Reforming the Meaning of “Charitable Gift”: The Case for an Alternative to Split Receipting

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PRÉCIS

La Loi de l’impôt sur le revenu devrait être modifiée pour qu’y soit ajouté une définition de l’expression « don de bienfaisance » qui permet de désigner les dons admissibles en fonction d’un critère de réalité économique. En vertu de la loi actuelle, les allégements fiscaux pour les dons de bienfaisance ne s’appliquent que lorsqu’une donation est remise à un organisme de charité. Toutefois, la loi ne définit pas le terme « donation ». En l’absence d’une définition établie par la loi, les tribunaux et l’Agence du revenu du Canada ont généralement adopté la position selon laquelle le sens du terme donation est défini dans le droit privé. Dans les provinces de common law, cela a généralement fait en sorte que seuls les transferts ou les cessions qui sont admissibles à titre de donation de common law peuvent donner lieu aux allégements fiscaux accordés aux dons de bienfaisance. Cette méthode a permis au critère des donations de common law de dominer sur celui de la réalité économique, de sorte qu’on a refusé de reconnaître les opérations de donation sur le plan fiscal, et ce, sans aucune raison probante. Différentes exceptions ad hoc (certaines étant reconnues comme telles, d’autres non) à la règle selon laquelle le sens de la donation découle du droit privé a évolué avec le temps, ce qui a donné lieu à une grande confusion quant à l’application adéquate de la loi.

En décembre 2002, une ébauche de règles sur les reçus de don pour une partie de la valeur a été proposée de façon à apporter des précisions et à étendre le sens du terme donation. Les règles proposées n’aboutiront probablement pas à une réforme concrète et elles ne seront donc vraisemblablement pas adoptées. La définition du don de bienfaisance qui est proposée dans le présent article s’appuie principalement sur la réalité économique davantage que sur sa forme juridique. Elle vise à combler autant que faire se peut les incohérences de la loi actuelle sur les plans doctrinaires et théoriques.

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ABSTRACT
The Income Tax Act should be amended to include a statutory definition of “charitable donation” that identifies eligible donations based on an economic substance test. Under current law, the tax concessions for charitable donations apply only where a “gift” is made to a charity. The Act does not, however, define the term “gift.” In the absence of a statutory definition, courts and the Canada Revenue Agency have typically taken the position that “gift” has its private-law meaning. In the common-law provinces, this has generally meant that only those transfers qualifying as common-law gifts could attract the tax concessions for charitable gifts. This approach has allowed the common-law form of donations to prevail over economic substance, meaning that gift-like transactions have, for no persuasive reason, been denied tax recognition. Various ad hoc exceptions (some acknowledged, some not) to the rule that “gift” has its private-law meaning evolved over time, resulting in significant confusion as to the proper application of the law.

In December 2002, draft “split-receipting” rules were introduced to clarify and broaden the meaning of “gift.” The proposed rules will not achieve meaningful reform and should not be enacted. The definition of “charitable donation” proposed in this article prioritizes economic substance over legal form. It remedies to a much greater extent the doctrinal and theoretical incoherence of the current law.

KEYWORDS: CHARITABLE DONATIONS ■ GIFTS ■ TRANSFERS ■ SUBSTANCE OVER FORM ■ SPLIT ■ RECEIPTS

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INTRODUCTION
The Income Tax Act¹ contains extensive tax concessions for charitable gifts but does not define the term “gift.” In the absence of a statutory definition, the authorities have established that “gift” has its private-law meaning.² The standard position taken in the common-law provinces (to which there are exceptions) is that “gift” means a voluntary transfer of property for no consideration, meaning that gift-like transfers for inadequate consideration have typically not qualified. In Quebec, the approach has been less restrictive because the civil-law conception of gift includes transfers for partial consideration.³

Dissatisfaction with this approach culminated in the release of proposed amendments to the Act—the “split-receipting” rules—on December 20, 2002.⁴ While these proposed amendments do not contain a statutory definition of “gift,” they make it clear that a transfer for partial consideration can qualify as a charitable gift in both the civil-law and common-law jurisdictions of Canada. Specifically, proposed subsection 248(30) provides that the existence of an “advantage” (defined, in proposed subsection 248(32), to include, inter alia, consideration received by a donor) does not “in and by itself” disqualify a donation as a “gift.” The receiptable amount of a gift is the “eligible amount,” defined in proposed subsection 248(31) as the value of the donated property net of the advantage. Though the split-receipting rules have yet to be enacted, they are being administered by the Canada Revenue Agency (CRA) to apply to gifts made as far back as December 20, 2002. The most recent iteration of the split-receipting rules—released by the Department of Finance on July 18, 2005—was set out in former Bill C-10,⁵ which died on the order paper when the 39th Parliament dissolved on September 7, 2008. It is rumoured that the split-receipting rules will be reintroduced, but at the time of writing, the law is in limbo. It is not clear when (or if) the proposed rules will be reintroduced, or whether they will be reintroduced in modified form.

The thesis of this article is that, although there is a strong case in favour of statutory reform of the meaning of “gift,” the split-receipting rules are not the model to

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¹ RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”).
² In The Queen v. L. McBurney, [1985] 2 CTC 214 (FCA); rev’g. [1984] CTC 466 (FCTD), Stone J observed that the Act contains no statutory definition of “gift,” and noted that he could “find nothing in the context to suggest that [the term] is used in a technical rather than in its ordinary sense” (FCA, at paragraph 11). See also Bleeker Stereo and Television Ltd. v. MNR, [1984] CTC 2885 (TCC); and A.D. Friedberg v. Canada, [1992] 1 CTC 1 (FCA).
³ See, for example, Aspinall v. MNR (1970), 70 DTC 1669 (TAB). The Quebec decisions have not, however, been consistent in this regard: see R v. E. Littler Sr., [1978] CTC 235 (FCA); and Gervais v. The Queen, 85 DTC 5004 (FCTD).
follow. Instead, a transaction should have to meet a new statutory definition of “charitable donation” in order to be recognized for tax purposes. The proposed split-receipting rules represent at best a modest improvement to the law. A legislative response that is more responsive to the underlying problems surrounding the meaning of “gift” is needed to achieve meaningful reform. Many of these problems can be addressed by identifying qualifying donations on the basis of economic substance. The determinative issue should not be whether a putative charitable donation is in the legal form of a common-law gift, whether it was inspired by a charitable motive (described in the authorities as a “detached and disinterested generosity”), or whether it was further to a legal or moral obligation. All of these factors (and other specious considerations) have historically been assigned undue emphasis, and this continues to be the case under the draft split-receipting rules. The determinative issue should simply be whether a putative donation confers a net economic enrichment on the donee. If it does, then it can qualify as a gift to the extent of the enrichment, subject to exceptions that we might devise for abusive donation schemes or for donations where the donee is enriched but the donor is not impoverished.

The argument develops as follows. Documenting the ambivalent state of the jurisprudence regarding the meaning of “gift” (at least in the common-law provinces), the first section below builds the case for statutory reform. Previous papers have also lamented the ambiguous state of the gift jurisprudence, but the discussion here develops the point more fully, and demonstrates more completely how this ambiguity has frustrated gift planning, especially in relation to the use of express trusts.6 The second section considers the experience to date with the draft split-receipting rules. Drawing on the published CRA interpretations of the rules, it is argued that, owing to design flaws, the proposed legislation is unlikely to go very far toward remedying the problems under the current law. The discussion then turns to the development of an alternative model for reform. The third section considers the theories behind the tax concessions for charitable gifts, with a view to developing a theoretically sound alternative reform proposal. Drawing on this theoretical analysis, the fourth section proposes a new statutory definition of “charitable donation” based on an economic substance test.

THE NEED FOR REFORM

It is no secret that the Act’s charitable gift provisions have given rise to a number of difficult issues surrounding the meaning of “gift.” In recent years, the concerns

reforming the meaning of “charitable gift”

raised by abusive transactions involving art flips and leveraged donation schemes have received the lion’s share of media, practitioner, and scholarly attention. These concerns, significant though they are, represent but one facet of the problem. The more deep-seated problem, which seems to have fallen by the wayside, is that the tax authorities have not rendered a doctrinal test for identifying gift transactions that is sufficiently clear or well developed for planning purposes. Innumerable cases and CRA publications have stated that a gift is by definition a voluntary transfer of property for no consideration. This basic working definition has given rise to a number of contentious issues that no single paper could adequately address, such as whether non-cash gifts (gifts-in-kind) should be recognized, how such gifts should be valued, whether the right to use property can qualify as a gift, and whether forgiving a debt owed by a charity qualifies as a gift. However, two matters of controversy stand out from the others, in that they have so significantly frustrated the ability to state with precision the meaning of “gift” that they ground a strong case for statutory reform. These two issues are whether the presence of consideration necessarily vitiates a donation as a gift and whether a donation must take on any particular transactional form in order to qualify as a gift. This section of the article sets out in detail the ambiguities surrounding these issues, demonstrating how they have contributed to confusion over both the meaning of “gift” and the possible ways that qualifying donations may be legally structured.

7 See Daniel Sandler and Tim Edgar, “The Tax Expenditure Program for Charitable Giving: Kicking a Gift Horse in the Teeth” (2003) vol. 51, no. 6 Canadian Tax Journal 2193-2214; Hayhoe and Campbell, supra note 6, at 31:1-18; Boyle, supra note 6, at 7:1-36; and Innes and Boyle, supra note 6, at 104-10.


9 An early case, Gaudin v. MNR (1955), 55 DTC 385 (TAB), suggested that gifts-in-kind could not qualify owing to concerns over valuation. It is now clear that such gifts do indeed qualify, except for gifts of services: see, for example, Slobodian v. R, [1998] 3 CTC 2654 (TCC).

10 See, for example, Nguyen v. R, [2008] 2 CTC 2321 (TCC).

11 Compare CRA document no. 9923095, November 29, 1999, with CRA document no. 2004-0106211E5, October 18, 2005, and the CRA’s Registered Charities Newsletter no. 22, March 8, 2005. The discrepancies indicate that the CRA has never fully come to grips with the distinction between temporary transfers of property and temporal forms of property (leaseholds, possession, determinable and defeasible estates, etc.).

12 In Benquesus v. R, [2006] 3 CTC 2191 (TCC), the forgiveness of a loan owed by a charity was held to qualify as a gift. The CRA has taken a different approach. See, for example, CRA document no. 2000-0063095, March 29, 2001.
Significance of Consideration

The No Consideration Rule

The customary line taken in the authorities is that, since “gift” has its common-law meaning under the Act, the presence of consideration automatically vitiates a donation as a gift. An unambiguous statement of the rule may be found in *AWS Tite v. MNR*, where the court observed that “it is not possible to make a ‘gift’ if some valuable consideration such as goods or services is received in return.” Consistent with this approach, the legal form of transactions has often prevailed over economic substance. Gift-like transactions, such as sales of property to charities for less than fair market value consideration and purchases of property from charities for consideration in excess of fair market value, have been held not to qualify as gifts owing solely to the presence of consideration. The mere fact that a transaction helped to finance the delivery of charitable goods and services is therefore not necessarily enough for it to qualify as a charitable gift. Reflecting the dogmatic rule that gifts and transfers for consideration are mutually exclusive, some authorities have concluded that the presence of consideration disqualified transactions as gifts without even commenting on whether the consideration received by the taxpayers was above, below, or equal to fair market value. Even if property is transferred to a

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14 See, for example, *Hudson Bay Mining*, supra note 13, at paragraph 8 (FCTD), and CRA document no. 2000-0030237, July 25, 2000.

15 See, for example, *Gaudin*, supra note 9; *Hudson Bay Mining*, supra note 13; CRA document no. 9729915, January 20, 1998; CRA document no. 9620635, November 27, 1996; and CRA document no. 9530067, January 22, 1996.

16 In *Webb*, supra note 8, at paragraph 14, Bowie J observed that “‘purchase’ is, of course, a word quite inapt to describe a gift.” See also CRA document no. 9600855, February 21, 1996; and CRA document no. 9423317, September 13, 1994.

17 In *Nadeau*, supra note 13, at paragraph 6, the court observed that the “nobleness of the goal and objectives and the outstanding results achieved have absolutely nothing to do with the point at issue here.”

charity for no consideration, the receipt by the donor of consideration from a third party can vitiate the donation as a gift.19

So the presence of consideration has very often (although, as we shall see, not always) been treated as a factor that vitiates a donation as a gift. Most analyses leave the matter at that, without specifically exploring how the common-law conceptualization of gifts as transfers for no consideration manifests in the doctrinal test for identifying gifts. The impression created is that the no consideration rule is but one of the criteria for charitable gifts. This is problematic because it gives an incomplete sense of the scope of statutory reform necessary to implement a broader legislative conceptualization of gift transactions. As it turns out, the view that consideration vitiates a gift finds implicit and explicit expression across several of the essential criteria for charitable gifts, including the requirements for donor intent, generous motive, and voluntariness. To be sure, these criteria are generally used in the authorities as proxies for mutual exchange transactions. Since the flawed design of the split-receipting rules is owing at least in part to a failure to fully appreciate this (a point developed later in this article), it is worth setting out here how the conceptualization of gifts as transfers for no consideration manifests in each of these criteria.

Starting with donor intent, everyone agrees that donor intent is an essential prerequisite for a charitable gift. However, the authorities have articulated a definition of donor intent that is unhelpfully broad and inconsistently applied.20 What appears to have happened is that confusion regarding the meaning of “gift” has translated into confusion over the precise meaning of donor intent. It takes but a moment to appreciate why this has occurred. Essentially, donor intent means that the donor must intend a gift. In order to determine whether a gift is intended as opposed to another kind of transaction it is necessary to defer to some concept of what constitutes a gift. Uncertainty regarding the meaning of “gift” has therefore been projected onto the meaning of donor intent.

It is, though, possible to draw at least some conclusions regarding the role played by “donor intent” in the tax jurisprudence. Donor intent is used at least in part as a legal mechanism through which the authorities enforce the view that a gift is a transfer for no consideration. In particular, many authorities establish as a categorical imperative the principle that consideration and donor intent are mutually exclusive. A representative articulation of the principle may be found in McPherson v. r, where the court observed:

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19 See, for example, McBurney, supra note 2 (FCA), at paragraph 12, where the court adopted the following proposition from the decision of Federal Court of Australia (General Division) in Leary v. FC of T, 80 ATC 4438, at 4454 (Aus. FC): “Ordinarily, a gift will be without valuable material return . . . either from a stranger or the donee.” See also Commissioner of Taxation of the Commonwealth v. McPhail (1967-68), 41 ALJR 346 (Aus. HC).

20 For example, in Coombs et al. v. The Queen, [2008] DTC 4004 (TCC), at paragraph 15, Woods J observed that donor intent is a “general notion” implicitly reflected in each of the constituent elements of a gift transaction.
There is an element of impoverishment which must be present for a transaction to be characterized as a gift. Whether this is expressed as an \textit{animus donandi}, a \textit{charitable intent} or an \textit{absence of consideration} the core element remains the same.\footnote{McPherson, supra note 13, at paragraph 20 (per Little J) (emphasis in original).}

Thus, even if tax courts have been unable to articulate precisely what donor intent means, they have very often been content (presumably on the basis of the common-law understanding of gift) to conclude that donor intent is absent if consideration is present.

Consider next the issue of motive. It has never been unambiguously established that a generous motive is absolutely essential for a gift, and in fact there are reasons to conclude that motive is irrelevant as a matter of both doctrine\footnote{Several case authorities (tax and non-tax) are consistent with the position that motive speaks to why (not whether) a gift is made. See, for example, Graham \textit{v. Commissioner}, 822 F. 2d 844 (9th Cir. 1987); \textit{Schultz v. Schultz}, 637 SW 2d 1 (MO 1982); \textit{Adilman Estate}, supra note 13; \textit{The Queen v. Antoine Guertin Ltée}, [1988] 1 CTC 360 (FCA); aff‘g. [1981] CTC 351 (FCTD); \textit{C. Bernett v. MNR}, [1957] 17 Tax ABC 131 (TAB); \textit{Ribert v. Stewards’ Charitable Foundation}, [2006] 4 CTC 67 (BCSC); and \textit{Mordo v. Nitting et al.}, [2006] BCSC 1761. See also American Law Institute, \textit{Restatement of the Law Third: Property—Wills and Other Donative Transfers} (St. Paul, MN: American Law Institute, 2003), vol. 2, section 6.1, comment b; Bruce Welling, \textit{Property in Things in the Common Law System}, 2d ed. (Queensland: Scribblers Publishing, 2008), 166; and Mockler, supra note 8, at 383. The CRA has never taken the position in any of its publications that motive does not matter.} and theory.\footnote{Motive has theoretical relevance if the tax concessions for charitable gifts are viewed as a reward for generosity: see Boris I. Bittker, “Charitable Contributions: Tax Deductions or Matching Grants?” (1972-1973) vol. 28, no. 1 \textit{Tax Law Review} 37-63, at 60-61. For criticisms of the generosity thesis, see David G. Duff, “Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform” (2004) vol. 42, no. 1 \textit{Osgoode Hall Law Journal} 47-97, at 67 and 95; and John D. Colombo, “The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption” (2001) vol. 36, no. 3 \textit{Wake Forest Law Review} 657-703, at 677 and 692.} Nevertheless, many case decisions remark that a gift must be born of a “liberal intent” or a “detached and disinterested generosity.”\footnote{This and similar phraseology derive from US gift jurisprudence. US courts have established that gifts are made from a “detached and disinterested generosity” (\textit{Commissioner v. LaBue}, 351 US 243, at 246 (3d Cir. 1956)); “out of affection, respect, admiration, charity or like impulses” (\textit{Robertson v. United States}, 343 US 711, at 714 (10th Cir. 1952)); and in the absence of “the constraining force of any moral or legal duty” (\textit{Bogardus v. Commissioner}, 302 US 34, at 41 (2d Cir. 1937)). The US Supreme Court imported these tests into the charitable gift jurisprudence in \textit{Duberstein}, supra note 8, at 285, which was then picked up by the Federal Court of Australia in \textit{Leary}, supra note 19. In \textit{McBurney}, supra note 2 (FCA), at paragraph 12, the court adopted this test, citing the Australian authorities but, curiously, not the US authorities on which they were ultimately based. A number of Canadian cases have since disqualified donations as gifts citing, inter alia, the taxpayer’s selfish motive. See, for example, \textit{Hudson Bay Mining}, supra note 13; \textit{Burns}, supra note 13 (for an analysis, see Zweibel, supra note 8); \textit{Nadeau}, supra note 13; \textit{Dutil v. The Queen}, 95 DTC 281 (TCC); \textit{Dupriez}, supra note 13; \textit{Tite}, supra note 13; \textit{Woolner v. R}, [2000] 1 CTC 35 (FCA); aff‘g. [1999] 4 CTC 2512 (TCC); and \textit{McPherson}, supra note 13. CRA publications too numerous to cite crib the language quoted above from the US cases.} In one leading case, the court

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21 McPherson, supra note 13, at paragraph 20 (per Little J) (emphasis in original).
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observed that the impulse to give must be the “pure moral benefit” of giving;25 in another, the court said that “the motive of a disponent and the purpose of the disposition are critical matters for consideration.”26 The implication is that a charitable gift, at least for tax purposes, is by definition a gift made charitably, that a selfless motive is essential for a transaction to qualify as a charitable gift quite apart from the no consideration criterion. Yet several other cases contradict this claim. The most overt example is Klotz v. The Queen, where the court observed:

A charitable frame of mind is not a prerequisite to getting a charitable gift tax credit. People make charitable gifts for many reasons: tax, business, vanity, religion, social pressure. No motive vitiates the tax consequences of a charitable gift.27

Consistent with Klotz, many cases dealing with buy-low, donate-high arrangements have explicitly held that a transaction may qualify as a charitable gift even where the principal motive of the donor is simply to obtain a tax advantage.28 Further, observing that a “man may, by his gifts, gain fame or formal honours without losing his tax deductions,”29 an Australian court implied that a non-pecuniary selfish motive does not vitiates a charitable gift. The cases dealing with the deductibility of charitable donations as business expenses have nonetheless been interpreted to mean that the distinguishing characteristic of a true charitable gift is that, unlike a business expense, it is inspired by charitable motives.30 However, the business expense cases establish neither that a charitable motive is a prerequisite for a charitable gift nor that a business motivation vitiates a donation as a charitable gift.31 The principle that emerges from the cases is simply this: Where the motive behind the donation is to gain or

25 Burns, supra note 13 (FCTD), at paragraph 28.
26 Leary, supra note 19, at 4451, cited with approval in McBurney, supra note 2 (FCA), at paragraphs 11-12.
27 2004 TCC 147, at paragraph 25 (emphasis added).
29 Leary, supra note 19, at 4440 (per Bowen CJ). See also McPhail, supra note 19, at 347, where Owen J held that defining a gift as a “present made without return of any kind” disqualifies too many transactions. In his view, only the return of a “material advantage” should disqualify a donation as a gift.
30 See Olympia Floor & Wall Tile v. MNR, [1970] CTC 99 (Ex. Ct.); and Impenco Ltd. v. MNR, [1988] 1 CTC 2339 (TCC). In Symes v. The Queen et al., 94 DTC 6001 (SCC), Iacobucci J appears to have understood these cases as signifying that a donation will not qualify as a charitable gift unless the donation is made for a charitable purpose—that is, further to a charitable rather than a business motive.
31 In fact, Olympia, supra note 30, openly calls into doubt whether it is possible for corporate donations to ever be motivated by charitable impulses.
produce income, the donation will be treated as a deductible business expense (and not as a charitable gift) if there is a close connection between the donation and income generation. Where the connection between the donation and income generation is remote, the donation will be treated as a charitable gift notwithstanding the presence of a non-charitable motive.\(^{32}\)

So the authorities are seemingly divided on the issue of motive. The way to reconcile the contradictory positions taken in the authorities is to note that a charitable motive is not an independent criterion for a gift. Instead, motive is used in the cases generally as a way of enforcing the view that a gift is a transfer for no consideration. Typically, the cases in which donations have been disqualified as gifts on the ground that the requisite motive or liberal intent was absent are cases where the would-be donor’s motive was to obtain a pecuniary benefit from the charity, or where the donation involved a circular flow of cash directly between the donor and the charity or indirectly through a third party.\(^ {33}\) Even the cases establishing that tax-motivated buy-low, donate-high donations qualify as gifts have explicitly correlated that conclusion with the observation that a tax benefit is not consideration. Absent a mutual exchange of some sort, a selfish motive has not typically vitiated donations as gifts.

Consider next the requirement for voluntariness. At first blush, the voluntariness criterion appears to have nothing to do with the no consideration criterion. However, once the authorities are deconstructed, it becomes apparent that the voluntariness criterion serves the function of weeding out mutual exchange transactions. Voluntariness is defined negatively in the authorities as meaning “not involuntary.” It is tested for by asking whether a donation was made in fulfillment of an obligation. Innumerable authorities have concluded that donations in fulfillment of legal obligations are involuntary and thus not gifts.\(^ {34}\) It matters not if the legal obligation to make the donation is itself voluntarily assumed.\(^ {35}\) Transfers of property to charities further to bilateral contracts between taxpayers and charities have on this basis been held not to qualify as gifts.\(^ {36}\) The authorities reason that, since contracts are legally enforceable, a transfer of property further to a contract fulfills a legal obligation and

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\(^ {32}\) To be sure, in Olympia, ibid., the court held that certain donations motivated by business considerations—to avoid damage to the corporate image—were nonetheless charitable gifts because they were too tenuously connected to the income-generating process.

\(^ {33}\) See, for example, Hudson Bay Mining, supra note 13; McPhail, supra note 19; Leary, supra note 19; Burns, supra note 13 (FCA); Nadeau, supra note 13; Tite, supra note 13; Woolner, supra note 24 (FCA); Dupriez, supra note 13; and McPherson, supra note 13.

\(^ {34}\) The CRA publications are too numerous to list. For a representative statement of the rule, see Interpretation Bulletin IT-110R3, “Gifts and Official Donation Receipts,” June 20, 1997, paragraph 9.

\(^ {35}\) This is what Brulé J appears to have meant in Tite, supra note 13, at 2346, where he observed, “In this case while the payment by the appellant to the [charity] in response to their advertisement was voluntary, there was a contractual obligation to pay $450.”

\(^ {36}\) See Tite, supra note 13, for an example of a bilateral contract that was held not to be a gift owing to, inter alia, the absence of voluntariness. For other charity cases explicitly linking the involuntariness of a donation with the existence of a contractual obligation, see Woolner, supra
is on that basis involuntary (and thus not a gift). The principle has been applied even where the charitable donee is not privy to the contract. Thus, the CRA took the position that where a contract between A and B obliged A to make a donation to charity C, the donation failed to qualify as a gift on the ground of involuntariness.37 This was so even though the transaction as between A and charity C, viewed as a discrete transaction, was a voluntary transfer of property for no consideration.38 Also, donations in discharge of a statutory obligation or a plea bargain arrangement have been disqualified as gifts on the ground of involuntariness. However, not all gifts made pursuant to legal obligations have been disqualified on the basis of involuntariness. Some authorities have characterized as gifts donations made in fulfillment of contractual obligations owed by donors to third parties.41 As well, it is the longstanding position of the CRA that a donation in fulfillment of a pledge will not fail the voluntariness requirement.42 Since pledges are generally

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37 See, for example, CRA document no. 9729335, supra note 18; and CRA document no. 9800525, April 15, 1998.
38 But see Duguay, supra note 28 (TCC), at paragraph 165, and Côté, supra note 28, at paragraph 165, for the proposition that whether a particular transaction qualifies as a charitable gift needs to be determined on the basis of the legal relationship between the taxpayer and the charity. If this is correct, then a donation to a charity pursuant to a contract with a third party should nevertheless qualify as a gift to the charity.
39 In McBurney, supra note 2, the Federal Court of Appeal concluded that a payment to a private religious school was not a gift because, inter alia, the payment discharged the taxpayer's statutory obligation to ensure that his children were being properly educated. The facts of this case and the courts' decisions are discussed in more detail below (infra notes 49 to 52 and associated text). See also CRA document no. 2001-0109435, January 14, 2002.
40 See CRA document no. 9M18520, supra note 18, question 17.
41 See Jobs Construction Ltd. v. R, [1999] 3 CTC 2556 (TCC), in which a transfer of property to a charity further to a settlement agreement with a third party was held to be a gift. See also McBurney, supra note 2 (FCA), at paragraph 12, where the court quoted with approval a passage from a decision of the Federal Court of Australia: Leary, supra note 19, at 4454, where Deane J observed that “the mere fact that a person has made a contractually binding promise to make a gift may not, however, necessarily deprive it of its character as such when it is made.” On the basis of the authority cited in support of this statement, A-G v. Holden, [1903] 1 KB 832, it is apparent that Deane J was contemplating a charitable donation further to a contractual obligation between the donor and a third party rather than a donation further to a bilateral contract between the donor and the charity.
42 This position is set out in numerous CRA publications. See, for example, Information Circular 80-10R, “Registered Charities: Operating a Registered Charity,” December 17, 1985, paragraph 31; and IT-110R3, supra note 34, paragraph 9.
unenforceable, this position will usually not pose a conflict with the rule that a legal obligation vitiates voluntariness.\textsuperscript{43} However, in a variety of circumstances, pledges are indeed enforceable. For example, in some provinces, pledges are enforced legislatively.\textsuperscript{44} Also, since both promises under seal and promises in exchange for nominal consideration are enforceable,\textsuperscript{45} pledges given under seal or in return for “peppercorn” consideration should be binding. As well, a donor who promises to make a charitable gift may be estopped from refusing to honour the promise where the charity has detrimentally relied upon it. There are numerous authorities to the effect that detrimental reliance may be invoked only as a shield and not as a sword (that is, as a defence rather than as a cause of action). However, since there is an increasing number of authorities that refute the shield/sword distinction,\textsuperscript{46} arguably the doctrine of detrimental reliance has a role to play in the enforcement of pledges.\textsuperscript{47}

Finally, there is also the subtle distinction between a gift subject to a condition precedent and a unilateral contract. Assume that A promises to make a gift to charity B if charity B first raises $1 million from other donors by a given date. If this is a gift subject to a condition precedent, the arrangement will be unenforceable (unless it falls under one of the exceptions to the general rule that pledges are unenforceable). This is because a gift subject to a condition precedent is not a gift but rather a promise to make a gift if certain events—the condition precedent—materialize. If, however, the arrangement may be characterized as a unilateral contract, then A may be contractually obliged to make the “gift” if charity B meets the condition. Thus, the CRA’s recognition of donations in fulfillment of pledges as gifts reveals that not all legal obligations have vitiated voluntariness. The same point applies in relation to the CRA’s position regarding payments made by a taxpayer as guarantor of a debt owing by a charity. Although these payments are legally enforceable, the CRA has historically characterized them as gifts.\textsuperscript{48}

These exceptions to the general rule that a legal obligation vitiates voluntariness share a telling commonality: they do not involve transactions of mutual exchange

\textsuperscript{43} See Governors of Dalhousie College \textit{v.} Boutilier, [1934] 3 DLR 593 (SCC), and Brantford General Hospital Foundation \textit{v.} Marquis Estate (2003), 67 OR (3d) 432 (SCJ), for decisions in which pledges were held to be unenforceable. US courts are more willing to enforce pledges. See Evelyn Brody, “The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future” (2004-5) vol. 29, no. 2 Seton Hall Legislative Journal 471-530, at 512-22.

\textsuperscript{44} See, for example, the Public Subscriptions Act, RSNS 1989, c. 378; and the Statute of Frauds, RSPEI 1988, c. S-6, section 4.


\textsuperscript{46} See, for example, Waddams, ibid., at 136-49.

\textsuperscript{47} Note that in the \textit{Dalhousie College} and the \textit{Brantford General Hospital} decisions, supra note 43, the courts refused to enforce the pledges, not on the basis that the doctrine of detrimental reliance was inapplicable to charitable subscriptions, but instead on the basis that the charities had failed to establish that they had in fact detrimentally relied upon the pledges under review.

\textsuperscript{48} See IT-110R3, supra note 34, paragraph 9. To fall within this administrative position, the guarantee itself must have been given voluntarily without consideration.
between donors and charities. They are in this respect distinguishable from those legally enforceable donations that the authorities have traditionally disqualified as gifts on the ground of involuntariness. It therefore seems that the policy function of the voluntariness criterion is not to test for voluntariness per se, but to test for a mutual exchange transaction. In other words, the voluntariness criterion is primarily a filter for preventing bargains from entering the pool of transactions that qualify as gifts. The problem is that this is a flawed methodology for exposing bargains inasmuch as it renders false positive results (that is, it sometimes finds bargains where none exist), because there is no perfect correlation between the legal enforceability of a transaction and its status as a bargain. As a result, the authorities have been forced to recognize exceptions to the rule that a donation further to a legal obligation is not a gift.

The legal obligation test renders not only false positive results but also false negative results (that is, it sometimes rules out a bargain where one actually exists). To deal with this, the authorities recognize that a moral obligation can also trump voluntariness and thus vitiate the status of a donation as a gift. This is evidenced by the cases dealing with “gifts” to private religious schools as epitomized by the decision in The Queen v. L. McBurney.49 In McBurney, the taxpayer claimed as charitable gifts payments made by him to private religious schools attended by his children. Instead of charging a mandatory tuition fee, the schools trusted parents to contribute according to their means and conscience.50 No students were ever required to leave a school for want of contribution. Stressing that the taxpayer was not contractually obliged to contribute financially to the schools, the Federal Court Trial Division upheld the payments as gifts.51 The decision was reversed by the Federal Court of Appeal. Stone J rejected the implication of the lower court’s ruling that gift simply means “not contract.” A transaction, he reasoned, can be one of mutual exchange (and thus not a gift) even though it does not impose legally enforceable obligations on the transacting parties. Stone J emphasized that, even though the taxpayer was not under a legal obligation to contribute, he nevertheless had a “Christian duty” and “personal obligation” to support the schools “according to their expectations and his means.”52

Presumably owing to McBurney and decisions like it, the CRA has frequently observed that not only legal but also moral obligations vitiate voluntariness. The

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49 Supra note 2. For a discussion of the McBurney decision, see Zweibel, supra note 8, at 423-28.
50 The school did, however, provide parents with a document setting out suggested “donation” amounts based upon family income.
51 The court also drew an analogy to the “spiritual, educational and social benefits” provided by churches. Since (reasoned the court) these benefits do not disqualify contributions to churches as gifts, the same conclusion should apply to contributions to religious schools. McBurney, supra note 2 (FCTD), at paragraph 38.
52 McBurney, supra note 2 (FCA), at paragraph 16. Stone J also emphasized that the taxpayer was under a statutory obligation to ensure that his children were being properly educated. For other cases in which courts have adopted reasoning similar to the McBurney decision, see Homa, supra note 13; R v. J. Zandstra, [1974] CTC 503 (FCTD); Woolner, supra note 24; Dupriez, supra note 13; Burns, supra note 13 (FCTD); Bleeker Stereo, supra note 2; and Getkate v. MNR, 80 DTC 1695 (TRB).
principle has often been articulated by the CRA with the undue breadth of a categorical imperative. According to the CRA, “[a]ny obligation, contractual, moral or otherwise, on the donor would cause [a] transfer to lose its status as a gift.” This frames the rule too bluntly. To the extent that the cases have established a principle regarding moral obligations, it is simply this: a mutual exchange transaction between a taxpayer and a charity cannot be saved as a gift simply because the obligation assumed by the taxpayer to pay for goods or services is moral rather than legal. The sole objective here is to prevent the payment of fees for services rendered or goods provided from qualifying as a gift simply because the taxpayer’s obligation to pay the charity is further to a loose moral understanding rather than an enforceable legal one. Absent a loose understanding of this nature, the presence of a moral obligation to donate is not in and of itself a factor that vitiates gift.54

In short, the idea that consideration vitiates gift is ubiquitous in the jurisprudence, in that it finds explicit and implicit expression across several of the essential criteria for charitable gifts.

Ad Hoc Exceptions to the No Consideration Rule
From time to time, the authorities have adopted a less restrictive approach. Rather than restrict the concept of gift to transfers for no consideration, many authorities are more consistent with the view that a gift is a transfer without adequate consideration. Thus, several transactions have been allowed to qualify as charitable gifts notwithstanding the receipt of consideration by the donor, including transactions involving consideration of nominal value,55 the purchase of tickets from charities for special events (dinners, balls, concerts, shows, etc.),56 payments for religious education,57

53 See document no. 9901985, supra note 36. A similar statement appears in numerous other CRA publications.
54 In Leary, supra note 19, at 4439, Bowen CJ observed that “a payment may be regarded as voluntary though made under a sense of moral obligation.” For a non-charity case consistent with this principle, see also Bernett, supra note 22. Similarly, in the context of estate tax, courts have reasoned that, instead of being a vitiating factor, moral duty is actually a prerequisite for a gift. See Gogolinski Estate v. MNR, 64 DTC 793 (TAB).
55 The CRA has concluded that a gift is not vitiated where the donor receives benefits/consideration of nominal value (defined as the lesser of $50.00 and 10 percent of the amount of the gift), nor is the value of the gift discounted by the value of such consideration. See IT-110R3, supra note 34, paragraphs 3 and 11.
56 See paragraph 5 of IT-110R3, supra note 34. The value of the gift corresponds with the extent to which the purchase price for a ticket to attend a “dinner, ball, concert, show or like event” exceeds the fair market value of the ticket. In CRA document no. 9423317, supra note 16, this administrative practice was correlated with the decision in Aspinall, supra note 3. See also D.A. McKerrall Exe’t’s v. MNR, [1957] 17 Tax ABC 38 (TAB), in which a transfer of property for $1.00 was held to be a gift for tax purposes.
57 The cases dealing with the characterization of transfers made by taxpayers to private religious schools at which their children attend have rendered inconsistent results. Consistent with the form-over-substance approach, some cases have held that the transfers qualified in their entirety
and the purchase of annuities from charities. On occasion, even sales of property to charities for less than fair market value consideration and payments to charities above and beyond amounts owing as fees for services have qualified as gifts. Epitomizing the ambivalence of the jurisprudence, some of the authorities characterizing transfers for partial consideration as gifts have nevertheless defined a gift as a transfer for no consideration.

The CRA has long taken the position that transfers to charities in exchange for naming privileges can qualify as charitable gifts. This position has not been framed as an exception to the no consideration criterion, but that is arguably precisely what it represents. A “gift” in exchange for a negotiated naming privilege represents a

as gifts provided that they were not made further to an enforceable contractual obligation (for example, McBurney, supra note 2 (FCTD), and Bleeker Stereo, supra note 2). Other cases have concluded that the presence or absence of a contractual obligation is not determinative. Under this approach, an unenforceable “understanding” that education will be provided in exchange for payments disqualifies the payments in their entirety as gifts. That is, if the payment (notwithstanding its legal form) is in substance a fee for service—that is, a contract-like quid pro quo—then none of it qualifies as a gift (see Homa, supra note 13). Other cases have held that the payments qualify as gifts to the extent that they exceed the combined cost of the religious and secular education being provided (for example, H. Koetsier v. MNR, [1974] CTC 2011 (TRB), and Zandstra, supra note 52) or to the extent that the payments are specifically earmarked for a purpose other than tuition (for example, No. 688, supra note 13). The Federal Court of Appeal ultimately resolved the issue by concluding that transfers to private schools fail to qualify as gifts only to the extent that they are in respect of secular education; that is, transfers are gifts to the extent that they are in respect of religious instruction (see, for example, Woolner, supra note 24 (FCA), and McBurney, supra note 2 (FCA)), 59

58 For many years, the CRA has allowed the purchase of an annuity from a charity to qualify as a charitable gift. See, for example, Interpretation Bulletin IT-111R2, “Annuities Purchased from Charitable Organizations,” September 22, 1995.

59 See, for example, 882885 Ontario Ltd. v. R, [2007] 3 CTC 2119 (TCC); Jabs Construction, supra note 41; and McBurney, supra note 2 (FCA) (where Stone J quoted with approval, at paragraph 12, a passage from Leary, supra note 19, at 243, in which it was observed that a gift may exist even where the donor receives a benefit in return). For non-charity cases, see Phaneuf Estate v. The Queen, 78 DTC 6001 (FCTD); and Littler, supra note 3.

60 Blended payments were characterized as gifts (at least to the extent that they exceed the amount owing to the charity) in Jubenville v. R, [2002] 4 CTC 2058 (TCC), and in the cases dealing with transfers to private schools: see, for example, Zandstra, supra note 52; Koetsier, supra note 57; Woolner, supra note 24 (FCA); and McBurney, supra note 2 (FCA). The US authorities have long since been willing to isolate the gift element of a blended payment to a charity on the basis of the view that a gift is a transfer for inadequate consideration. See United States v. Amer. Bar Endowment et al., 477 US 105 (FC 1986), at 117; and Internal Revenue Service, Rev. rul. 67-246, 1967-2 CB 104; and Rev. rul. 68-432, 1968-2 CB 104.

61 See, for example, Zandstra, supra note 52; Woolner, supra note 24 (FCA); and Aspinall, supra note 3. (Note, though, that Aspinall was decided in Quebec, where the common law does not apply.) See, for example, CRA document no. 2002-0155715, September 12, 2002. In the United States, the Internal Revenue Service has taken a similar position: see, for example, Rev. rul. 68-432, supra note 60.
contractual quid pro quo. As one commentator has concluded, a “donor” who bargains for naming privileges appears not to be making a common-law gift so much as he is “purchasing a monument to himself” via a “quasi-purchase” transaction.

No explanation has ever been offered for why these (and only these) exceptions to the no consideration criterion should exist. Instead, the exceptions have often gone altogether unacknowledged, been written off as unimportant administrative concessions, or justified on grounds that strain credulity. For example, the CRA has drawn the dubious conclusion that naming privileges are not consideration because they have no value. In addition, the exception for payments for religious education has been justified on the shaky ground that religious education is not consideration. From a private-law perspective, this is obviously wrong. It may (or may not) be good public policy to allow payments for religious education to qualify as charitable gifts, but the provision of educational services in exchange for a fee represents a transfer for consideration, whether the educational services purchased are religious or secular in nature.

Thus, the state of the law is such that it is generally understood that only transfers for no consideration can qualify as charitable gifts, but there are a sufficient number of sporadic exceptions (some acknowledged, some not) that it has never really been clear either why or when the presence of consideration will vitiate a transaction as a charitable gift. Over time, courts themselves have come to candidly acknowledge that reform is necessary to remedy the ambivalence of the jurisprudence on this

63 The judicial treatment of naming privileges has admittedly not been this cut and dried. See, for example, John K. Eason, “Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad” (2005) vol. 38, no. 2 UC Davis Law Review 375-463. Eason observes that naming privileges have been enforced in the United States as contracts, conditional gifts, and trusts. So far, Canadian courts have not enforced naming privileges as contracts (compare Allegheny College v. National Chautauqua County Bank, 246 NY 369 (1927) with Brantford General Hospital, supra note 43). Also, given the dearth of authorities in Canada on conditional gifts (see infra notes 85-96 and associated text), a court in Canada seems less likely to enforce a naming privilege as a conditional gift than a court in the United States, where the law pertaining to conditional gifts is much more developed (or rather, less underdeveloped). See Eason, at 403-23.

64 Colombo, supra note 23, at 677 and 661, respectively. To illustrate the point, Colombo opens his article with this telling quote from Gerald Ratner, a University of Chicago donor: “I know it says in the Bible it is better to give, but I still enjoy having my name on the building.”

65 See infra note 193.

66 See Information Circular 75-23, “Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools,” September 29, 1975, paragraph 4, for the proposition that “religious training is not viewed as consideration for purposes of the definition of gift.” See also Woolner, supra note 24 (TCC), at paragraphs 30-36.

67 Not everyone agrees. Patrick Boyle concludes that consideration “will usually disqualify the gift only to the extent thereof” and that courts have “consistently” upheld transfers for partial consideration as gifts: see Boyle, supra note 6 (2004 Conference Report), at 7:12 and 7:2, respectively. While it is certainly true that several authorities upheld mixed transactions as gifts, framing this as the usual practice perhaps overstates the point.
point.\textsuperscript{68} However, no one has ever acknowledged the scope of reform that this will require in light of how deeply interwoven across the gift indicia is the conception of gift as a transfer for no consideration.

**Permissible Legal Forms for Gifts**

Another source of ambiguity is that the authorities have never been clear on exactly what they mean when they say that gift has its common-law meaning under the Act. On the one hand, they could be referring to “the common-law gift” as a specific transactional form. On this view, only gifts in the legal form of common-law gifts can qualify as charitable gifts for tax purposes. On the other hand, the authorities could simply be saying that it is the common-law concept of gifts as transfers for no consideration that applies under the Act. On this view, the concept of gift is not necessarily wed to any particular transactional form but instead includes any transaction whereby property is transferred for no consideration. The distinction is important to how charitable gifts are legally structured. Since the presence of consideration—even nominal consideration—signals that a transaction is in the legal form of a contract,\textsuperscript{69} contractual transfers obviously do not qualify as gifts under either interpretation (except, of course, where one of the ad hoc exceptions to the no consideration rule applies). Conversely, common-law gifts obviously qualify under both interpretations. However, common-law gifts are not the only legal form of transaction by which property may be transferred for no consideration. Express trusts, though they are often confusingly described using gift terminology,\textsuperscript{70} represent an alternative

\textsuperscript{68} In *R v. Bromley*, [2004] 3 CTC 58 (BC Prov. Ct.), at paragraphs 118-19, the court candidly acknowledged that the law dealing with the meaning of gift is “in flux” and “requires clarification” owing to “ambiguity.”

\textsuperscript{69} As a general rule, the law does not evaluate the adequacy of consideration, meaning that a transfer for nominal consideration (such as a peppercorn) is sufficient to ground a contract. See, for example, *Thomas v. Thomas* (1842), 2 QB 851; and *Chappell & Co Ltd v. Nestlé Co Ltd*, [1960] AC 87 (HL). Nevertheless, in CRA document no. 9925595, November 16, 1999, the CRA offered the view that a sale of property for $1.00 consideration may be a gift for income tax purposes.

\textsuperscript{70} Gifts and trusts are distinguishable modes of transferring property. The distinction is often needlessly confused. In CRA document no. CES-011, May 5, 2000, and CRA document no. CES-012, October 3, 2000, it is confusingly observed that the “difference between a conditional gift, and a special purpose charitable trust is not easy, since a conditional gift can also exist within the context of a special purpose charitable trust.” Also, the *Canadian Encyclopedic Digest (Ontario)*, 3d ed. (Toronto: Carswell) (looseleaf), observes that a “gift may be effected only by delivery of the gift property to the donee, transfer by deed or declaration of trust” (see “Gifts,” section 4). This is incorrect. A declaration of trust establishes a trust. It does not complete a common-law gift. Similarly, Mockler, supra note 8, at 378, observes that “[a]lthough at law a man may make a gift in trust, a trust and gift are two separate and distinct legal concepts.” However, if trust and gift are separate concepts, how can “a man . . . make a gift in trust”? Courts have contributed to the confusion of the concepts through the undisciplined use of language. A good example is Leach MR’s conclusion in *A-G v. Cordwainers’ Co.* (1833), 3 My & K 534, at 542 (HC), that the transaction under review was “a gift upon condition [rather] than a gift upon trust.” Why did he not simply conclude that the transaction was a gift rather than a trust?
transactional form by which property may be transferred for no consideration. To what extent can express trusts be used in charitable gift planning?

The authorities, especially the CRA publications, contain statements that seem to wed the meaning of “gift” to transactions in the legal form of common-law gifts.71 The focus on legal form was candidly acknowledged in one leading charitable gift case (albeit in connection with an unrelated matter) in which the Federal Court of Appeal emphasized that “[i]n tax law, form matters.”72 That said, the authorities have never established as a categorical imperative that only donations in the legal form of common-law gifts can qualify. It is more accurate to say that they portray common-law gifts as the idealized norm of what constitutes a charitable gift. The idealization of common-law gifts has not prevented the structuring of donations in the legal form of express trusts, but it arguably has harmed the use of express trusts in charitable gift planning in two distinct ways, explored below. First, it has contributed to the underdevelopment of the law in relation to donation arrangements involving express trusts. If “gift” is understood as ideally meaning a common-law gift, then it is easy to see how the law dealing with other donation arrangements may be left to languish. Second, this approach to the meaning of “gift” has contributed to confusion over how conditional donations are legally structured. Many conditional donations are charitable purpose trusts at law, but there is much confusion surrounding the tax status of these donations.

**Charities as Beneficiaries of Trusts**

Difficult questions arise when charities are given beneficial interests in trusts. There is a dearth of case law dealing with these donation arrangements, and the administrative positions of the CRA are untenable in several respects. For example, when a charity is given a beneficial interest in a trust, it is necessary to consider which taxpayer should be considered to have made a gift: the settlor at the time of establishing the trust, or the trust at the time of distributing property to the charitable beneficiary? In order to avoid gift claims by both the settlor and the trust, the CRA has adopted puzzling administrative positions that sometimes result in neither the settlor nor the trust being able to claim a gift. The settlor may be considered to have made a charitable gift at the time of settling a trust in which a charity is given a beneficial interest if, inter alia, the beneficial interest is susceptible to valuation at that time.73 This test

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71 See, for example, *Woolner* (FCA), supra note 24, at paragraph 7. CRA publications routinely and explicitly correlate the meaning of gift with the common-law form of transaction. See CRA document no. 2001-0065935, supra note 18, for a representative example.

72 *Friedberg*, supra note 2, at 2 (emphasis added).

will be made out only if the charity is given a fixed (non-discretionary) interest in the trust. To preclude the trust from subsequently claiming that it too has made a gift when trust capital is distributed to a charity, the CRA has relied upon the definition of a gift as a voluntary transfer of property. Specifically, the CRA has opined that the voluntariness criterion is met by the trust only when the trust makes a discretionary (non-fixed) distribution to a charity. This sometimes prevents distributions from trusts from qualifying as gifts even where the settlor was unable to claim the settlement of the trust as a gift. An example is a trust under which the trustees have the power to encroach upon the capital of the fund in favour of the income beneficiary and a charity has a fixed entitlement to all of the capital of the fund remaining upon the death of the income beneficiary. Even though the charity holds a fixed interest, the settlor will not be considered to have made a gift at the time of settling the trust because the value of the charity’s interest is not ascertainable at that time. The trust will not be considered to have made a gift at the time the charity vests in possession as to the capital of the fund because the distribution to the charity is a legal obligation and is thus involuntary.

74 This position is set out in numerous CRA publications. See, for example, CRA document no. 9732295, supra note 73. Note, though, that trustee discretion is apparently necessary but not sufficient for a distribution from a trust to qualify as a gift by the trust, since even a discretionary distribution to a charity will not, in the CRA’s view, qualify as a gift by the trust if it is in fulfillment of the charity’s beneficial interest in the trust. See, for example, CRA document no. 9918215, December 1, 1999.

75 See, for example, IT-226R, supra note 73, paragraph 6; and CRA document no. 2003-0182905, December 11, 2003. However, according to the CRA, the settlor may amend his or her tax return for the taxation year in which the trust was settled if the remainder interest given to the charity becomes susceptible to valuation (for example, if the income beneficiary dies or irrevocably disclaims the right to receive capital under the fund) within the normal reassessment period: see CRA document no. 2003-0182905, supra; and CRA document no. 2002-0117823, January 1, 2002.

76 See CRA document no. 2003-0182905, supra note 75. The CRA has, though, reasoned elsewhere (CRA document no. 9811782, February 11, 1999) that a power to encroach upon the capital of the fund in favour of the income beneficiary necessarily makes a charity’s entitlement to the remainder discretionary, in the sense that the power of encroachment gives the trustees discretion as to what, if any, capital will ultimately vest in the possession of the charity. However, this is true only if the power of encroachment is drafted broadly enough to relieve the trustees of the duty to maintain an even hand among the beneficiaries. Otherwise, the trustees could be considered to have committed a breach of trust if the power of encroachment was exercised to the undue benefit of the income beneficiary. See, for example, Fox v. Fox Estate (1996), 28 OR (3d) 496 (CA).
Further, for reasons that are not obvious, the CRA has taken the position that the creation of a capital interest for a charity can qualify as a gift by the settlor,77 but not the creation of an income interest.78 Similarly, the CRA has somewhat surprisingly concluded that contributing property to an existing trust in which a charity already has an indefeasibly vested capital interest is not a gift because no additional property is transferred to the charity.77 78 Also, although the CRA has accepted that a remainder interest in the capital of a trust may be gifted by the settlor in circumstances where the remainder will vest in possession after a single income interest expires, it has declined to comment on whether the same conclusion follows where vesting in possession is delayed until after two successive income interests expire.80 Finally, the tax treatment of income distributions to charities from trusts is something of a mystery. The CRA’s administrative position on whether such distributions are deductible to the trust under subsection 104(6) of the Act or are charitable gifts by the trust under subsection 118.1(3) inexplicably varies for inter vivos and testamentary trusts.81 According to the CRA, the issue ultimately turns on whether the charity is an income beneficiary of the trust.82 Isn’t the mere fact that the trust instrument provides for fixed or discretionary distributions of income to the charity in and of itself sufficient to conclude that the charity is an income beneficiary?83 It would be a breach of trust for trustees to distribute income to a charity unless the charity were in some way beneficially interested in the trust.

Charities as Trustees of Purpose Trusts

The portrayal of common-law gifts in the authorities as the idealized benchmark of what constitutes a charitable gift for tax purposes also seems to have distorted

77 See, for example, IT-226R, supra note 73; CRA document nos. 9732295, 9822955, and 2000-0014355, supra note 73; and CRA document no. 2006-0182881R3, 2007.
78 See, for example, CRA document no. 9800137, April 16, 1998. The stated reason is that a gift must involve property and the future income of the fund is not property as of the date of settlement (although CRA document no. 9908430, May 1, 1999, does suggest a more liberal position). The CRAs reasoning does not follow. The property given to the charity at the date of settlement is not the future income of the fund but rather an income interest in the fund, which is indeed property as of the date of settlement. The CRA recognizes this in relation to capital interests (see, for example, CRA document no. 1999-0006995, supra note 73) but, inexplicably, not income interests.
79 See, for example, CRA document no. 2001-0101845, supra note 73. It is unclear why the CRA would adopt such a legalistic position. True, the charity has not been given an additional form of property, but the value of the charity’s interest in the trust has been quantifiably increased. The settlor could settle another trust with identical terms, but wouldn’t the CRA simply consolidate the trusts under subsection 104(2) in any event?
82 Ibid.
83 See the definitions of “beneficiary” and “beneficially interested” in subsections 108(1) and 248(25), respectively.
thinking over how donations should be legally structured. Donations that arguably should be structured as charitable-purpose trusts have instead been routinely papered as common-law gifts, leaving tremendous confusion over their enforceability and proprietary effect. The experience with conditional donations illustrates the point. These transactions have come to be known by various inventive terms in the gift-planning industry that have no established legal meaning—conditional gifts, donor-directed gifts, donor-designated gifts, donor-restricted gifts, special-purpose gifts, etc. Subject to certain limitations, the CRA accepts these transactions as gifts for tax purposes.\(^{84}\) However, none of the CRA publications has ever correlated the conclusion that conditional donations can qualify as gifts with a thorough analysis of their true proprietary nature. While the private law in this area is somewhat murky, the better view is that conditional charitable “gifts” are generally not possible at common law and must instead take effect as charitable-purpose trusts.\(^{85}\) Since this statement may prove controversial, an explanation of the underlying private law is warranted.

The range of “conditional gifts” supported by the common law is much narrower than is often assumed. The only context in which conditional gifts are clearly possible at common law is where the subject matter of the gift is land. Since the common law has for centuries recognized conditional freehold estates, a conditional freehold may be granted without creating a trust.\(^{86}\) The same point does not, however, unambiguously apply to personalty. In this context, there are a number of impediments to the recognition of conditional gifts, including a dearth of supporting authorities. The authorities typically cited in support of conditional gifts tend not to support the possibility of conditional gifts of personalty. Many of these cases deal with realty or express trusts.\(^{87}\) Others deal with testamentary dispositions under wills. Since wills are statutory trusts,\(^{88}\) these authorities do not provide unambiguous support for conditional gifts of personalty outside a trust. Yet other cases involve transactions that can be characterized as conditional gifts only through a strained interpretation.\(^{89}\)

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\(^{86}\) For example, a donor may transfer to a university an estate in fee simple “for so long as the land is used for a law school.” The university would hold a vested, determinable, common-law fee simple and the donor would hold a contingent possibility of reverter. Both of these are common-law (not equitable) forms of property.

\(^{87}\) See, for example, the authorities cited in Hubert Picarda, *The Law and Practice Relating to Charities*, 3d ed. (London: Butterworths, 1999), 278-80.

\(^{88}\) See section 2 of the Estates Administration Act, RSO 1990, c. E.22.

\(^{89}\) For example, *The Canadian Abridgment*, 3d ed. (Toronto: Carswell, 2003), cites several cases under the heading of conditional gifts that actually deal with demand loans (for example, *Dance (Trustee of) v. Anderson*, 2006 CarswellOnt 302 (SCJ); *Goldring v. Lococo*, 2004 CanLII 10207 (Ont. CA); *Wilkosz v. Amato* (2000), 132 OAC 196; and *Bonham v. Bonham* (1920), 47 OLR 535.
Some support for conditional gifts of personality may be found in the cases dealing with engagement rings and *donationes mortis causa* (gifts made in contemplation of death). But even here the true legal character of these transactions is a matter of debate. Engagement rings have been variously characterized as consideration for a contract of marriage, unconditional gifts, and bailment transactions that will become completed gifts upon marriage. *Donationes mortis causa* have been variously characterized as revocable gifts, inter vivos trusts, gifts subject to a condition subsequent, and bailments that will become perfected gifts upon the death of the donor. Even accepting that these transactions are properly characterized as conditional gifts, it is still unclear whether they establish a general rule in support of conditional gifts of personality or merely a limited exception to the rule that conditional gifts of personality are not possible.

In addition to a paucity of supporting authorities, there are conceptual hurdles to the recognition of conditional gifts of personality. A key reason why conditional freehold estates are possible at common law is that the common law recognizes successive interests in land. Specifically, the fragmentation of property in land into successive interests is what allows for gifts of land subject to conditions precedent and conditions subsequent/determinable restrictions outside a trust. Since successive

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90 Gifts of engagement rings have been characterized in certain authorities as either gifts subject to the condition precedent of marriage or determinable/defeasible gifts that conclude upon the dissolution of marriage. *Donationes mortis causa* have consistently been cast in the authorities as being conditional upon the death of the donor. However, the cases have never clearly resolved whether the donor’s death is a condition precedent to the gift’s vesting (that is, a condition of acquisition) or a condition of retention, meaning that the gift is vested from the outset but will divest or determine if the donor survives the peril that inspired the gift in the first place. See Welling, supra note 22, at 185-91.

91 Chambers, supra note 85, at 451-57.

92 The holder of an estate in fee simple may grant a life estate to an individual, A, followed by a contingent remainder to a charity, B, subject to the condition precedent that B must operate a soup kitchen at the time of A’s death. This would not be possible outside a trust if the common law did not allow estates to be divided into life estates and remainders. A similar outcome may be achieved in relation to personality, but only by settling an express trust.

93 For example, a common-law land grant “to the University of Western Ontario on condition that the land be used for the law school” creates a defeasible estate, that is, an estate subject to a condition subsequent. The grantor holds a right of re-entry by which he or she may reclaim the estate if the condition subsequent is broken. A common-law land grant “to the University of Western Ontario for so long as the land is used for the law school” creates a determinable estate. The grantor holds a possibility of reverter by which the estate will automatically revert if the determinable restriction ceases to be complied with. Rights of re-entry and possibilities of reverter (and, by extension, conditions subsequent and determinable restrictions) are possible outside a trust only because the common law recognizes successive interests in land. Again, a similar outcome may be achieved in relation to personality, but only by settling an express trust.
interests in personalty are typically not recognized by the common law, the proprietary mechanism through which conditional gifts of realty are made possible cannot be applied to personalty without considerable analytical difficulty. True, it has been argued that the common law is capable in theory of recognizing conditional gifts of personalty. However, that argument is prescriptive of what the law could be rather than descriptive of what it currently is. The better view is that many conditional transfers that qualify as charitable gifts for tax purposes are not gifts at common law.

The more apt characterization is that of express trust, a point that becomes apparent when one considers the kinds of conditions that charitable donors frequently attach to donations of cash or other personal property. It is not uncommon for donors to impose the restriction that the donated property can only be used in furtherance of a specific charitable purpose, such as a scholarship fund or an endowed chair at a university. If the use restriction is expressed in precatory (non-binding) language, the donation is unconditional and can qualify as a common-law gift. If the language is binding, then the arrangement instead creates a purpose trust.

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94 The CRA acknowledged this in CRA document no. 1999-0007035, February 8, 2000. Perhaps one exception may be found in the authorities that have recognized that a will may create future interests in non-consumable chattels. See, for example, Anne Warner La Forest, Anger and Hansberger Law of Real Property, 3d ed. (Aurora, ON: Canada Law Book, 2006), 9:15; and Bruce H. Ziff, Principles of Property Law, 4th ed. (Toronto: Thomson Carswell, 2006), 189-90. But even here it appears to be unresolved whether principles of common law or equity are at play. For an argument that these circumstances involve the creation of a trust, see Neville Crago, “Bequests of Chattels in Succession” (1999) vol. 28, no. 2 University of Western Australia Law Review 199-213. American law apparently differs from Canadian law on the issue of successive interests in personalty. For a discussion of American authorities in support of successive interests in/conditional gifts of personalty, see American Law Institute, Restatement of the Law Third: Trusts (St. Paul, MN: American Law Institute, 2003), vol. 1, section 5, comment h; Restatement of the Law Second: Property—Donative Transfers (St. Paul, MN: American Law Institute, 1992), vol. 4, section 31.2; T. Thomas, “Inter Vivos Gift of Remainder in Chattel” (1991) 83 ALR (4th) 966; Eason, supra note 63, at 403-23; and Ver Byrke v. Ver Byrke, 843 A. 2d 758 (MD 2004).

95 See Chambers, supra note 85, at 430.

96 Chambers, ibid., at 433, describes his argument as simply an “exploration of the possible ways in which the common law might give effect to conditional gifts” (emphasis added).

97 This statement may prove to be controversial. It has long been debated whether charitable corporations hold property beneficially or as trustees for their charitable objects. See Maurice C. Cullity, “The Charitable Corporation: A ‘Bastard’ Legal Form Revisited,” in Fundamental New Developments in the Law of Charities in Canada (Toronto: Canadian Bar Association, October 27, 2000), tab 6. Note, though, that I am not claiming that charitable corporations necessarily hold all of their property as trustees. My claim is simply that a charitable-purpose trust has been created when property is transferred to a person subject to an enforceable duty to apply the property in furtherance of a specific charitable purpose. The fact that the transferee happens to be a charitable institution (trust or corporation) as opposed to a private individual does not change the analysis. See, for example, Mark Gillen, Lionel D. Smith, and D.W.M. Waters, Waters’ Law of Trusts in Canada, 3d ed. (Toronto: Thomson Carswell, 2005),
states, “[w]here a gift is made on the condition that it be used in a certain way, there will be a trust if that condition is enforceable in equity.”

Also, for reasons owing to the disbursement quota rules, donors often impose the condition that the donated property be held and invested for at least 10 years. The Act implies that this kind of donation will take the form of a trust. Moreover, in at least one of its more recent publications, the CRA described this kind of condition as “a trust at law.”

Nevertheless, conditional donations are routinely—though inaccurately—documented as common-law gifts. While this is presumably owing at least in part to the murky state of property law regarding the extent to which conditional gifts are possible outside a trust, the perception that charitable gift under the Act means a common-law gift has surely been another contributing factor. A donor may prefer to live with ambiguity surrounding the proper private-law characterization of a conditional donation than to possibly risk disqualifying the donation as a gift for tax purposes, or to have to contend with the other unresolved tax issues raised by donations structured as charitable-purpose trusts. For example, if a donor appoints a charity the trustee of a charitable-purpose trust, does this create a new taxpayer for which a separate charitable registration number, tax return, disbursement quota calculation, etc., is necessary? While this seems doubtful, the CRA has never taken a position on the matter, at least not an official one, and there are no case authorities directly on point.

What the analysis of conditional gifts reveals is that the underdeveloped state of the law in relation to donations structured in the form of charitable-purpose trusts and the insinuation of the cases and CRA publications that “gift” means a common-law gift have negatively influenced how conditional donations are legally structured. The mismatch between what these transactions often purport to be (common-law gifts) and the range of transactions that can actually qualify as gifts at common law results in considerable uncertainty as to the enforceability and proprietary nature of many conditional donations. Many of the issues that would ordinarily be dealt with in a

638; Cullity, supra, at 16-17; Jean Warburton and Debra Morris, Tudor on Charities, 8th ed. (London: Sweet & Maxwell, 1995), 159; and Picarda, supra note 87, at 406-7. Even in Christian Brothers of Ireland in Canada (Re) (2000), 184 DLR (4th) 445 (Ont. CA), a decision that has been widely criticized for its uncongenial approach to charitable-purpose trusts, it was acknowledged (at paragraphs 69-93) that a charitable corporation may receive property as the trustee of a charitable-purpose trust.

98 Chambers, supra note 85, at 443. For a similar idea, see Cullity, supra note 97, at 21.

99 See the definitions of “disbursement quota” and “enduring property” in subsection 149.1(1) of the Act. If the donor imposes a “trust or direction” that the donated property be held for at least 10 years (5 years if the donor is another charity), the usual 80 percent expenditure obligation will be deferred.

100 See the definition of “enduring property” in subsection 149.1(1).

properly drawn trust indenture are simply left unaddressed. What if the charity ever wants or needs to transfer the fund to another charity? Does it have the authority to appoint a successor trustee? Can the charity borrow from a fund established for purpose A to help finance purpose B? What will happen if the charity ever ignores the donor’s condition? Will the charity be in breach of trust, in breach of an unenforceable promise, in breach of contract, etc.? Many of the same points apply in relation to donations in exchange for naming privileges. Probably owing to the received wisdom that “gift” means a common-law gift, these essentially contractual arrangements are routinely dressed as common-law gifts, leaving many questions unanswered regarding the nature of these donations.

The surprising frequency with which these sorts of practical planning problems arise in gift planning, together with the above-mentioned concerns over the inconsistency of the gift jurisprudence on the issue of consideration, grounds a case for reforming the meaning of “gift” to make clear whether consideration vitiates a gift and whether the meaning of “gift” is wed to any particular transactional form.

**Draft Split-Receipting Rules**

What do the draft split-receipting rules offer in the way of clarifying the ambiguities and planning problems identified above? Not that much, as it turns out. The sole contribution that the proposed split-receipting rules make to reforming the meaning of “gift” is to specify in proposed new subsection 248(30) that the presence of consideration does not in and by itself disqualify a donation as a gift. In theory, this reform has the potential to improve the law in two senses. First, it seemingly removes uncertainty caused by the inconsistent positions taken in the authorities over whether consideration necessarily vitiates a gift. Second, it suggests that a transaction cannot be disqualified as a charitable gift for tax purposes solely because it is not in the legal form of a common-law gift. This in turn liberates gift planners to use transactional forms other than common-law gifts (for example, contracts and express trusts) as circumstances warrant, and opens the door for the development of sorely needed tax policy in relation to such alternative legal structures. Nonetheless, it is evident that the potential for the split-receipting rules to achieve meaningful reform is more theoretical than real. As a result, these rules should not be enacted in their present form.

The Department of Finance has already had to partially withdraw the split-receipting rules. In recognition of the disbursement quota complexities that would otherwise arise in relation to intercharity gifts, proposed subsection 248(40) provides that the split-receipting rules do not apply in this context.102 However, the major failing of the proposed legislation is that the Department of Finance has underestimated the extent of reform that will be necessary to unmoor the meaning of

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“gift” from the form-over-substance approach that has generally prevailed in the authorities and has been the cause of the problems discussed above. The experience to date with the split-receipting rules reveals that a statutory amendment merely specifying that consideration does not automatically disqualify a donation as a gift is too minimalist a solution to achieve any real reform.

Experience to Date with Split Receipting

Although the split-receipting rules have not yet been enacted into law, and at the time of writing are not even before Parliament in bill format, they have been (and still are) applied by the CRA, affecting donations dating back to December 20, 2002. The CRA’s published interpretations reveal that the rules, as currently drafted, are unlikely to achieve meaningful reform. One might have expected the CRA to have interpreted the proposed rules as representing an entirely new paradigm of what transactions qualify as gifts. If under the split-receipting rules the presence of consideration does not disqualify a donation as a charitable gift, this must be, one might have thought, because economic substance is now meant to prevail over legal form. What should matter is not whether the putative donor took back consideration or how the donor has legally structured the donation, but rather whether a net enrichment has been conferred on the charity. Common-law gifts, one might have thought, would be viewed under split receipting as but one example of a gift transaction. In stark contrast to this, the CRA’s published interpretations reveal that even under the proposed split-receipting rules, the charitable gift provisions of the Act continue to be administered in a way that prioritizes the common-law conception of gift. Admittedly, the CRA no longer takes the position that only common-law gifts can qualify. In one of its publications, the CRA specifically observes that “a sale of property for partial consideration can qualify as a gift.”

103 The continuing influence of the common-law conception of gift is more subtle. In numerous CRA publications, the following statement (or some version thereof) appears:

In general, a “gift” for purposes of the Income Tax Act (“the Act”) means a voluntary transfer of property without valuable consideration to the donor.104

These documents then go on to acknowledge, with reference to the draft split-receipting rules, the possibility that “in some circumstances” a transfer for consideration can qualify as a gift.105 The implication is that the split-receipting rules do not represent a new paradigm of what transactions qualify as gifts so much as they codify a

105 Ibid. At least one CRA publication continues to define “gift” solely in terms of its common-law meaning: see CRA document no. RC4142, 2005.
limited departure from the common-law methodology for identifying gift transactions. “Gift” still means a common-law gift, but “in some circumstances” it also includes other transactions. In other words, rather than establishing a new rule, split receipting merely formalizes an exception.

This approach to conceptualizing gift transactions is no more coherent than the one that it is meant to improve upon. If a transfer for partial consideration can qualify as a gift, which the split-receipting rules say is the case, then obviously “gift” does not actually mean a transfer for no consideration. The concept of split receipting seems more consistent with the position that “gift” includes (but does not mean) a transfer for no consideration. The overlooked subtlety between “means” and “includes” has given rise to a highly confused conceptualization of gift, under which the term is mainly but not exclusively understood as still having its common-law meaning. One manifestation of this confusion is that the CRA continues to treat criteria such as voluntariness and donor/liberal intent, which are employed in the pre-split-receipting jurisprudence to enforce a narrow definition of “gift” modelled after the common-law view, as essential criteria that all transactions regardless of legal form must meet in order to qualify as charitable gifts. It is not clear what the continued relevance of these criteria might be under split receipting, or even what a taxpayer would have to demonstrate to make out a case that the criteria were satisfied. As a result, much of the ambivalence that the proposed split-receipting rules were meant to remedy continues to exist unabated.

Take the continued enforcement of the voluntariness criterion. Whereas split receipting seems intended to allow transactions of mutual exchange to qualify as gifts, the primary function of the voluntariness criterion has been to disqualify such transactions as gifts. Moreover, whereas split receipting seems intended to allow economic substance to prevail over legal form, the voluntariness criterion is tied to the common-law form of gift. The most that can be said in support of the continued enforcement of the voluntariness criterion under split receipting is that this criterion justifiably precludes donations made further to plea bargains and court-ordered penalties/fines from qualifying as charitable gifts under the Act. The reason why these donations should fail to qualify as gifts is that allowing them to attract the tax benefits exclusive to charitable gifts would water down their intended punitive

106 See, for example, CRA document no. 2008-0294701E5, February 20, 2009; document no. P113, supra note 104; and document no. 2007-0228411E5, supra note 104.

107 See, for example, Canada Revenue Agency, Registered Charities Newsletter no. 15, spring 2003; Income Tax Technical News no. 26, supra note 4; CRA document no. CPC-024, February 26, 2003; CRA document no. 2007-0227171R3, supra note 103; and CRA document no. 2007-0228411E5, supra note 104.

108 See, for example, CRA document no. 2008-0294701E5, supra note 106; CRA document no. P113, supra note 104; and CRA document no. 2007-0228411E5, supra note 104.

109 Voluntariness is a unique attribute of a common-law gift in the sense that a promise to make a gift is (generally) unenforceable. A donor who honours such a promise is under no legal obligation to do so.
and deterrent effect.\footnote{110 This is the general policy behind prohibiting the deductibility of fines and penalties. See Peter Hogg, Joanne E. Magee, and Jinyan Li, \textit{Principles of Canadian Income Tax Law}, 6th ed. (Toronto: Thomson Carswell, 2007), paragraph 8.5(b), and Vern Krishna, \textit{The Fundamentals of Canadian Income Tax}, 9th ed. (Toronto: Thomson Carswell, 2006), chapter 9, section IV.} Note, though, that this reasoning ultimately has very little to do with restricting the meaning of “gift” to voluntary donations. True, donations made further to penal sanctions are involuntary and are thus unfailingly filtered out by a voluntariness test. However, the voluntariness criterion is an overly blunt policy instrument in that it also filters out other involuntary, albeit inoffensive, donations. A better approach would be to enact a targeted statutory provision specifically disqualifying penalties and fines from qualifying as charitable gifts for all purposes of the Act.\footnote{111 Section 67.6 of the Act currently provides that no deduction is available for fines or penalties. This precludes corporations from deducting under section 110.1 charitable donations made further to fines or penalties (see CRA document no. 2008-0294701E5, supra note 106). It does not, however, preclude such donations from qualifying as gifts by individuals under section 118.1 or as gifts for purposes of the preferred capital gains treatment of gifts of capital property.}

A similar point applies in relation to donation arrangements involving trusts. Here, the purpose of the voluntariness criterion is to address the two-donor concern discussed earlier. Even accepting that it is improper for the settlor and the trust to \textit{both} claim a gift where property is distributed to charity via a trust, it is doubtful that in any circumstance \textit{neither} taxpayer should be permitted to claim a gift; yet this is exactly the inexplicable result that the voluntariness criterion sometimes creates. Again, this criterion is a poor policy instrument for the task at hand because it filters out too many transactions. The better solution is to enact dedicated statutory provisions that specifically deal with the unique issues raised where donations are made through the intermediary of a trust, a point that the split-receipting rules do not take up.

The continued enforcement of the donor intent criterion gives rise to some of the same concerns.\footnote{112 See, for example, CRA document no. 2008-0294701E5, supra note 106; and CRA document nos. P113 and 2007-0228411E5, supra note 104.} As discussed earlier, the policy function historically played by this criterion has been to restrict the meaning of “gift” to transfers for no consideration. What the continued relevance of this criterion under split receipting might be is not clear. The irony of the continued enforcement of the donor intent requirement is reflected in the following observation by the CRA:

\begin{quote}
[A] gift is a voluntary transfer of property without valuable consideration to the donor. However, under [the split-receipting rules] a transfer of property for which the donor received an advantage will still be considered a gift for purposes of the \textit{Income Tax Act} as long as we are satisfied that the transfer of property was made \textit{with the intention to make a gift}.\footnote{113 CRA document no. T4033A, supra note 104 (emphasis added).}
\end{quote}

If a gift is by definition a “transfer of property without valuable consideration,” then how could a transfer for consideration ever be made with the “intention to make a
gift”? Restricting the meaning of “gift” to transfers made with donor intent (as that term has historically been understood by tax courts) seems to run contrary to the very purpose of the split-receipting rules, which is to allow transfers for consideration to qualify as gifts.

The continued enforcement of the donor intent criterion has not so far posed practical difficulties, primarily because proposed subsection 248(30) provides that donor intent is presumed to exist where the consideration received by the putative donor does not exceed 80 percent of the fair market value of the property transferred to the charity. However, this does not escape the necessity to assign theoretically relevant and doctrinally coherent meaning to the requirement for donor intent, since the statutory presumption of donor intent does not apply where the consideration received by the donor exceeds the 80 percent threshold, and even where the presumption does apply, it is treated as rebuttable. In circumstances where the presumption either does not apply or is rebutted, what must a taxpayer show in order to demonstrate the existence of donor intent? Perhaps this might simply require demonstrating that the putative donor had knowledge that he or she was transacting with a charity on terms that benefitted the charity; for example, the taxpayer did not unwittingly undersell property to a charity. Such an interpretation might make sense. If the tax concessions for charitable gifts are viewed as an inducement to support charities financially, then perhaps there is a case for excluding transactions (such as those that unintentionally benefit charities) that are necessarily unresponsive to an incentive.

However, the indications to date are that donor intent is being interpreted, not as requiring knowledge, but instead as requiring a charitable motive. For example, the CRA has opined that the purchase of lottery tickets from a charity does not qualify as a gift under the split-receipting rules because the participants are “primarily motivated by the chance to win the significant prizes that are offered.” This is reminiscent of the pre-split-receipting authorities in which the concepts of “liberal intent” and “detached and disinterested generosity” were used to disqualify as gifts transfers for consideration. Under the split-receipting rules, it is not at all clear why the donor’s motive should matter. If the price of a lottery ticket sold by a charity exceeds the fair market value of the chance to win a prize, the surplus payment should qualify as a gift. Inquiries into motive are probative of nothing that matters and raise inordinate difficulties surrounding how to test for motive.

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114 See, for example, CRA document no. 2003-0030567, August 6, 2003; and CRA document no. CPC-025, February 26, 2003.
115 Canada, Department of Finance, Explanatory Notes to Legislative Proposals Relating to Income Tax (Ottawa: Department of Finance, 2006), technical notes to proposed subsections 248(30) through (33).
116 Ibid.
118 Curiously, the CRA has not adopted this approach in relation to raffle tickets: see, for example, CRA document no. 2003-0008405, July 24, 2003.
Design Flaws in the Split-Receipting Rules

The lacklustre experience with the split-receipting amendments to date is owing to design flaws in the proposed rules. The rules, as drafted, represent a minimalist approach to reform that betrays a failure to fully appreciate the scope of the problem at hand and its adverse effects on gift planning. They neither explicitly define what “gift” means, nor speak directly to the various legal forms that a gift may take. All that they establish is that consideration does not “in and by itself” disqualify a donation as a gift. Moreover, they seem to establish this rule with reference to but one of the common-law gift criteria used to weed out transfers for consideration. Specifically, proposed subsection 248(30) implies that donor intent will not automatically be assumed to be absent simply because a donor receives consideration. The provision does not squarely address how the presence of consideration affects the other criteria (such as voluntariness and generous motive) that have historically been used to disqualify transfers for consideration, or whether these other criteria should even continue to be enforced. Nor does proposed subsection 248(30) outright preclude consideration from continuing to vitiate donor intent. To the contrary, it explicitly indicates that consideration in excess of 80 percent of the value of the donated property will vitiate a donation as a gift unless the donor adduces evidence establishing that the donation was made with the intention to make a gift. Essentially, therefore, proposed subsection 248(30) does nothing more than to preclude consideration from functioning as an automatic disqualifying factor; that is, it merely tempers but does not eliminate the historical role played by the no consideration criterion. In short, rather than explicitly stating what “gift” means, proposed subsection 248(30) merely tells us that “gift” does not categorically mean a transfer for no consideration. It would be naïve to expect that such a minimalist approach to reform could achieve anything more than the marginal improvement to the law reflected in the CRA’s commentaries to date on the split-receipting rules.\(^{119}\)

Why did the Department of Finance favour the minimalist approach to reform reflected in the draft split-receipting rules? Given the confusion surrounding donations structured other than in the legal form of common-law gifts, and given the extent to which the conceptualization of gifts as transfers for no consideration pervades the criteria that donations must meet in order to qualify as gifts, it was predictable that the proposed rules would leave many questions unanswered. One possibility is that the Department of Finance does not fully appreciate the scope of the problem at hand and its adverse effects on gift planning. Another possibility is that Finance has concluded that retaining a more restrictive understanding of gift has policy advantages in relation to attacking abusive donation schemes that outweigh the costs of continuing ambiguity surrounding the precise meaning of “gift.”

\(^{119}\) The term “gift” is laden with decades of tax jurisprudence and centuries of common-law jurisprudence associating it with transfers for no consideration and with a particular legal form of transaction. It will take more than proposed subsection 248(30) to completely free the meaning of “gift” from this enduring legacy.
If, for example, “gift” were defined as any transaction, regardless of legal form, that economically enriches a charity, abusive donations could be attacked only by quibbling over whether or to what extent a putative gift enriched a charity. In contrast, the draft split-receipting rules appear to have been intentionally drafted so as to preserve the ability to deny donation credit claims for abusive donations on the additional ground that no “gift” was made.\(^{120}\)

Enforcing specious gift criteria to achieve anti-avoidance objectives is a poor way to address the problems posed by abusive donation schemes. Specifically, requiring all donations to pass a generous motive test is a highly inefficient way to target such schemes. While a selfish motive is positively correlated with abusive donations, it is not exclusively associated with such donations and will therefore possibly disqualify non-abusive donations.\(^{121}\) There are also inordinate difficulties associated with developing an administratively workable test capable of testing motive, and problems surrounding the theoretical relevance of motive. Motive is relevant only if the tax concessions for charitable gifts are theorized as a reward for generosity. It has no obvious relevance to the dominant theoretical frameworks—the tax base theories and the subsidy theories (discussed below)—in support of tax concessions for charitable gifts. In short, motive is an unreliable proxy for detecting abusive donations. The better approach is to identify abusive donation schemes on the basis of qualitative criteria that are exclusive to these schemes. A common characteristic of these schemes is their marketed feature.\(^{122}\) Since a number of proposed and enacted anti-avoidance provisions already target abusive donation schemes on the basis of (among other things) their shared marketed feature, it is redundant to also leave open the possibility of attacking abusive donations on the ground that they fail the doctrinal test for gifts. This serves more than anything else to cloud the meaning of “gift.”

**CONNECTING DEFINITION WITH THEORY**

So far, I have demonstrated why reform of the meaning of “gift” is necessary and why the draft split-receipting rules, if enacted, will do very little to remedy existing deficiencies. Having criticized the status quo and the current reform proposal, it behooves me to suggest a workable, alternative reform. First, however, it is necessary to consider the theories behind the tax concessions for charitable gifts. These theories do more than merely explain why these concessions exist; they also inform

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\(^{120}\) The technical note accompanying proposed subsection 248(30) expressly contemplates that the requirements for a gift will not be made out if the “primary motivation of a taxpayer for entering into a transaction or series of transactions is to return a profit to the taxpayer by way of a combination of tax and other benefits”: Department of Finance, supra note 115, technical note to proposed subsection 248(30).

\(^{121}\) Much of the theoretical scholarship dealing with the preferred tax treatment of charitable gifts is dismissive of the possibility that a charitable motive is even possible: see Colombo, supra note 23. If this is correct, then what donations will pass a generous motive test?

\(^{122}\) See Sandler and Edgar, supra note 7, at 2197-2205.
the analysis of what transactions should qualify for the tax concessions. Thus, they are foundational to crafting a meaningful reform proposal. The concept of “gift” supported by theoretical considerations will vary according to whether we view the tax provisions dealing with charitable gifts as structural income-defining provisions versus tax expenditures providing charities with a state subsidy. Nevertheless, the theoretical thinking behind the tax concessions for charitable gifts is a muted consideration in both the jurisprudence and the scholarly literature dealing with the meaning of “gift.” The cases and CRA publications, including those dealing with the proposed split-receiving rules, seem instead to define “gift” in a theoretical vacuum. Also, while much has been written in the scholarly literature on the theoretical justifications for tax-assisted charitable giving, far less attention has been given to what the competing theories have to say about the definition of “gift.” All of this has contributed to the present discord between the interpretation of “charitable gift” applied in tax law and the theory underlying the tax concessions for charitable gifts.

With a view to proposing a doctrinally workable and theoretically sound reform proposal, this section of the article considers the theories in support of tax-assisted charitable giving. The discussion unfolds in two parts. In the first part, I take a position in the debate over what is the strongest theoretical case for the tax concessions for charitable gifts. In the second part, I consider the idealized definition of a charitable gift supported by that theory.

**Theories Behind the Tax Concessions for Charitable Gifts**

The theoretical foundation for the tax concessions for charitable gifts has been the subject of a sustained debate. While there has been some controversy over whether the tax concessions for charitable gifts are justifiable on any ground, the primary debate has played out among those who agree that the concessions are proper but disagree over the “correct” justification. In 1972, Boris Bittker observed that the matter had been so extensively argued that he wondered “whether anything new

123 On a similar note, Colombo, supra note 23, at 689, observes that “one should not provide a deduction for economic transfers that do not advance the underlying rationale.”

124 But see Duff, supra note 23; Colombo, supra note 23; and Zweibel, supra note 8.

remains to be said.” Nevertheless, the debate over the “correct” theory continues. The theories may be grouped into two categories: tax base theories and subsidy theories. The subsidy theories are preferable if only because the tax base theories cannot account for how the tax concessions for charitable gifts are structured in Canada. While there are also contentious issues surrounding the subsidy theories, these controversies generally arise over the reasons why charities should (or should not) be subsidized through tax concessions, rather than the foundational claim that the tax concessions for charitable gifts are justifiable (if at all) on the ground that they subsidize charities.

**Tax Base Theories**

Theories Explained

The tax base theories contend that charitable gifts need special recognition for the proper calculation of taxable “income.” These theories contend that, since charitable gifts are outside the normative tax base, the favourable treatment of charitable gifts is, in the words of William Andrews, simply a “refinement in our notion of an ideal personal income tax, rather than a departure from it.” Andrews’s version of this argument is the best known of the tax base theories. Building on Henry Simons’s conception of income as the sum of all personal consumption and accumulation, Andrews argued, as Simons did as well, that cash income provides an inaccurate measurement of personal consumption and accumulation. While Simons emphasized circumstances in which cash income understates taxable income (for example, where goods and services are consumed but not paid for with cash), Andrews emphasized the reverse scenario, where cash income overstates taxable income because cash has been applied in a way that amounts to neither personal consumption nor accumulation. According to Andrews,

> taxable personal consumption should be defined to include divisible, private goods and services whose consumption by one household precludes enjoyment by others, but not collective goods whose enjoyment is nonpreclusive or the nonmaterial satisfactions that arise from making contributions.

Since Andrews categorizes charitable gifts as non-preclusive consumption, he argues that they are excluded from the normative tax base. In short, charitable gifts are not appropriately subject to income tax because they are not income.

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126 Bittker, supra note 23, at 37.
129 Ibid., at 313 and 325.
130 Ibid., at 314-15.
Boris Bittker also turned to tax logic to justify the preferred tax treatment of charitable gifts.\textsuperscript{131} He defended this treatment on grounds of horizontal equity. Special recognition of charitable gifts, he reasoned, is necessary to ensure that tax is assessed on the basis of relative well-being. It acknowledges that taxpayers who make charitable gifts are acting further to a moral obligation and are left with less income at their personal disposal.\textsuperscript{132} It ensures the equitable treatment of taxpayers who donate services and taxpayers who donate property.\textsuperscript{133} Finally, Bittker concluded (as have Canadian courts) that a deduction for gifts made as business expenses is necessary to ensure the proper measurement of business income.\textsuperscript{134}

More recently, Johnny Rex Buckles introduced a new tax base argument—the “community income theory.”\textsuperscript{135} Like Andrews, Buckles argues that a deduction for charitable gifts is necessary to ensure the proper calculation of income.\textsuperscript{136} However, Buckles arrives at this conclusion via a different route. According to Buckles, taxpayers who donate to charity “may be viewed as acting on behalf of the community with respect to the portion of their income that is donated.”\textsuperscript{137} He argues that since “the community is not an appropriate object of taxation,”\textsuperscript{138} the portion of a taxpayer’s income that is donated to charity is properly excluded from income.

**Criticisms of Tax Base Theories**

The proponents of tax base theories, and Andrews in particular, have attracted intense criticism. One critique is that Andrews—notwithstanding his insistence to the contrary—relies upon considerations extrinsic to income tax to justify the deductibility of charitable gifts, and that he therefore adds “little to the subsidy justification

\textsuperscript{131} As will be shown below, Bittker did not rely exclusively on tax logic.

\textsuperscript{132} Bittker, supra note 23, at 58-59. Bittker’s implicit assumption was that the satisfaction that donors experience from making charitable gifts is in some material way distinguishable from that associated with other expenditures. This assumption was subsequently identified and defended by Mark P. Gergen in “The Case for a Charitable Contributions Deduction” (1988) vol. 74, no. 8 *Virginia Law Review* 1393-1450, at 1426-33.

\textsuperscript{133} Bittker, supra note 23, at 59-60. Since tax law does not impute income to donors who donate services, Bittker reasoned that it should allow a deduction for donors who donate property in order to ensure the equitable treatment of these two kinds of donors.

\textsuperscript{134} Bittker, supra note 23, at 57-58. See also the decisions in *Olympia* and *Impenco*, supra note 30. Note, though, that the characterization of donations as business expenses supports the deductibility of donations as business expenses and not as charitable donations, and thus tells us little about the proper tax treatment of charitable gifts.


\textsuperscript{136} Buckles, ibid., at 954, observes that “income means something, and that analyzing what we do and do not mean by income sheds light upon the justification for the charitable contributions deduction.”

\textsuperscript{137} Ibid., at 986.

\textsuperscript{138} Ibid., at 971.
of the deduction” (discussed below).\textsuperscript{139} Also, Andrews’s tax base argument is plagued by the considerable ambiguities (described by one author as “insoluble”)\textsuperscript{140} that cloud the precise meaning of “taxable consumption.” Andrews’s argument holds true only if (1) “taxable consumption” means (and \textit{only} means) preclusive consumption and (2) charitable gifts represent \textit{non-preclusive} consumption. Both claims have come under sustained attack. Mark Kelman, for example, argues that it is descriptively inaccurate to assert that the tax base includes only non-preclusive consumption and that in any event charitable gifts have private preclusive elements.\textsuperscript{141} No other deductions have been defended on the ground that taxable consumption excludes non-preclusive expenditures.\textsuperscript{142} Other analysts have critiqued Andrews’s understanding of taxable consumption for its reliance on the contestable assumption that private wealth redistribution is a suitable substitute for redistribution through the tax system.\textsuperscript{143} Even Simons, upon whose work Andrews built, characterized charitable gifts as taxable consumption.\textsuperscript{144}

The ultimate problem with the tax base theories, however, is that they struggle to account for how the tax concessions for charitable gifts are structured in Canada. As Andrews himself noted, his theory cannot explain the exemption from capital

\textsuperscript{139} Gergen, supra note 132, at 1416. Andrews’s argument that charitable gifts are non-consumptive (and thus properly excluded from income) ultimately relies upon the collective nature of charitable purposes, since the collective nature of charity is what makes charitable donations non-preclusive in Andrews’s view. Many authors who reject Andrews’s tax base argument nevertheless defend the deduction on the ground that it is a justifiable subsidy of public works. On the ground that both of these arguments rely upon the collective nature of charity, Gergen has suggested that “all Andrews really does is to repackage the arguments for subsidizing charities” (ibid.).


\textsuperscript{141} See, for example, Kelman, supra note 125, at 844-56. There is a wide body of social science scholarship that essentially denies the existence of altruism. In this view, all behaviour—including seemingly other-centred behaviour—is directed by self-interest. Colombo thus observes (supra note 23, at 681) that “if taxpayer A chooses to spend his economic resources on a bag of Ruffles while taxpayer B chooses to purchase some guilt relief with a donation to the Red Cross, no inherent principle of defining the tax base justifies taxing A but not B. Both, presumably, are equally well-off, each having chosen to spend his or her economic resources in a manner designed to maximize personal well-being.” See also ibid., at 667-80; and Duff, supra note 23, at 53.

\textsuperscript{142} See Edgar, supra note 140, at 341.

\textsuperscript{143} See, for example, Edgar, ibid., at 342; and Duff, supra note 23, at 52. Andrews’s argument that taxable consumption means preclusive consumption betrays the normative conviction that non-preclusive consumption serves a similar purpose to income tax and for that reason need not be included in the tax base. Andrews himself acknowledged this value commitment: supra note 127, at 325-27 and 356.

\textsuperscript{144} Simons, supra note 128, at 56-58.
gains tax for gifts of capital property to charity.\textsuperscript{145} Further, the tax base arguments have the greatest resonance in jurisdictions where a deduction is available for charitable gifts. Their explanatory force is much weaker in Canada, where charitable gifts by individuals are dealt with via a two-stage non-refundable tax credit.\textsuperscript{146} For the first $200 of charitable gifts, the credit is calculated using the lowest marginal tax bracket (currently 15 percent).\textsuperscript{147} For all charitable gifts in excess of $200, the credit is calculated using the highest marginal tax bracket (currently 29 percent).\textsuperscript{148} High-income donors therefore pay more tax on the first $200 of charitable gifts than what they receive back in the form of a tax credit. The opposite holds true in relation to each dollar above $200 donated to charity by all donors not in the highest marginal tax bracket.\textsuperscript{149} For these donors, the tax credit does not simply operate to refund the tax paid on the income donated to charity, but instead returns a surplus. The credit would not be structured in this manner if, as the tax base theorists claim, the issue were simply the proper definition of income.\textsuperscript{150}

\textbf{Subsidy Theories}

\textbf{Theories Explained}

Given the difficulty of relying on tax logic to justify the tax concessions for charitable gifts, the better view is that the justification for these concessions is not intrinsic but rather extrinsic to income tax. One example of this reasoning is the argument that the tax concessions provide a morally defensible reward for generous behaviour.\textsuperscript{151} This theory has come under attack on several grounds: for example, there is no such thing as selfless behaviour;\textsuperscript{152} even if selflessness exists, it is tainted by the tax

\textsuperscript{145} Andrews, supra note 127, at 371-72.

\textsuperscript{146} For an analysis of the credit, see David G. Duff, “Charitable Contributions and the Personal Income Tax: Evaluating the Canadian Credit,” in Phillips, Chapman, and Stevens, supra note 125, 407-56.

\textsuperscript{147} See subsections 117(2) and 118.1(3) of the Act.

\textsuperscript{148} Ibid.

\textsuperscript{149} The one exception is a donor whose income is too low to be taxable. For this donor, the credit has no value.

\textsuperscript{150} For a similar observation, see Edgar, supra note 140, at 343 and 349.

\textsuperscript{151} See Bittker, supra note 23, at 60-61. See also Richard B. Goode, The Individual Income Tax, rev. ed. (Washington, DC: The Brookings Institute, 1976), 165. Bittker’s argument on this point is somewhat confusing. He observes that “something can be said for rewarding activities which in a certain sense are selfless, even if the reward serves no incentive function”: Bittker, supra note 23, at 60. The suggestion is that rewarding generosity is good public policy even if it results in no more generosity. Later, Bittker reasons that, even if the tax concessions for charitable gifts are inefficient, they are justifiable owing to the existence of “favorable offsetting externalities”: ibid., at 60-61. What might these offsetting externalities be, if the tax concessions are ineffective as an incentive for generosity?

\textsuperscript{152} Colombo summarizes the work of social scientists on this point: see supra note 23, at 668-78. For a critique of the argument that all charitable giving is selfish, see Gergen, supra note 132, at 1428-33.
incentives for charitable gifts, and it is in any event impossible to distinguish between charitable gifts owing to genuine altruism and those owing to self-interested utility maximization. More commonly, the tax concessions are defended on the ground that they provide a state financial subsidy for charities. The idea is that by reducing the after-tax cost of charitable gifts, these concessions indirectly subsidize the operations of charities.

The subsidy arguments constitute a heterogeneous body of scholarship in which there is much dissent. The common denominator is that all subsidy theorists agree on the baseline observation that it is good public policy to ensure that charities receive adequate funding. This supposition rests on the normative claim that charities do “good” work. If charities do not in some way make the world a “better place,” why should we subsidize them? Another common theme in the literature is the idea that charities would be underfunded without tax concessions for charitable gifts, owing to government and market failure. Government failure is theorized to result from the fact that governments supply public goods only to the level desired by the median voter. This means that many public goods for which there is significant public demand are not delivered (and thus not funded) by the government. Market failure results from the inability of charities to compete with private firms for capital. Charities are unlike private firms in that they are unable to distribute profits to investors. This removes any pecuniary incentive to “invest” in charities. Underfunding also results from the fact that charities provide “public goods.” Since such goods are non-rival (that is, one person’s consumption of the goods does not prevent simultaneous consumption by others) and non-excludable (that is, the goods may be consumed without payment), charities are uniquely vulnerable to “free riding”—that is, some (or even many) individuals enjoy the benefits of charitable goods and services without contributing to their cost. The combination of these factors means that investments in charities are associated with pure risk (a risk for which there is no offsetting potential for gain) and thus are unattractive to private investors.


154 Colombo, supra note 23, at 669.

155 Colombo, ibid., at 682, describes this as “the most widely accepted rationale.”

156 In much of the literature, this normative claim is either altogether unacknowledged or acknowledged but left unexplained. Nonetheless, it is foundational to all subsidy theories.


159 See, for example, Gergen, supra note 132, at 1397-98.
The state could remedy underfunding through direct transfer payments to charities, but subsidy theorists agree that an indirect subsidy delivered through tax legislation is preferable. They just disagree on why this is so. One line of argument emphasizes that charities relieve the government of expenses that it would otherwise have to incur.\textsuperscript{160} Therefore, if the tax concessions for charitable gifts raise more money for charity than they cost the treasury in forgone revenue, they can be defended on efficiency grounds.\textsuperscript{161}

Others argue that an indirect subsidy results in higher quality and greater diversity of public goods than would a direct state subsidy. Enhanced quality derives from the fact that charities are engaged in an ongoing competition for gifts.\textsuperscript{162} Enhanced diversity derives from the fact that charities can provide services for which there exists a public demand sufficient to attract voluntary gifts but insufficient to influence elected legislatures.\textsuperscript{163} Also, certain public goods (such as religious services provided by churches) cannot be provided directly by the state for constitutional reasons, and can therefore be subsidized by the state only indirectly, if at all.\textsuperscript{164}

Another line of argument points to the societal benefits of allowing taxpayers to utilize charitable gifts as a means of voting how public funds should be allocated.\textsuperscript{165} The tax concessions for charitable gifts have been characterized as a “social choice mechanism to determine government spending”\textsuperscript{166} through which the state becomes a “financing partner”\textsuperscript{167} of charitable donors. The associated benefits include enhanced pluralism, innovation, and civic engagement.\textsuperscript{168}

\textsuperscript{160} See, for example, David E. Pozen, “Remapping the Charitable Deduction” (2006-2007) vol. 39, no. 2 Connecticut Law Review 531-601, at 556.


\textsuperscript{164} See, for example, Gergen, supra note 132, at 1434-43; and Pozen, supra note 160, at 559. Not everyone agrees that it is proper for the state to subsidize religious activity, even indirectly. See, for example, Brooks, supra note 125, at 480.

\textsuperscript{165} See Levmore, supra note 162.

\textsuperscript{166} Ibid., at 405.

\textsuperscript{167} Ibid., at 388.

\textsuperscript{168} See Duff, supra note 23, at 62. Bittker was an early proponent of the view that tax concessions for charitable gifts foster democratic renewal: see supra note 23, at 61-62.
In a similar vein, an indirect state subsidy of charity has been defended on the basis that it better allocates the costs of a given charitable program to the taxpayers who value that program than would a direct government grant.\textsuperscript{169} When a taxpayer makes a charitable gift, the tax concessions reduce the donor’s after-tax cost of the gift, essentially resulting in the cost of the gift being shared among all taxpayers. The tax concessions for donors therefore function in practice as an indirect tax on free riders. However, even with this cost sharing, the individual donor makes a bigger contribution to the charity than any other single taxpayer. In contrast, a direct grant would allocate the cost of a particular program across all taxpayers without making any adjustment for any individual taxpayer’s preferences.\textsuperscript{170}

**Criticisms of Subsidy Theories**

The subsidy arguments have been met with a number of criticisms. The tax incentives for charitable gifts have been criticized as being an inefficient funding mechanism.\textsuperscript{171} It has also been argued that indirect state subsidization of charities lacks the transparency and control that is characteristic of direct government spending.\textsuperscript{172} The rationality of allocating public funds on the basis of gift campaigns has been questioned,\textsuperscript{173} as has the equity of affording wealthy philanthropists a disproportionate say in the distribution of public funds.\textsuperscript{174} For all of these reasons, Neil Brooks has concluded that Canada’s charitable tax credit is “one of the most shameful tax concessions in the Income Tax Act.”\textsuperscript{175} Approaching the topic from a different perspective, David Stevens questions whether economic analysis has much to contribute

\textsuperscript{169} Gergen, supra note 132, at 1399-1406.

\textsuperscript{170} Ibid., at 1402.

\textsuperscript{171} See Brooks, supra note 125, at 472. For discussions of and citations to the various studies, see Pozen, supra note 160, at 556-58; and Evelyn Brody, “Charities in Tax Reform: Threats to Subsidies Overt and Covert” (1999) vol. 66, no. 3 *Tennessee Law Review* 687-764, at 714-19. Even accepting that the tax concessions for charitable gifts raise a dollar for every dollar that they cost the public treasury, the concessions may still be inefficient, since the cumulative overhead expenditures of the tens of thousands of charities that make up the charitable sector are presumably higher than would exist under the economies of scale that could be achieved via a centralized provider of the same goods and services.


\textsuperscript{173} For example, Brooks has observed that the various publicity campaigns used by charities to raise funds for medical research—walkathons, telethons, direct-mail solicitation, the Terry Fox run, etc.—are an “odd basis for determining how much and where public money is spent on medical research”: Brooks, supra note 125, at 468.

\textsuperscript{174} Ibid., at 459-62. Not everyone agrees on this point. If the tax concessions for charitable gifts are meant to serve as an incentive for giving, then it may make some sense to provide the greatest incentive to those—the wealthy—with the most to give. See Colombo, supra note 23, at 684, and the authorities cited therein.

\textsuperscript{175} Brooks, supra note 125, at 458.
to the analysis of charity law. Specifically, he objects to the tax incentives for charitable gifts being framed as a remedy for government and market failure.177

Stevens has a point. If the justification for the tax concessions for charitable gifts is that they help to overcome market failure caused by free riding, one might reasonably expect the definition of a charity to include only those non-profit institutions vulnerable to free riding. However, this is not the case. Religious charities, which represent the largest single category of registered charities in Canada, apparently experience comparatively low rates of free riding.178 Some have concluded from this that churches should be ineligible for the tax concessions for charitable gifts, because they do not suffer from the mischief that these concessions are meant to remedy.180 However, it could just as well be concluded that the market failure thesis is inadequate as a theory because it cannot account for why religious charities, the lion’s share of charities, qualify for the tax concessions for charitable gifts.

Note, though, that these criticisms do not discredit subsidy theory, since they ultimately do not call into question the foundational claim of subsidy theory—namely, that, if there is a case for tax concessions for charitable gifts, it is that they provide an indirect state subsidy for charities. Instead, these criticisms merely reflect that there is a debate over the reasons why charities should receive a state subsidy of any sort (is it to overcome underfunding caused by market failure or some other reason?) and over what form the subsidy should take as between a direct subsidy, an indirect subsidy, or some other funding mechanism. In short, the issue in debate is how and why charities should be subsidized, rather than whether subsidizing charities is indeed the policy function served by the tax concessions for charitable gifts.

Implications of Subsidy Theory for the Definition of a Gift

Developing a Working Definition of a Charitable Gift

Accepting that subsidy theory is the more tenable of the available theories in support of the tax concessions for charitable gifts, it falls to consider what subsidy theory has to say about how a charitable gift should be defined. Subsidy theory is capable of supporting a very broad definition. If the policy function of the tax concessions for charitable gifts is to subsidize charities, the only question that needs to be asked to determine whether a particular transaction qualifies as a charitable gift is: Does the transaction economically enrich a charity?181 If it does, it can qualify as


177 Ibid., at 49-51.


179 See, for example, Gergen, supra note 132, at 1434-43.

180 Ibid., at 1442.

181 For a similar conclusion, see Duff, supra note 23, at 95-96.
a charitable gift, the value of which may be calculated by netting the value of what the donor contributes against the value of what the donor takes back. Many of the issues that have historically influenced the meaning of “gift” in the tax jurisprudence, and that continue to have influence under the CRA’s published interpretations of the split-receipting rules, lack relevance under subsidy theory. It is, for example, irrelevant to subsidy theory whether a gift involves a transfer for consideration; whether it is in the legal form of a common-law gift or some other transactional form (a purpose trust, a contract, an interest-free loan, etc.); whether the gift is voluntary or further to an enforceable obligation of some sort; whether it involves a transfer of property versus the provision of services; or whether the donor’s underlying motive is selfish. The only transactions that subsidy theory categorically disqualifies as charitable gifts are transactions that are not susceptible of valuation and transactions that are either economically neutral (the value of what is contributed to the charity is equal to the value of what is taken back by the donor) or economically detrimental to the charity (the value of what is contributed to the charity is less than the value of what is taken back by the donor). At some point, fiscal concerns over limiting the extent of the state subsidy for charities and the loss of tax revenue that this entails could justify other limitations, such as the exclusion of donated services and gifts that would have been made even without the tax concessions. Nonetheless, as a starting point, subsidy theory supports a broad definition of a charitable gift that includes all transactions that economically equip charities to perform charitable work.

Refinements to the Working Definition

Donee Enrichment versus Donor Impoverishment

It may be necessary to refine the broad definition proposed above, specifically with respect to whether the value of a gift should correlate with the extent to which the charitable donee is enriched or whether it should be limited to the extent to which the donor is impoverished. The proposed split-receipting rules adopt the latter approach. In the ordinary course, the issue will be moot, since there will usually be no difference between the two measures of a gift. This is not, however, categorically true. The experience with leveraged gift schemes reveals that abusive arrangements can create a disparity between the charity’s enrichment and the donor’s impoverishment. This disparity can also occur in certain non-abusive arrangements—for example, where a third party provides a donor with a pecuniary incentive to donate. To cite an example that has been the subject of a CRA publication, consider a newspaper

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182 See Duff, ibid., at 66-67 and 95-96.

183 Further to proposed subsection 248(31), the receivable amount of a gift under the split-receipting rules is the “eligible amount,” which is determined, pursuant to proposed subsection 248(32), on the basis of the net cost of the donation to the donor as opposed to the net gain to the charitable donee.

184 The disparity arises, in part, because portions of donations made as part of leveraged gift schemes are often circulated back to donors through complex and artificial structures.
that gives free advertising space to donors who give to charity.\textsuperscript{185} The incentive from the newspaper results in the charitable donee being enriched to a greater extent than the donor is impoverished. In this type of scenario, is the value of the gift the amount contributed to the charity, or is it that amount net of the benefit from the third party? A case could be made for focusing exclusively on the economic enrichment of the charity and ignoring benefits provided to donors by third parties. Discounting the value of a gift by the value of benefits received from third parties effectively precludes third parties from supplementing the tax incentives with further pecuniary incentives. Since higher levels of donations might follow if the tax incentives are combined with incentives provided by third parties, and since “the more the merrier”\textsuperscript{186} is a tenable position to take with respect to charitable giving, there is a case for concluding that third-party pecuniary incentives should not grind down the value of a gift. In addition, reducing the receivable amount of the gift by the value of third-party benefits becomes administratively unworkable in circumstances where the charitable donee—the party that issues the gift receipt—is not acting in concert with the third party and is thus not aware of the third-party benefit.

Nonetheless, there are reasons to conclude that the benefits identified by subsidy theorists in support of an indirect state subsidy of charities delivered through tax incentives are best attained where the value of a gift corresponds with the economic impoverishment of the donor. Recall from the discussion above that one argument for an indirect subsidy is that it allows donors to vote how public funds are allocated. To the extent that a donor receives value from a third party for his gift, that donor’s vote costs him nothing. This detracts from the desirability of allowing donors to allocate public funds through charitable gifts, because donors may well take their votes less seriously to the extent that they are costless.\textsuperscript{187} Recall also that, according to subsidy theorists, tax concessions for charitable gifts result in a better allocation of the costs of a given charitable program to donors who value that program than is the case with a direct state subsidy. The desired cost allocation is disrupted to the extent that the donor receives value from a third party for his gift. Besides, it is not obvious that a combined third-party and income tax incentive will necessarily result in greater levels of giving. To the extent that a third party provides a pecuniary incentive to give, a further tax incentive may be inefficient because it might not alter behaviour. Ultimately, however, this issue speaks less to how “gift” should be defined than to how gifts, once identified, should be valued for tax purposes. Even accepting

\textsuperscript{185} CRA document no. 2000-0053175, February 21, 2001. The CRA concluded that such an arrangement would not be a gift because of the receipt of a benefit by the donor from a third party. However, in CRA document no. 2000-0051255, February 13, 2001, the CRA opined that an incentive from a third party does not vitiate a gift provided that the incentive is available to both those who merely consider making gifts and those who actually do so. The two documents, written a week apart, are not altogether consistent.

\textsuperscript{186} Colombo uses this phrase in the context of a similar discussion: see supra note 23, at 693.

\textsuperscript{187} Levmore, supra note 162, at 411.
that the tax-receipted portion of a gift should not exceed the extent to which a donor is impoverished, the defining characteristic of a gift under subsidy theory remains that it is a transaction that enriches a charity. Building an impoverishment requirement into the definition of a gift is unnecessary and undesirable. Doing so risks clouding the meaning of “gift” without achieving anything that cannot be achieved through provisions that net out benefits supplied by third parties at the stage of valuation.

Gifts and Free Riding

Some subsidy theorists have advocated other restrictions on the doctrinal test for gifts. John Colombo, for example, argues that the primary function of the tax concessions for charitable gifts is not to subsidize charities per se but to correct for the underfunding of charities caused by market failure and in particular by free riding. In his view, the root cause of underfunding can be addressed by providing a limited tax incentive to induce donations to charity, which would apply only where taxpayers might otherwise free ride. He therefore concludes that “gift” should be defined such that the tax concessions for charitable gifts are targeted exclusively at the types of transactions that leave charities vulnerable to free riding and are denied to all other transactions. Specifically, Colombo concludes that only “transactions that are likely to suffer free-riding effects” should qualify and, conversely, that “transactions that are not likely to suffer such effects” should be disqualified.

Colombo does not explicitly define what he means by “transactions that are likely to suffer free-riding effects”; indeed, it seems counterintuitive to refer to a transaction as being vulnerable to free riding. Free riding occurs where the goods and services provided by a charity are consumed either without any payment or for a lowball payment. When a free rider fails to make any contribution, free riding manifests not in a particular kind of transaction, but rather in the complete absence of a transaction. The transactions that Colombo would disqualify as a gift are those (which he labels as “transactions characterized by market failure”) that leave the amount (if any) of a charitable donation entirely to the discretion of the individual. Colombo’s argument is not so much that this type of transaction is vulnerable to free riding, but rather that a charity is vulnerable to free riding to the extent that it relies on this type of transaction for its funding. Where the end users of charitable programs are free to decide whether and what amount to contribute, the concern is that they are likely either to contribute nothing at all or to lowball—that is, to free ride.

Translating this observation into a doctrinal test for charitable gifts, Colombo begins with the observation that mutual exchange transactions should not qualify. His reasoning is that a “nonprofit organization [that] did nothing other than enter into contractual exchanges” would not need any government subsidy because “no

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188 Colombo, supra note 23, at 698.
189 Ibid., at 699.
190 Ibid.
market failure would exist.” What he means by this is that exchange transactions do not leave charities vulnerable to free riding. By their nature, these transactions are such that it is not possible to consume a good or service without payment, and the market will operate such that the transacting parties can be expected to agree on a price that corresponds to the value of the goods or services exchanged. There is therefore no market failure in relation to such transactions that needs to be remedied through a tax concession. In contrast, a charity that relies for its funding on non-exchange transactions (gifts as defined in common law) is vulnerable to free riding because this form of transaction leaves open the possibility that potential donors may choose either to not contribute or to undercontribute. Colombo does not go so far as to explicitly restrict the meaning of “gift” to transactions that take any particular legal form, but common-law gifts epitomize the kind of transactions that he argues need to be induced through a tax incentive in order to minimize underfunding caused by free riding.

Colombo then applies this reasoning to what he calls “quasi-purchase transactions.” By this he means arrangements involving a fixed fee schedule that dictates how much a donor must contribute in order to “purchase” a naming privilege of some sort—for example, a commemorative brick or tile, or a named classroom, building, research chair, etc. These transactions currently qualify for tax concessions (without any discount for the value of the naming privilege) under both Canadian and US tax law. Colombo argues that subsidy theory does not support this result. Since the naming privilege is exclusive to those who make the specified gift, quasi-purchase transactions are immune to free riding. No one can negotiate a lowball price or consume the naming privilege without making the specified contribution. Therefore, to the extent that a charity relies upon quasi-purchase transactions for funding, it will not be underfunded. For that reason, Colombo argues, these transactions should not qualify as charitable gifts, nor should other, similar arrangements.

There is an intuitive appeal to Colombo’s argument, but it is not without problems. His argument is based on the prediction that a tax concession narrowly targeted at transaction types that leave charities vulnerable to free riding will alter behaviour sufficiently to offset underfunding caused by free riding. This does not necessarily follow. Think of free riders along a continuum. At one end of the continuum are

191 Ibid.
192 Ibid., at 661 and 663-64.
193 The CRA has observed that naming rights will have a nil value provided that there is no “prospective economic benefit” associated with the naming rights (whatever that means): see CRA document no. 2005-0130381R3, January 1, 2005; CRA document no. 2005-0110701R3, January 1, 2005; CRA document no. 2006-0218471R3, January 1, 2007; and CRA document no. 2003-0043013, January 1, 2003. Prior to the split-receipting rules, the CRA consistently observed that naming rights were not consideration. See, for example, CRA document no. 9731345, February 25, 1998; CRA document no. 2001-0069965, supra note 84; and CRA document no. 9613015, September 24, 1996. For the US position, see Colombo, supra note 23.
194 Colombo, supra note 23, at 699-700.
people who would not free ride even if there were no tax concessions for charitable gifts. At the other end of the continuum are people who will free ride even with the tax concessions for charitable gifts. In between are people who will be induced by the tax concessions either to not free ride or to at least reduce the measure of their free riding. What would happen if the availability of the tax concessions for charitable gifts were restricted, as Colombo argues it should be, to transactions that leave charities vulnerable to free riding? Such narrowly targeted tax concessions would remedy underfunding caused by free riding only if they sufficiently altered the behaviour of those potential donors who would be induced away from free riding to compensate for those who would remain indifferent to the incentive and continue to free ride. Colombo offers no evidence to suggest that this result would follow. Therefore, even accepting that the sole function of tax concessions for charitable gifts is to compensate for the underfunding caused by free riding, it is not obvious that we should restrict the meaning of “gift” to transaction types that leave charities vulnerable to free riding. A broader construction of “gift” may be required to compensate for those who will free ride notwithstanding the tax concessions.

Another problem is that it is not entirely clear from Colombo’s argument how he proposes to deal with mixed transactions that combine a mutual exchange with a gift, such as purchases from charities for consideration in excess of fair market value. On the one hand, we could rely upon Colombo’s argument to conclude that these transactions generally should not qualify as gifts because they are immune to free riding (no goods or services are consumed for low or no payment). On the other hand, this conclusion seems incorrect inasmuch as a mixed transaction is comprised of a gift element; hence, the concerns over underfunding caused by free riding apply in relation to that element of the transaction. On this view, Colombo’s theory supports recognizing as a gift that portion of the consideration that exceeds fair market value.

For example, consider a charity that relies for revenue on a fundraising dinner. The dinner is organized such that tickets are sold for a minimum of $50 each, which corresponds to the fair market value of the dinner. It is left to the discretion of the attendees whether to support the operations of the charity by purchasing tickets for an amount in excess of the $50 minimum. The dinner transaction is itself immune to free riding, because those who attend must at least pay fair market value; however, the charity itself is vulnerable to free riding inasmuch as it relies upon the dinner as a source of revenue for its charitable programming. The attendees have the option to pay only the fair market price for the dinner, without making any additional contribution. The vulnerability of the charity to free riding is much like that of a charity that relies exclusively upon common-law gifts for funding. Therefore, Colombo’s theory should allow payments in excess of $50 per ticket to qualify as gifts.

If it is correct that Colombo’s model allows for the recognition of the gift element of a mixed transaction, then his conclusion that quasi-purchase transactions should be disqualified becomes controversial. The only unique issue raised by quasi-purchase transactions is that they are difficult to value because there is generally no parallel market for naming privileges outside the charitable sector. It is therefore very difficult to determine what, if any, portion of the required gift exceeds the fair
market value of the naming privilege. Colombo’s model appears at first blush to avoid these issues. If disqualifying quasi-purchase transactions as gifts is simply a matter of concluding that these transactions are immune to free riding, then perhaps Colombo has provided a way to avoid having to delve into the difficult issue of valuation. However, when his argument is deconstructed, it becomes apparent that it is ultimately based not on a new conception of gift, but rather on some assumptions regarding the value of naming privileges.

Accept for the sake of argument Colombo’s assertion that a fixed fee schedule prevents a donor from acquiring a naming privilege for a lowball price. Colombo is content to conclude from this that no charitable gift occurs. However, where a lowball price is ruled out, all that can be concluded is that the charity has not made a gift to the donor—that the donor got what he or she paid for and no more. This only takes us so far. To rule out a charitable gift, it is necessary to determine whether the donor got what he or she paid for and no less; if the value of the naming privilege is less than the transaction price, the donor should be considered to have made a net contribution. Colombo does not explicitly address this question, perhaps because he is willing to simply accept that naming privileges are generally worth whatever charities ask for them—that a fixed fee schedule is evidence that a charity is “correctly pricing its product.” This is no more plausible than the current position of the CRA, which is that naming privileges have no market value. The point of this discussion is not to resolve how naming privileges should be valued, but rather to identify the concept of gift implicit in Colombo’s argument. If I understand his argument correctly, his ultimate reference point for whether a transaction qualifies as a charitable gift is whether (and to what extent) it economically equips a charity to provide charitable goods and services to the public. On this point, Colombo seems to agree with other subsidy theorists. He differs only inasmuch as he questions whether this test is made out in the case of quasi-purchase transactions on the basis of assumptions he is willing to make regarding the value of naming privileges. For these reasons, it is not at all clear that subsidy theory supports restricting the definition of charitable gift in the way that Colombo advocates.

In sum, subsidy theory is the more tenable of the current theories accounting for the tax concessions for charitable gifts. This theory supports a very broad definition of a charitable gift, one that includes all transactions, regardless of their legal form, that economically equip charities to perform charitable work. Some transactions that can qualify as gifts consistent with subsidy theory may nonetheless be excluded from the definition of a charitable gift in order to ration state subsidies for charities. For example, even though there is no theoretical reason why the gratuitous provision of services cannot qualify as a gift under subsidy theory, the revenue implications of extending tax concessions to such donations could support their exclusion

195 Ibid., at 699.
196 Ibid., at 700.
197 See supra note 193.
from the definition. As discussed above, other refinements could be advocated to exclude from the definition of a charitable gift donations that enrich charities but do not impoverish donors, or, as Colombo argues, to exclude quasi-purchase transactions. However, since these latter refinements ultimately speak not to the definition of a gift, but rather to the related (though separate) issue of how gifts, once identified, should be valued, there is no theoretical reason to incorporate them into the definition of a charitable gift.

ALTERNATIVE PROPOSAL FOR REFORM

A New Statutory Definition of “Charitable Donation”

At this point, it is possible to draw upon the preceding analyses and arguments, and propose an alternative reform—or, as it were, an important modification—to the split-receipting rules. A strong case can be made in favour of a new provision specifically defining what transactions qualify for the tax concessions for charitable donations. To that end, I propose that the term “gift” no longer be used to identify the range of qualifying contributions to charities. Instead, a transaction should have to meet a new statutory definition of “charitable donation” in order to be recognized for tax purposes.

This proposal could be implemented by retaining the draft split-receipting rules with the important exception of subsection 248(30), which should be replaced by an alternative provision containing the following definition of “charitable donation”:

“[C]haritable donation” means any transfer of property to or for the benefit of a qualified donee, whether by way of common law gift, trust, sale or any other form of transaction, in respect of which there is an eligible amount.

This amendment retains the split-receipting netting formula set out in the draft legislation, whereby the amount for which an official donation receipt may be issued—the “eligible amount,” as defined in proposed subsection 248(31)—is calculated by netting the fair market value of property transferred to a charity against the fair market value of the “amount of the advantage,” as defined in proposed subsection 248(32). By making the existence of an “eligible amount” the defining characteristic of a charitable donation, my proposed definition means that any transaction whereby a taxpayer transfers property to or for the benefit of a charity for either no or inadequate consideration could qualify. To implement this proposal, it would, of course, be necessary to amend all provisions in the Act that currently contemplate charitable “gifts,” including most obviously sections 110.1 and 118.1, so that they instead refer to “charitable donations.”

The fundamental difference between my proposal and the draft split-receipting rules is that my proposed definition of a charitable donation makes economic substance a determinative variable, whereas the draft split-receipting rules merely provide in draft subsection 248(30) that the presence of consideration is not an automatic vitiating factor. While this difference may be subtle, it means that my proposal goes much further toward remediating the doctrinal and theoretical incoherence of the current law.
Discussion of the Proposed Definition

My proposed statutory definition of “charitable donation” is responsive to the four principal lessons that emerge from the foregoings discussion of the gift jurisprudence, the experience to date with the proposed split-receipting rules, and the scholarly literature theorizing the tax concessions for charitable gifts.

The first lesson is that leaving the term “gift” undefined will not work to wean the gift jurisprudence off the common-law approach to defining gift. As the analysis in the earlier sections of the article reveals, the common-law conception of gift as a transfer for no consideration is deeply interwoven across several of the gift criteria enforced in the authorities, many of which, though moot under subsidy theory, continue to be enforced under the draft split-receipting rules. The only way to make a clean break from the past and to start identifying qualifying contributions solely on the basis of economic substance is through a statutory definition.198 But even at that, in order to guard against the potential influence of the common law, the defined term must avoid gift nomenclature. This is why I have proposed the term “charitable donation.”199 This expression lacks any established meaning at common law that could frustrate efforts to move beyond the form-over-substance approach of the common law that has prevailed in the authorities.

The second lesson is that the common-law form of donation, which has historically been treated as a decisive factor and continues to have importance under the draft split-receipting rules, is ultimately irrelevant. The doctrinal test for qualifying contributions should instead focus exclusively on economic substance. What ultimately matters under subsidy theory is not the kind of transaction through which a taxpayer enriches a charity, but rather the mere fact of the enrichment. As revealed in my analysis of the draft split-receipting rules, the fundamental problem with these provisions is that they do not go far enough to codify this principle in the Act. Whereas reform is needed to establish (as my proposed definition of “charitable donation” establishes) that qualifying contributions include, but are not restricted to common-law gifts, the draft split-receipting rules merely codify a limited exception to the general rule that “gift” means a common-law gift. The draft rules treat donations that are not in the legal form of common-law gifts as exceptional, and thus maintain to a significant extent the association of “gift” with a particular legal form of transaction. Consistent with the analysis of subsidy theory above, my proposed reform leaves it entirely open to a donor to legally structure a donation in whatever way is appropriate in the circumstances. This will, for example, mean a common-law gift where property is unconditionally transferred to a charity for no consideration, a contractual transfer where property is transferred to a charity for inadequate consideration, and an express purpose trust where a conditional transfer of personal property is made to a charity. That donors would be at liberty under my proposal to structure donations using any of these transaction types may not seem

198 Duff has also pointed out the desirability of a statutory definition: see supra note 23, at 96.
199 Duff, ibid., has suggested the alternative term “qualifying contribution.”
like a substantial improvement to the law, but that largely reflects just how counter-intuitive the current law is in its fixation on legal form.

The third lesson is to avoid the mistake of clouding the definitional question with issues that can be better dealt with through valuation rules or targeted anti-avoidance rules. Since economic substance should be treated as a decisive factor, many of the variables that have assumed importance in the gift jurisprudence should no longer be enforced as definitional criteria but should instead speak to valuation. As the analysis of the case law reveals, the authorities have been preoccupied with determining whether putative gifts were in reality payments made in exchange for goods or services, such as educational services, 200 ski lessons, 201 etc. The status of these transactions as gifts has been attacked through the enforcement of the common-law view that gift means a transfer for no consideration. This was most obvious through the enforcement of a no consideration rule. However, the authorities have also developed a host of other tools for disqualifying exchange transactions as gifts, including doctrinal tests focusing on donor intent, voluntariness, and motive. Under these tests, involuntariness and selfish motives have been treated as vitiating factors because they have been viewed as proxies for mutual exchange transactions. The central question—whether the taxpayer contributed more than he or she took back in the form of goods or services—has been entirely emasculated by the enforcement of these criteria. The only way to identify charitable donations on the basis of economic substance is to entirely remove these variables from the definitional criteria and to consider them at the stage of valuation, which is what my proposed definition of “charitable donation” achieves.

Since identifying gift transactions is distinct from valuing them, the concerns about donee enrichment versus donor impoverishment and the difficulties with Colombo’s “quasi-purchase” transactions are not reflected in my proposed definition. Addressing what are essentially valuation issues through definitional criteria would only serve to confuse the meaning of “charitable donation.” Similarly, concerns over abusive donation schemes are better addressed using anti-avoidance rules that target these transactions on the basis of their shared qualitative criteria. Weeding out abusive transactions by requiring all donations to pass a generous motive test (as the draft split-receipting rules do) would serve more than anything else to confuse the meaning of “charitable donation.” This is why I have proposed retaining draft subsections 248(31) and (32). While the drafting of these provisions is excessively broad in some respects, 202 they are defensible in principle. The receivable amount of donations is reduced under proposed subsection 248(32) not only by consideration received by donors directly from charitable donees, but also by other amounts

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200 See supra note 57.
201 See Burns (FCA), supra note 13.
202 Specifically, the definition of the “amount of advantage” in proposed subsection 248(32) includes amounts that are consideration, gratitude, or “in any other way related to the gift.” In my view, this drafting could be fairly criticized for being too open-ended.
received as gratitude for donations but not necessarily from charitable donees. This ensures that the receivable amount of donations corresponds to the extent of the donor’s impoverishment as a result of making the donation. As I have suggested above, this treatment is defensible under subsidy theory. Also, the netting formula set out in proposed subsections 248(31) and (32) nets out limited-recourse debt (which others have generally endorsed as an effective way to deal with abusive leveraged gift schemes). This ensures that the receivable amount of donations corresponds to the extent of the donor’s impoverishment as a result of making the donation. As I have suggested above, this treatment is defensible under subsidy theory. Also, the netting formula set out in proposed subsections 248(31) and (32) nets out limited-recourse debt (which others have generally endorsed as an effective way to deal with abusive leveraged gift schemes).

None of these provisions compromise the improvement to the law associated with my proposed definition of “charitable donation.”

The fourth lesson, one that is implicit in the discussion of subsidy theory above, is that the tax concessions for charitable donations represent tax expenditures rather than structural, income-defining provisions of the Act. The public cost of such concessions in terms of forgone tax revenue is at least one factor that has to be kept in mind when determining what donations should qualify. While my proposed definition of “charitable donation” broadens the range of qualifying transactions, it includes only those transactions that entail transfers of property to charities. It therefore continues the current practice of not recognizing donations of services. There is no theoretical basis for continuing this exclusion. If, as subsidy theory contends, the rationale behind tax concessions for donations is that they subsidize the good works of charities, it would be theoretically coherent to include donated services in the definition of “charitable donations.” However, the revenue implications of recognizing donations of services and the heightened difficulties associated with valuing and auditing such donations are plausible reasons to continue their non-recognition.

Limitations of the Proposed Definition

Admittedly, the definition of “charitable donation” that I have proposed will not solve all of the problems with the tax treatment of charitable gifts. In particular, the confused treatment of distributions from trusts to charitable beneficiaries will generally remain unresolved. This problem, which is the product of the CRA’s ambivalence as to whether express trusts should be treated as conduits or as individuals for the purposes of the charitable gift provisions, cannot be resolved simply by enacting a new definition of “charitable donation.” Similarly, some of the tax problems identified above in relation to donation arrangements in which charities are appointed trustees of purpose trusts will remain unresolved. For example, my proposed statutory definition clarifies that a charitable donation is made when a settlor transfers

203 See Sandler and Edgar, supra note 7, at 2212-14.

204 For an argument that donations of services should be recognized, see Duff, supra note 23, at 66 and 96; and McDaniel, supra note 125, at 396.

205 The definition of “charitable donation” that I have proposed would, however, resolve at least some of the concerns in this area. For example, the CRA’s position that a transfer of additional property to an existing trust in which a charity has a beneficial interest is not a gift because it entails no additional transfer of property to the charity (see supra note 79 and associated text) would no longer be tenable because the definition I have proposed extends to transfers of property to or for the benefit of a charity.
property to a charity to hold as trustee of a charitable-purpose trust, but leaves unresolved whether this donation arrangement creates a new taxpayer—the purpose trust—separate from its charitable trustee. Nevertheless, the reform that I have proposed addresses the root cause of the underdeveloped state of the law in relation to donation arrangements involving express trusts. I speculated earlier that the law pertaining to these arrangements has been left to languish at least in part because of the traditional association of the meaning of “gift” with transactions in the legal form of common-law gifts. By reorienting thinking away from this view and toward the more theoretically sound view that “gift” means a transaction that has a particular economic effect—the enrichment of a charitable donee—my reform removes the blinders that are responsible for the poorly developed state of the law in relation to donation arrangements involving trusts. The statutory definition that I have proposed thus paves the way for future reform in relation to these donation arrangements.

Adopting the statutory definition of charitable donation that I have proposed would solve many problems, but it would also raise new ones requiring changes in some of the CRA’s administrative practices. This is true primarily in relation to the valuation of donations. The historical emphasis on legal form, though theoretically specious, had the benefit of avoiding some highly difficult valuation issues. For example, since a fee for service represents a quid pro quo, there has historically been no need to determine whether the fee charged by a charity corresponded with the value of the service provided. The transaction could be disqualified as a gift solely on the basis that the transaction was one of mutual exchange. This is not the case under the economic substance test that I have proposed. Under this test, it is necessary with every transaction involving a charity, including a fee for charitable services rendered, to assess the adequacy of consideration. Some very difficult valuation issues will be raised because many of the services for which charities charge a fee are not provided generally in the market, making it difficult to determine the true economic substance of these transactions. How, for example, do we conclude whether a university student receives value commensurate with his or her tuition payments? It may therefore be necessary to adopt some blunt administrative rules, such as a rule deeming that fees for charitable services correspond with the value of the services received. The definition of “charitable donation” that I have proposed may also make it increasingly difficult for the CRA to maintain its current position that naming privileges have no value. Presumably, this fiction was initially adopted by the CRA because it was the only way that donations in exchange for naming privileges could qualify as gifts defined as transfers for no consideration. However, under my proposed statutory definition of “charitable donation,” the issue becomes exclusively one of netting the value of what is contributed against the value of what is taken back. The impetus for maintaining the fiction that naming privileges categorically

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206 Subsection 104(1) establishes as a general rule that a trust is a separate individual and thus a separate taxpayer. Would this rule apply here?

207 See supra note 193.
have no value will wane under this framework. The administrative problem this raises is that assigning value to naming privileges is bound to be an arbitrary exercise. Whereas the CRA currently assigns naming privileges a nil value, and Colombo essentially argues that they are worth whatever donors pay for them, the true value probably lies at some indeterminate point between these positions. Since these sorts of difficult valuation concerns will take on a heightened importance under the definition of “charitable donation” that I have proposed, it is inevitable that certain of the CRA’s administrative practices surrounding valuation will need to be revisited.

The reform that I have proposed thus does not provide all of the answers. Some might even say that, though the definition of “charitable donation” that I have proposed remedies the speciousness of the form-over-substance orientation of the status quo, it substitutes the imprecision of an economic substance test. Be that as it may, by directing attention away from the theoretically irrelevant issues that have confused the jurisprudence (such as the legal form of donations, the presence of consideration, voluntariness, motive, and donor intent) and focusing on economic substance, it will at least ensure that the right questions will be asked in respect of putative charitable donations.

CONCLUSION

The absence of an administrable and theoretically sound doctrinal definition of “gift” has been a longstanding problem. Mockler observed back in 1962 that it was “difficult to state” a “precise definition of gift” owing to “confusion in this area of the law.”\(^{208}\) More recently, Zweibel criticized the tax treatment of charitable donations on the ground that “it lacks, as a basis, a comprehensive definition of charitable gift that incorporates tax policy considerations.”\(^{209}\) The split-receipting rules were meant to remedy this state of affairs, and to a very limited extent, they are capable of succeeding. These rules resolve the ambiguity over whether consideration automatically disqualifies donations as gifts. However, they leave unaddressed many ambiguities that plague the gift jurisprudence and introduce new sources of confusion. Common-law gift criteria that were historically applied to enforce the common-law conceptualization of gifts as transfers for no consideration continue to be enforced. It is not at all clear what the relevance of these criteria continues to be, nor is it clear what exactly they require. Alternative statutory reforms are needed to address the problems identified in this article. Such reforms should include the adoption of a statutory definition of “charitable donation,” formulated to reflect a focus on the economic substance of transactions with charities. In this article, I have provided the theoretical basis for such a definition and suggested wording that would address concerns with both the current law and the proposed amendments.

\(^{208}\) Mockler, supra note 8, at 375.

\(^{209}\) Zweibel, supra note 8, at 419.