

# Dancing the Intricate Tango: Charities and Donors Take the Floor

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## Introduction

In a dramatic reversal, the Ontario Government has changed its position regarding the control and management of the McMichael Canadian Collection. The Kleinberg Ontario Gallery houses a major collection of works by the Canadian Group of Seven and some related artists.<sup>1</sup> A majority of these paintings were donated by art patrons Robert and Signe McMichael. After engaging in litigation at two levels of the Ontario court system, the Government has introduced new legislation, the *McMichael Canadian Art Collection Amendment Act*, 2000, Bill 112, which seeks to honour the McMichaels' original vision, which was set out in an *Agreement*, at the time of the original gift in 1965.

## The McMichael Saga

The controversial saga began in the early 1950s when the McMichaels started to collect paintings by artists whose work, they believed, enshrined the natural beauty of Canada and had marked the beginning of a new school of art. These artists included the Group of Seven and several of their contemporaries and related artists, including Tom Thomson. The McMichaels were also prescient in their collection and appreciation of First Nations art. By an *Agreement* signed in 1965 by the then Premier of Ontario John Robarts, the McMichaels gave their art collection of 194 works, their log-and-fieldstone house and 14 acres of land to the Province. From the very beginning, the McMichaels sought and obtained absolute assurance from the Ontario Government that the essential character of the Collection would always be preserved. Initially, the McMichaels were closely involved in the operation of the Gallery, acted as managers and curators, and sat on the Advisory Committee which made decisions regarding acquisitions. After the beginning of the 1980s, the role of the McMichaels was reduced significantly by legislated amendments to the original 1965 *Agreement*.

The McMichaels felt a "deep personal hurt and betrayal".<sup>2</sup> What followed was over 17 years of intermittent legal wrangling which finally culminated in two court cases. In the first instance,<sup>3</sup> in November 1996, Grossi J. of the Ontario Court's General Division found in favour of the McMichaels and ruled that the 1965 *Agreement* was in full force and effect and that the superceding legislative amendments did not override its terms. He ordered the Gallery to abide by the terms of that the *Agreement*. However, upon appeal,<sup>4</sup> in November 1997, a

majority of the Ontario Court set aside the judgment of Grossi J. The Court held that when Robert McMichael resigned as Director in October, 1980, "he contracted to retire from operative decision-making and to assume an honorary role". The Court also noted that the staff of the Gallery were opposed to Robert McMichael's treating the Collection as "his private fiefdom, albeit for the benefit of the public".

### **The Current Situation**

Since the gift was made over three decades ago, the circumstances under which the Gallery operates have changed significantly. The original collection has grown to 6,000 works, the museum space has expanded 25-fold and there is a staff of more than 40. Also, the Ontario Government now provides 42 per cent of the gallery's operating budget of 6.4 million dollars. The staff of the Gallery felt that a public gallery has the responsibility to reflect the "cultural heritage of Canada, responding to changing times and constituency of public ownership". In a public collection the curator, as the person responsible, "must look to historical interactions, evolutions, contents and contributions of all artists".<sup>5</sup> The staff argued that a public gallery, even if focused on a particular area, had an obligation to reflect the multiplicity of public opinion. Private likes and dislikes, they felt, must be set aside and only the most objective criteria should be used in deciding the content of a collection.

### **New Legislation**

Not surprisingly, the proposed legislation by the Ontario Government to reinstate the original version of the McMichaels' *Agreement* and restore their position as trustees and members of the Advisory Committee, has provoked a flood of outrage from the arts community.<sup>6</sup> Curatorial discretion, the arts community argues, is sacrosanct and should not be impeded and they also fear that the Collection might become fossilized in time. To counter this argument, supporters of the McMichaels have argued that in many parts of the world there are successful galleries housing private collections, e.g., the Rodin and Picasso museums and the Frick Collection in New York and the Oskar Reinhart Collection in Switzerland.<sup>7</sup> They see the new legislation as finally righting the wrong done to the McMichaels for a breach of faith by previous Ontario Governments.

Many members of the arts community are also concerned that the new legislation sets a bad precedent because it permits the government to get involved in the actual running of the Gallery and thus sets the stage for political interference. In their view, the provisions of this new legislation are ominous. They will give the Ontario Minister of Culture, Citizenship and Recreation the authority to choose the director, grant approval to amendments of bylaws, and be involved in the financial management of the Gallery. Apart from these considerations, the Gallery will be obliged to divest itself of over 3,000 works of contemporary Canadian art that the McMichaels feel should not form part

of the Collection. (This includes a sculpture by John McEwen titled “Babylon and the Tower of Babel, which the McMichaels have called an “eyesore”.) Critics believe the divestment of these works will cause several problems. First, the donors of the works in question may feel wronged, especially so if they have donated their works of art based on the understanding that they would be displayed as part of the Collection. Second, since most donors have already received tax receipts, it is unlikely that these gifts will be returned as it would be exceedingly difficult to unravel these transactions. Robert McMichael has suggested that the offending works might be transferred to the Ontario Heritage Foundation which, even if it were possible, might still leave donors feeling aggrieved.

### **Advent of the New Benefactors**

The question that arises is whether the McMichael case is unique, because of the significance of the gift of Group of Seven paintings and the negotiations that took place directly with the then Premier. The answer may be that although it is highly unlikely that any institution would agree to be tied to such onerous conditions today, the pendulum appears to be swinging towards increased donor involvement after gifts are made. Witness the new trend of benefactors wishing to make major gifts who approach charities with the same expectation of hands-on management that they bring to their businesses and stock portfolios. In other words, today’s wealthy philanthropists are looking for rapid, tangible and quantifiable returns. The new philanthropists are accustomed to calculating total return on their investments and they bring the same cast of mind to their charitable donations. They look for *return on philanthropic dollars*. A possible difference between the McMichaels and the new philanthropists is that while the McMichaels wished that things had remained the same, the new philanthropists don’t necessarily insist on maintaining the *status quo*. After all, it is their sheer dynamism that enables them to succeed in the New Economy where the survival of their companies depends upon change and innovation. However, both the McMichaels and the new enterprising philanthropists, share a wish to continue to exercise some degree of control after they have donated their properties.

In the cover story of a recent issue of *Time* magazine,<sup>8</sup> the authors aptly summarize this trend as “Enterprising Philanthropy”, an approach whereby the New Economy millionaires and billionaires are not just giving record amounts, but “they’re making sure they get more bang for their donated bucks”. Having transformed the way in which North America does business, these new philanthropists are taking the same innovative approach to philanthropy. They draw from their experience as entrepreneurs and venture capitalists, do extensive research and ask a lot of questions before giving. The bottom line is that they demand results and accountability. To achieve these outcomes, the new philanthropists expect to be very hands-on and to form partnerships with charities and not-for-profits. They don’t simply write cheques, but also share techno-

logical expertise derived from running their own “lean and mean” organizations.

### **Enterprising Philanthropists**

These new philanthropists, as a result of their innovative genes, like to identify lacunae in the social service structure. They often bypass traditional charities and create private foundations to fill what they perceive as “unmet needs”<sup>9</sup> although they could probably, just as effectively, attain their philanthropic objectives by using the conduits of existing public community foundations. Experience in the United States has shown that sometimes after two or three generations, private foundations fizzle out and have to be rolled into public community foundations in any case because heirs have lost interest in administering the foundation or its continuing operations has become impractical for other reasons. While it is laudable and exciting to create new charitable vehicles, it is also well worthwhile to support existing charities that provide funding to old standbys such as food banks and women’s shelters; not to overlook the core funding support provided by the United Way, which although not, perhaps, glamorous, is nevertheless essential to the maintenance of a civil society.

When the new philanthropists have identified a cause which they wish to support, they need to seek out a charity which best fits the bill. In the United States, this has spawned a new service which performs the due diligence for such donors. Such services review a number of factors, such as the quality of leadership provided by a charity and the impact of its work. They also examine the ratio of administrative expenses to the dollars actually put to work for the cause. To meet this increased demand from donors for accountability and transparency, charities will have to ensure that proper governance structures are in place and that adequate budgetary controls exist. Since the new donors are results-orientated, there is also a paramount need to conduct independent audits to evaluate and review the impacts of programs.

### **The Canadian Scene**

The new trend of increased donor involvement is also evident in Canada as witnessed by the \$15 million donation of businessman Joseph Rotman to the business school of the University of Toronto.<sup>10</sup> The gift is to be made in installments over 11 years subject to the understanding that an installment can be withheld or redirected if the Rotman Foundation feels that the university’s faculty of management is veering from *the shared vision* with the donor and failing to pursue excellence as a recognized international institution of quality. In accepting this gift, the university believes that by careful negotiation, it has preserved its academic freedom while still honouring the vision of the donor.

From an institutional perspective, charities and not-for-profits favour discretionary gifts so that they can use their accumulated experience and expertise

in disbursing gifted funds. They would much prefer donors to be hands-off. However, the reality is that, increasingly, donors are choosing not only to make designated instead of discretionary gifts but are also seeking to make larger gifts conditional upon significant donor involvement. Thus charities and not-for-profits have their work cut out for them to educate both existing and potential donors about the importance of the work that they do.

### **How can charities protect themselves?**

While it is rare for gifts to result in a protracted dispute as has happened in the McMichael case, it is still very important to have safeguards in place to avoid damaging misunderstandings from developing later on between charities and donors. If both parties work closely together, they can find creative solutions which respect the mission and strategic objectives of the charities while also carrying out the intent of the donor.

Some of these safeguards include:

1. *Gift Acceptance Policies:* For a start, all charities need to create or to dust off their Gift Acceptance Policies to ensure that they are relevant and reflect the vision, mission and values of the organization.<sup>11</sup> It is also important to be able to walk away from gifts which are not in keeping with this mission and these values. A good example is a gift to an art gallery with an unacceptable condition that the art object be permanently displayed.<sup>12</sup>
2. *Negotiation of Agreements:* It is particularly important that the charitable purpose be expressed in terms as general and flexible as possible and not be limited to very specific terms that donors might desire. This is especially true of long-term gifts. For example, it would be better not to make a gift for the purpose of finding a cure for a specific disease such as asthma, as a cure for that disease may become available within a few decades. A more general gift for the purpose of seeking a cure for respiratory diseases would be preferable.
3. *Power to Vary Language:* A lot of potential problems can be avoided by inserting a power-to-vary clause in the endowment agreement. Such a provision would help to maintain the validity and relevance of the gift over the long term.<sup>13</sup> A typical power-to-vary clause provides for the amendment of the purpose of the endowment with the mutual agreement of the donor and charity while the donor is alive and unilaterally by the charity after the death of the donor. The endowment fund would still continue to carry on the name of the donor and follow the original intent as closely as possible.
4. *Continuing Stewardship:* Better one-on-one communication and keeping donors informed on a continuing basis about how their gifts are being used are essential for effective donor involvement. A good

example of this would be to link the donor who creates a scholarship to its recipients and to let the donor know how the careers of recipients have progressed. In a striking case, an ingenious Director of Development in an architectural faculty sent the donor photographs of buildings designed by recipients of his scholarships.

5. *Building Rapport*: Closer ties with donors through advisory services can yield mutually satisfying results. When the donors understand and avail themselves of the expertise of the charity in researching worthwhile community causes, they then have the reassurance that the donation has been put to good use. The charity benefits because it has assisted in creating a useful contribution to the community.

Putting all these measures into place will undoubtedly require increased staff resources and their reallocation by charities. This is no easy matter given current cash-strapped budgets. The judicious use of technology can help charities substantially to reinvent themselves and to improve the way in which they interact with donors in the future.

### **A Balancing Act**

As charities and donors negotiate gift agreements, they walk a fine line between their varying interests. The first step is for charities to acknowledge their moral obligation to fulfil the intent of the donor while at the same time giving the organization adequate flexibility to grow and adapt to changing conditions. The second step is to provide meaningful involvement for the donors in the work of the charity while not ceding the autonomy of the Board to decide upon institutional policies and maintaining its organizational integrity.

In the new era of philanthropy, partnerships between charities and not-for-profits and donors will be the order of the day. Often we wish to believe that donors give because of their absolute dedication to the cause or because of tax benefits. Although this may be true to some extent, it is interesting to note the wise observation of Ian Thom, senior curator at the Vancouver Art Gallery: "I would love it if people gave works on the basis of *ars longa, vita brevis*, with the idea of contributing to something that would endure".<sup>14</sup> However, in reality, he adds, "But people don't think that way. They react largely on the basis of their feelings about the people they are dealing with". Relationship building is critical. An intricate tango must be danced while building sound relationships between institutions and donors.

### **FOOTNOTES**

1. *The Globe and Mail*, Friday, June 23, 2000, at A1.
2. *The Globe and Mail*, Thursday, July 13, 2000, at R3.
3. *McMichael v. Ontario* (1996), 31 O.R. (3d) 196 (General Division).
4. *McMichael v. Ontario* (1996), 36 O.R. (3d) 163 (Ontario Court of Appeal).

5. See <http://www.mcmichael.on.ca/>
6. *The Globe and Mail*, Wednesday, June 28, 2000, at A17.
7. *Supra*, footnote 2.
8. *Time* magazine: “A New Way of Giving”, July 24, 2000, Vol. 156. No. 4, at p.1.
9. *Time* magazine: “A New Take of Giving”, December 21, 1998, Vol. 152. No. 25, at p.2.
10. *The Globe and Mail*, Saturday, February 1, 1997, at A9.
11. For an extensive discussion of this topic, refer to Shamin Lalani, “Looking a Gift Horse in the Mouth” (1997), *The Philanthropist*, Vol. 14, No. 1, at 45–55.
12. *The Globe and Mail*, Saturday, November 8, 1997, Section E, at E1.
13. Frank Minton and Lorna Somers, *Planned Giving for Canadians* (Somerset 2<sup>nd</sup> ed. 1997), at 55–62.
14. *Supra*, footnote 12, at E3.