposes become impossible or impractical to carry out.

Conclusion

Although it is still difficult to determine with any certainty the effect that recessionary times will have on charitable giving trends, it appears likely that disputes regarding the enforceability of restricted charitable gifts and charitable pledges will continue to increase as donors and charities become more sophisticated and active in enforcing their respective rights. In this regard, the enforceability of such gifting arrangements and the manner in which the documentation giving effect to such arrangements is drafted will become increasingly important.

For more information, please contact the author, or any of the other members of our Trusts, Wills, Estates and Charities group.

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