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**STEP CANADA –
OTTAWA BRANCH
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**EVOLVING TRENDS IN
PHILANTHROPY AND PLANNED
GIVING: MORE THAN JUST
CHARITABLE DONATIONS**

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INTRODUCTION

- The face of philanthropy and planned giving is evolving
- This is in part due to rapid changes in information technology, particularly on the internet and social media, in addition to the changing character of donors through shifts in demographics, as well as a change in donor expectations
- Donors today are also interested in funding innovative projects through inventive methodologies
- This presentation explains the ways in which philanthropy and planned giving are changing and what professional advisors need to know in order to keep abreast of what is happening

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OVERVIEW

- Funding Social Enterprises
- Funding Social Investments
- Funding Public Policy Dialogue
- Funding Registered Journalism Organizations
- Donor-Advised Funds
- Cryptocurrency Donations
- Crowdfunding
- Sponsorship versus Donations
- Cause-Related Marketing
- Select Case Law Update

FUNDING SOCIAL ENTERPRISES

- Charities are able to participate in social enterprises to a limited extent and as such are looking to attract donations to fund social enterprise programs
- In its most basic form, “social enterprise” can be boiled down to mean:
 - a business dedicated to achieve a social mission, or
 - making a profit to achieve a social good
- A social enterprise is not expected to provide a significant return to the investor since the focus is on achieving a social good instead of a profit
- Social enterprises combine charitable missions, corporate methods, and social consciousness in ways that transcend traditional business and philanthropy
- The ongoing public interest in “social enterprise” in Canada is reflected in the introduction of new provincial social enterprise legislation, e.g. B.C. - Community Contribution Companies; B.C. - Benefit Companies; Nova Scotia - Community Interest Companies
- Ontario is also looking at introducing “dual purpose” legislation

FUNDING SOCIAL ENTERPRISES (CONT'D)

- Provincial social enterprise corporations are still taxable companies and therefore have no general tax incentives available for investors who make contributions of capital or loans to these corporations
- Charities, on the other hand, enjoy tax advantages in being exempt from tax and being able to issue tax receipts
- The conundrum for charities is to determine what they can do to fulfill their charitable purpose through “social enterprise” while still being compliant as a registered charity under the *Income Tax Act* (“ITA”)
- Registered charities that are not private foundations are able to carry on “related businesses” but are limited to business activities that are “linked” and “subordinate” to their charitable purposes

FUNDING SOCIAL ENTERPRISES (CONT'D)

- The following are examples of income generation by charities that can constitute a form of “social enterprise” as a direct charitable activity
 - Businesses that provide permanent employment to those with disabilities
 - Employment-related training for the unemployed, e.g. language instruction, entrepreneurial training (see CG-014)
 - Sales of goods and services, e.g. tickets to symphony, religious literature sold by a church (see CG-013)
 - Providing micro-loans and loan guarantees, e.g. to assist eligible beneficiaries in attending courses to enhance employability or to establish a business
 - Making program-related investments, which are investments that directly further the charitable purposes of the charity, and not made solely to generate a return, e.g. share purchases in for-profit company to achieve charity’s charitable purpose

FUNDING SOCIAL ENTERPRISES (CONT'D)

- The Federal Government released its Budget on March 19, 2019 (“Federal Budget 2019”) which, among other things, provided further details to establish the Social Finance Fund announced in the 2018 Fall Economic Statement, providing up to \$755 million on cash basis over a period of 10 years to provide charities, non-profits, and other social purpose organizations with access to new funding, and connections to private investors
- The investment of \$50 million over two years in the Investment Readiness Program, a pilot program of the larger Social Finance Fund, which seeks to assist social purpose organizations to successfully participate in the social finance market commenced in mid-2019
 - Organizations can access grants by applying to “readiness support partners”, such as Community Foundations of Canada and Canadian Women’s Foundation which have already launched their windows for accepting applications

FUNDING SOCIAL INVESTMENTS (IMPACT INVESTING)

- Charities may also establish a fund or receive gifts intended to undertake “impact investing”, also referred to as “social investing” or “socially responsible investing”
- The Ontario *Charities Accounting Act* (“CAA”) was amended on November 14, 2017
 - CAA applies to all charities in Ontario and provides that the *Trustee Act* (which deals with investment powers of trustees) applies to trustees holding property for charitable purposes
 - Under these amendments, charities are now permitted to make “social investments”, by applying or using trust property to both:
 - directly further the purposes of the trust; and
 - achieve a “financial return” for the trust

FUNDING SOCIAL INVESTMENTS (CONT'D)

- In April 2018, the Ontario Public Guardian and Trustee (“OPGT”) released the “Charities and Social Investments Guidance” (the “Guidance”)
 - The Guidance clarifies that “financial return” is not required to be at market rates, and, depending on the terms of investment, it may not require the re-payment of the invested capital
 - This suggests that even where the investment results in a partial loss of capital, it may still qualify as a social investment as long as the investment was directly furthering the charitable purpose of the charity
- Before a charity makes a social investment, it is important that the charity understands the legal issues that need to be considered in undertaking social investments, some of which are discussed on the next slides

FUNDING SOCIAL INVESTMENTS (CONT'D)

- Charities holding “endowments” need to review their historical gift documentation to determine any limitations on the expenditure of capital, e.g. whether or not capital is to include realised capital gains
- Social investment must follow CAA requirements, for example
 - Dual purpose of furthering a charitable purpose and achieving a financial return
 - Duties of board members in making a social investment
- Liability of directors in making a social investment and how to mitigate such risk
- Does the proposed investment fall into one or more of the three investment regimes available to charities in Ontario, and the requirements of each regime: 1) ordinary investment under the *Trustee Act*, 2) social investment under the CAA, and/or 3) program-related investment under the CRA’s Community economic development Guidance (CG-014)

FUNDING PUBLIC POLICY DIALOGUE

- Charities can now participate in public policy dialogue, which may attract donors
- Amendments to the Income Tax Act in Bill C-86, *Budget Implementation Act, 2018, No. 2* (“Bill C-86”)
 - Bill C-86 that received Royal Assent on December 13, 2018 included amendments to the ITA to remove the “substantially all” test that had restricted registered charities from devoting no more than 10% of their resources on permitted political activities that were ancillary and incidental to their purposes, including gifts to other charities
 - However, Bill C-86 kept the prohibition on charities from the “direct or indirect support of, or opposition to, any political party or candidate for public office”

FUNDING PUBLIC POLICY DIALOGUE (CONT'D)

- Bill C-86 added a new definition of charitable activities that includes “public policy dialogue and development activities carried on in furtherance of a charitable purpose”
 - Explanatory notes clarified that charities’ participation in “public policy dialogue and development activities” (“PPDDAs”) is “without limitation”
- Bill C-86 also provides that PPDDAs do not become non-charitable collateral purpose
- Amendments to the ITA did not define “public policy dialogue and development activities”
 - The explanatory notes though stated that PPDDAs “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”

FUNDING PUBLIC POLICY DIALOGUE (CONT'D)

- On January 21, 2019, CRA released draft CG-027 Public Policy Dialogue and Development Activities by Charities (the “Draft Guidance”) together with a new Q&A webpage on PPDDAs by charities
 - The Draft Guidance states that “public policy” means the laws, policies, or decisions of a government, whether in Canada or a foreign country
 - PPDDAs are activities of the charity to participate in the public policy development process, or facilitate the public’s participation
 - Definition of PPDDAs confirmed to include “seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country,” as well as other activities, including disseminating information or research to the public
 - The Draft Guidance confirmed that the ITA places no limits on the quantum of PPDDAs

FUNDING PUBLIC POLICY DIALOGUE (CONT'D)

- As such, charities may devote up to 100% of their total resources on PPDDAs, provided that the PPDDAs further the charity’s stated charitable purpose
- However, PPDDAs as a means to achieve a charitable purpose, cannot become the purpose itself
- E.g., “charitable purpose” cannot “refer to influencing the laws, policies, or decision of a government”
- Rather, the purpose has to be a charitable purpose at common law, with PPDDAs simply being utilized as a means to achieve that purpose
- In addition, PPDDAs, when considered together with the charity’s stated purpose, must provide a public benefit
- However, charities continue to be prohibited from “directly or indirectly support or oppose a political party or candidate for public office,” examples of which are provided in the Draft Guidance

FUNDING PUBLIC POLICY DIALOGUE (CONT'D)

- The Draft Guidance notes that registered charities need to be aware of the intersection with other legal requirements, such as:
 - Federal and provincial lobbying and election legislation
 - The common law in different provinces, as applicable, although the Draft Guidance is unclear on this point
- While PPDDAs have been an important legislative development for charities, there are some areas of caution:
 - Watch for mission drift in charitable purposes
 - Charities will need to keep books and records of their PPDDAs, particularly minutes of committee and board meetings
 - T3010 and T2050 (now Form T1789 E (19)) require that charity must describe PPDDAs concerning how those activities relate to their charitable purposes

FUNDING REGISTERED JOURNALISM ORGANIZATIONS

- Funding “registered journalism organizations” (“RJOs”) as a qualified donee will soon be a possibility for philanthropic giving
- Federal Budget 2019 proposed tax measures to “provide support to Canadian journalism organizations producing original news”
- On June 21, 2019, Bill C-97, *Budget Implementation Act, 2019, No. 1* (“Bill C-97”) received Royal Assent, implementing the following changes:
 - Effective January 1, 2020, allowing certain journalism organizations to register as qualified donees under the new category for RJOs
 - A refundable labour tax credit for qualifying journalism organizations, applicable to salary or wages starting January 1, 2019; and
 - A temporary non-refundable tax credit for “eligible digital subscriptions” to Canadian news applicable to 2020 and subsequent taxation years

FUNDING RJOS (CONT'D)

- To qualify as a qualified donee under the RJO category:
 - The journalism organization must be a “qualified Canadian journalism organization” (“QCJO”), which is a corporation, partnership or trust that meets certain eligibility criteria and is designated by an independent panel as such
 - Eligibility requirements to be a QCJO are extensive, and include, for example:
 - the chairperson (or other presiding officer) and at least 75 per cent of the directors of the QCJO must be Canadian citizens
 - it is primarily engaged in the production of original news content
 - it must not be significantly engaged in the production of content for a government, Crown corporation, or government agency
- As qualified donees, RJOs are able to issue donation receipts and are tax-exempt entities, and can receive gifts from registered charities

FUNDING RJOS (CONT'D)

- RJOs are limited to corporations, partnerships or trusts that are “constituted and operated for purposes exclusively related to journalism”
- Any business activities that an RJO carries on needs to be related to its purposes
- RJOs are not “factually controlled by a person (or a group of related persons)”
- RJOs also have the obligations of qualified donee status, i.e., publicly listed, file annual information returns that are available to the public, issue receipts in accordance with ITA regulations, and maintain books and records as required under the ITA
 - Non-compliance with obligations may expose RJOs to monetary penalties, suspension of receipting status, or revocation of qualified donee status
 - RJOs, unlike registered charities, must report in the information return filings the names of donors that donate over \$5,000 along with the amount donated

DONOR-ADVISED FUNDS

- Donor-Advised Funds (“DAFs”) have garnered much attention lately
- A DAF is a type of charitable giving vehicle, established when a fund is created by a donor through an initial donation to a registered charity (“DAF charity”)
- The flexibility in structuring DAFs is one reason why their use has grown significantly in Canada over the last 20 years
- By 2016, in Canada:
 - There were an estimated 10,700 DAFs, holding \$3.2 billion CAD in assets, with \$300,000 CAD average fund size
 - Community foundations were estimated to hold DAFs with \$1.7 billion CAD in assets (versus \$5.8 billion CAD in total assets)
 - Private/public foundations created solely to hold DAFs estimated to have \$1.5 billion CAD in assets

DONOR-ADVISED FUNDS (CONT'D)

- DAFs are expected to continue growing in popularity in Canada, and are projected to potentially reach \$7.5 billion CAD by end of 2023
- The gift by the donor is irrevocable, and the donor receives a charitable donation receipt from the DAF charity in exchange for the gift
- Income generated by the capital in a DAF is gifted to qualified donees (most often to registered charities)
- The donor is given the unique role of making non-binding suggestions to the DAF charity regarding distribution of assets from the DAF to other charities
- However, despite this donor advice, all administrative, operational, and governance matters including compliance with the ITA and the policies of the CRA, are the sole responsibility of the DAF charity

DONOR-ADVISED FUNDS (CONT'D)

- One of the more pressing concerns regarding DAFs is how much ongoing control a donor can have over the DAF after the gift is made
- A “selling point” of DAFs in some marketing communications is that they allow the donor to have the perception of ongoing “control” over who receives disbursements from the DAFs, the amounts and timing of disbursements, and even how the assets are to be managed or invested
- There can be a “disconnect” between how DAFs legally and functionally work
- Too much donor control over the DAF after the gift has been made begs the question of whether there is legally a gift, and if it is receiptable under the ITA
- Documents creating a DAF must clearly state that
 - It is the DAF charity which administers the fund
 - The DAF charity reserves the right to not follow advice of the donor regarding how monies in the DAF are to be distributed or applied

CRYPTOCURRENCY DONATIONS

- Cryptocurrencies are “virtual currencies” that work as a medium of exchange through cryptographically secured digital records stored on a public, decentralized, distributed digital ledger such as Blockchain (said to make the data permanent and tamper-resistant)
- Blockchain technology is used for donations to charities and to trace funds to increase donor confidence
- Receipting issues
 - They are considered a commodity for income tax purposes (not “money” or “currency”) (see CRA TI 2013-0514701I7; see also CRA’s “Guide for cryptocurrency users and tax professionals”, March 3, 2019)
 - Donations in cryptocurrencies are, therefore, subject to the rules for gifts-in-kind and determination of fair market value (FMV) on the date of the donation is necessary for receipting purposes, including the deemed fair market value rule

CRYPTOCURRENCY DONATIONS (CONT'D)

- Mining cryptocurrencies by a charity, either directly or through a pooled fund, might not meet the prudent investor standard established in provincial trust legislation or alternatively may not constitute a permitted “related business”
- May 17, 2019 proposed changes treat virtual currency as “financial instrument” for GST/HST purposes, i.e. supplies of virtual currency are not taxable supplies
- Initial Coin Offerings (ICOs), which involve the charity creating its own cryptocurrency may be subject to provincial securities legislation
- Cybersecurity issues
 - Possible increased risk of hacking and real world crime (extortion and violence), due to “privacy” afforded by Blockchain technology to criminals
 - Costly mistakes if incorrect transfer because transactions are not reversible
 - Potential greater exposure of directors and officers to liability

CRYPTOCURRENCY DONATIONS (CONT'D)

- On June 21, 2019, Bill C-97 received Royal Assent, which included amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“Act”), allowing the Governor in Council to make regulations defining “virtual currency” and “dealing in virtual currencies” and amending the *Criminal Code* to criminalize reckless concealment of the origin of funds
- On July 10, 2019, regulations under the Act introduced a number of requirements for prescribed entities, including:
 - Maintenance of “large virtual currency transaction records”, and
 - Requirement for financial entities to verify the identity of each authorized user and maintaining records regarding every “prepaid payment product account”, which would include, accounts tied to prepaid cards programs and virtual currency of \$1,000 or more to be added in a 24-hour period but would exclude accounts tied to prepaid payment products, such as disaster relief prepaid cards, used for purposes of humanitarian aid by registered charities

CROWDFUNDING

- Crowdfunding involves fundraising by appealing to a “crowd” (broad group or network) of small donors, using the Internet and social media, e.g., GoFundMe
- More commonly used for specific projects with a time-limited campaign strategy
- There are various types of crowdfunding
 - Charities typically use donation-based crowdfunding (e.g. donating to a project or cause) or reward-based crowdfunding (e.g. contributing funds in return for non-financial benefits such as tickets or free gifts)
- Crowdfunding generally involves three elements: the campaigner, crowd, and platform
- Crowdfunding campaigns can be done by both charitable organizations and non-charitable organizations

CROWDFUNDING (CONT'D)

- Crowdfunding may be subject to provincial informal public appeals legislation
- The Uniform Law Conference of Canada (“ULCC”) released a *Uniform Informal Public Appeals Act* in 2011, but so far only Saskatchewan has adopted it
 - The Saskatchewan’s *Informal Public Appeal Act* was applied to the distribution of funds raised in the Humboldt Broncos crowdfunding campaign which raised over \$15 million on the GoFundMe platform
 - The ULCC recently released a Consultation Paper, seeking feedback from interested persons and organizations until January 15, 2020, for a proposed *Uniform Informal Public Appeals and Crowdfunding Act*, which revises the *Uniform Informal Public Appeal Act*
- It is possible that other provinces may also introduce similar legislation
- California recently proposed crowdfunding legislation on February 22, 2019, under Assembly Bill 1539

CROWDFUNDING (CONT'D)

- Charities should consider some of the following issues when using crowdfunding platforms:
 - What are the terms of use that the charity is accepting by using a crowdfunding platform?
 - Is the charity fully complying with applicable privacy legislation with regard to the personal information of donors, supporters, volunteers, or employees, and the personal information they share on social media and crowdfunding platforms?
 - Could the charity be exposed to liability for unauthorized sharing of data?
 - Does the charity have policies and practices in place regarding the management of personal information, such as those dealing with the proper collection, retention, use, and protection of such information?

CROWDFUNDING (CONT'D)

- Regarding third-party crowdfunding campaigns
 - If the charity or organization allows or encourages supporters to start their own fundraising campaign, is there an appropriate agreement in place to govern that relationship, such as an agency agreement?
 - Because the name of the charity is being used with the fundraising event by the third party, the charity could be seen as endorsing and/or being responsible for the event as if it was its own

SPONSORSHIP

- As an alternative to traditional philanthropy, businesses may support a charity through sponsorship because the business can claim a tax deduction for sponsorships in a similar way that they can for a donation (subject to a 75% limit for donations and a reasonableness test for sponsorships)
- Sponsorship is described by the CRA as
 - “when a business makes a donation toward the cost of a charity’s activity or event and, in return, the charity advertises or promotes the business’s brand, products or services”
- When it is intended to be a Donation - If the sponsoring business receives only the same level of recognition as other donors and receives minimal recognition, the charity may issue a donation receipt to the business for the full amount of the donation

SPONSORSHIP (CONT'D)

- When it is intended to be a Sponsorship - If the sponsoring business receives special or more than minimal recognition, then the CRA will consider this to be a sponsorship
 - Sponsorship is an advantage, and its fair market value must be subtracted from the donation amount to determine the eligible amount of the donation receipt in accordance with split-receipting rules under the ITA
 - If the value of the sponsorship cannot be calculated, the charity cannot issue a donation receipt
- The sponsoring business may be able to categorize its sponsorship costs as an advertising expense, provided that the sponsorship is “considered reasonable” and “given with the intent of generating income”

CAUSE-RELATED MARKETING

- Cause-related marketing or (social marketing ventures) are funding opportunities where a charity works in collaboration with a non-charitable partner to sell goods and/or services
 - e.g. Tim Hortons restaurants hold a “Camp Day” where it donates 100% of proceeds from all coffee purchases made on that date to support Tim Hortons Foundation Camps, which teach skills such as leadership and responsibility to disadvantaged youth
 - e.g. Stella Artois sells limited edition chalices and donates a portion of the proceeds of each chalice to water.org, a non-profit that seeks to provide access around the world to safe water and sanitation
- Often, the expenses incurred related to the venture are paid by the non-charitable partner and the charity contributes its logo or other form of intellectual property

CAUSE-RELATED MARKETING (CONT'D)

- The business, as a donor, may be entitled to a donation receipt from the charity
- However the benefit that the for-profit entity receives under cause-related marketing arrangement is considered an “advantage”, which will need to be subtracted from the fair market value of the donation in order to calculate the eligible amount of the gift for purposes of the official donation receipt
 - Some advantages may also be considered by the CRA as too minimal to affect the value of a gift, e.g. if the value of all advantages related to a gift is not more than \$75 or 10% of the amount gifted to the charity (whichever is less)
- Since it can be very difficult to calculate the value of an advantage in cause-related marketing arrangements, the CRA suggests that a charity consider whether the expenses from the cause-related marketing arrangement should be claimed as an advertising expense

SELECT CASE LAW UPDATE

The McKay Cross Foundation v ICSS, 2018 ONSC 6422 (October 30, 2018)

- Application to dismiss a claim made by plaintiffs for return of a \$100,000 donation to a registered charity, Innovative Community Support Services
- Court considered the evidence and agreement between both parties to determine if donated funds were specific purpose charitable funds
- Court found that donation was made with no strings attached; agreement was “too vague to be enforceable” and email exchanges did not indicate that donation was for a specific purpose
- Charities and donors should enter into proper gifting agreements prior to donations being made, especially if gift is intended to have a specific purpose

Faas v CAMH, 2018 ONSC 3386 (June 6, 2018); affirmed by Court of Appeal, 2019 ONCA 192 (March 11, 2019)

- The Faas Foundation and its principal (“Faas”) made an application under s.6 of the Charities Accounting Act for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds (\$1mil) donated by Faas
- In upholding the motion judge’s decision, the court found no error in the motion judge’s decision not to exercise the court’s discretion to make an order under s.6(3) of the CAA, as it was not of the opinion that the public interest would be served by an OPGT investigation
- The court also agreed with the motion judge that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH’s program and use of funds

Canada (AG) v Heffel Gallery Limited, 2019 FCA 82 (April 16, 2019); overturning 2018 FC 605 (June 12, 2018)

- Canadian Cultural Property Export Review Board had denied application to ship a painting to the UK because it met the “outstanding significance” and “national importance” (“NI”) criteria (“Test”) as per *Cultural Property Export and Import Act*
- Test is the same criteria required for an object to be a “total cultural gift” under ITA, which forms part of “total gifts” for tax purposes (and donation receipts)
- Federal Court narrowed Test by requiring an object of NI to have a direct connection to Canada, which would decrease the number of tax-receiptable cultural property items
- On April 16, 2019, Court of Appeal overturned lower court, upholding Board’s Test; an object may meet the NI test without requiring a direct connection to Canada
- On June 21, 2019, Bill C-97 received Royal Assent, amending the ITA definition of “total cultural gifts” to remove requirement of the NI criteria, as was proposed in Federal Budget 2019

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