



Carters Charity & Not-for-Profit Law Webinar

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Donor Advised Funds: An Overview of Key Legal Issues

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Introduction & Overview

- There continues to be significant interest in donor-advised funds (“DAFs”) in the charitable sector – from charities, donors, financial institutions/advisors, as well as the regulators, e.g. Canada Revenue Agency, Charities Directorate (“CRA”)
- It is timely to revisit what DAFs are at law and their key legal issues
- A more detailed review of DAFs is set out in the paper, “*Primer on Donor Advised Funds and Current Issues – Revisited*”, May 15, 2023, available at: <https://www.carters.ca/pub/seminar/charity/2023/Handout-Primer-on-Donor-Advised-Funds-and-Current-Issues-Revisited-2023-05-12.pdf>
- This presentation will review:
 - What are DAFs and Why are They so Popular?
 - What a DAF is at Law, including Recent Case Law
 - Survey of Current Legal Issues Related to DAFs
 - Practical Considerations when Working with DAFs

A. Context of DAFs – What is a DAF?

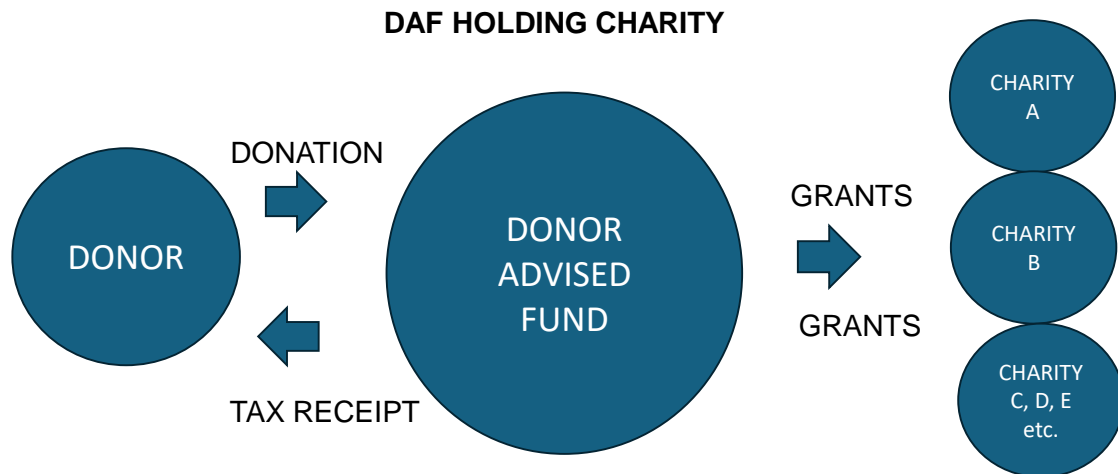
- A DAF is a type of charitable giving vehicle, established when a fund is created by a donor through an initial gift/donation to a registered charity (“DAF Holding Charity”)
- The CRA’s view is that “a DAF is a fund segregated into donor accounts, owned and controlled by a registered charity. Each account is comprised of contributions made by individual donors. Donors may provide ongoing non-binding suggestions on payouts from DAFs, but it is the charity’s sole responsibility to make such decisions.” (Source: T4033 Rev-24)
- The initial gift, and any ongoing ones, by the donor (normally a single person or family) to the DAF are irrevocable, and charitable donation receipts are issued for them by the DAF Holding Charity
- The DAF Holding Charity then makes gifts from each DAF (from any generated income, as well as possibly capital if the DAF is not perpetually endowed) to either:
 - Qualified donees (e.g. registered charities), or
 - Grantee organizations (subject to the qualifying disbursement rules)

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- In a DAF, the donor is given the unique role of making ongoing, but non-binding, suggestions to the DAF Holding Charity regarding the distribution of funds from the DAF to qualified donees or grantee organizations
- However, despite this donor advice, all administrative, operational and governance matters (including compliance with *Income Tax Act* [“ITA”] and CRA policies) related to the DAF are the **sole responsibility** of the DAF Holding Charity
 - This is because DAFs are the property of the DAF Holding Charity alone, **not** the donor
- Failure by a DAF Holding Charity to properly hold and maintain DAFs in compliance with tax/trust law could erode donor confidence and result in potential liability and credibility damage for the DAF Holding Charity

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HOW A DAF WORKS



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B. Why are DAFs so Popular Now?

- DAFs are a practical and appealing alternative for donors who do not have the ability, interest or time to operate their own private foundations
- It is relatively inexpensive to establish a DAF with a DAF Holding Charity versus establishing and then operating a private foundation
- There is also more anonymity (if desired) and flexibility in structuring DAFs for the donors

Some DAF Holding Charities do not impose minimum initial donations, or they can be as low as \$5,000, with ongoing fees also being moderate

Private foundations (unless established to facilitate flow through donations to qualified donees) are generally established with at least a \$2 - \$3 million capital asset base, and then have ongoing annual operational costs

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C. What is a DAF at Law?

1. It is a charitable gift

- A voluntary transfer of property owned by a donor to a donee, for which the donor receives no consideration

2. It could be a donor restricted charitable gift

- Unrestricted charitable gifts must be applied to a charity's charitable purposes, but no other donor restrictions would be imposed
- By contrast, restricted charitable gifts are subject to donor-imposed restrictions from the outset, which constrain or limit a charity's use of the DAF in the future

3. It must be a gift for income tax purposes to be receipted

- The CRA accepts the common law definition of a gift
- A gift which meets all ITA requirements can be receipted

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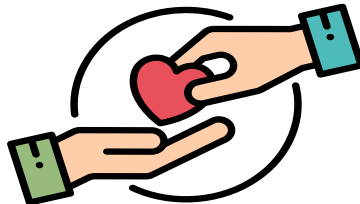
D. How Does This all Relate to a DAF?

- Original gift from the donor establishing a DAF in a DAF Holding Charity could be unrestricted or it could be subject to one or more donor restrictions, *e.g.* how long the capital is to be held, what income to be used for, *etc.*
- DAFs will then have a donor-advised "feature" added to the gift, which provides the donor (and possible successor "fund advisors" if permitted by the DAF Holding Charity) with the ability to offer ongoing advice to the DAF Holding Charity on various aspects of the DAF
 - This donor advised feature does not impose a legal obligation on the DAF Holding Charity to have to act as the donor advises
 - However, there is certainly a moral obligation for the DAF Holding Charity to consider all donor suggestions which are received as part of its decision making in relation to each DAF



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- A DAF Holding Charity must clearly inform its donors from the outset that their advice/input/suggestions are advisory only and all decisions related to the DAF are ultimately made by the Charity
 - This is imperative so that all DAF donations are true gifts at law and can be properly receipted under ITA
 - This reflects that the DAFs are the Charity's own charitable property over which it must exercise ongoing direction and control
 - If there is excessive on-going control by the donor over the gifted property, it may lead to the CRA considering the gift to be defeated or negated



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The Joseph Lebovic Charitable Foundation v Jewish Foundation, 2022 ONSC 4012 ("Lebovic Case")

- This is the first case in Canada which discussed DAFs at length and, at its essence, upheld the commonly understood conception of a DAF
- Key Facts: After the death of the original DAF donor, the donor's brother assumed responsibility as the DAF's fund advisor, which is held and administered by the Jewish Foundation of Greater Toronto ("JFGT")
- The brother brought motion to prevent the JFGT from spending a small portion of funds from the DAF contrary to his requests
- The Court found the brother lacked grounds for his motion – stating that unless restrictions are imposed at the time a gift is made, a donor is not able to later direct how any charitable gifts are spent by the recipient charity

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E. Key Legal Issues Associated with DAFs

1. Disbursement-Related Issues – “Languishing” Assets in DAFs

- The 2019 Report of the Special Senate Committee on the Charitable Sector recommended that consideration be given to:
 - “means of ensuring that donations do not languish in donor-advised funds, but are instead used to fund charitable activities in a timely fashion
- This recommendation has been criticized as conflating DAFs in Canada with certain features of US DAFs
- DAFs in the US can be used a loophole for private foundations to avoid minimum payout requirements, while this is not the case under applicable Canadian law

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- Specifically, in Canada, there are:
 - Annual disbursement quota requirements, being the minimum calculated amount that a registered charity is required to spend each year (more details are set out on next slide)
 - Inter-charity transfer rules which prohibit transfers between non-arms’ length charities for the purpose of avoiding minimum disbursement quota obligations
- Given these requirements, it is not clear why specific concerns about DAFs languishing are being raised in the Canadian context
- As a comparison, endowments and other restricted gifts provide donors with immediate tax benefits while asset distribution from the funds takes place over time
- However, it will be important to ensure the appropriate investment of any funds held in DAFs in accordance with applicable investment powers
- For more information on investment power issues, see Carters’ resource materials at: https://www.carters.ca/pub/seminar/charity/2025/CBA_Charity_Law_Conference-The_Spectrum_of_Investment_Powers_of_Charities_Including_Impact_Investing.pdf

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2. Disbursement Quota (“DQ”) Increase as of January 1, 2023

	Property* in excess of \$25,000 (foundations) of \$100,00 (charitable orgs) up to \$1 million	Property* in excess of \$1 million
DQ Rate	3.5%	5%

- However, a DAF Holding Charity meets its DQ obligations in any given year on a **charity aggregate basis**, not a **fund-by-fund** basis, although some DAF Holding Charities set their own internal fund by fund distribution rate
- Some in the sector have questioned if individual DAFs should be required under the ITA to disburse a minimum amount of income each year
- Meeting the 5% DQ could be a challenge for charities with endowments or other restricted funds on a fund-by-fund basis – might need costly court order to be able to encroach on capital or realized capital gains if not enough income is generated from the capital

**“Property” refers to the value of a charity’s not used for charitable activities or administration*

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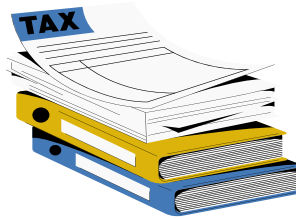
- In Canada, it is estimated that only 10% of DAFs hold assets over \$1 million
 - So, if a DQ were in theory imposed at an individual DAF level (not aggregate), a DAF Holding Charity would have lower overall DQ obligation given 3.5% DQ rate for assets under \$1 million, but this would result in excessive administrative costs for the DAF Holding Charity
- Average granting rate from DAFs in 2021 was 9.8% of assets, which is well in excess of the 5% DQ imposed on amounts above \$1 million (2023 CAGP Report)
- The ITA was amended in December 2022 to provide that: (1) admin and management expenses cannot satisfy DQ obligations: (2) charities can apply for reduction in DQ obligations but, if approved, this would be made public



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3. Changes to Annual Charity Information Return (T3010)

- In January 2024, the CRA amended the T3010 form in order to, among other matters, gather more DAF-related information
- Specifically, the current form T3010 (Rev. 24) asks the following questions:
 - Question C18 – Did your charity hold any DAFs during the fiscal period?
 - If so, then, need to provide the following:
 - (a) Total number of DAFs held at the end of the fiscal period
 - (b) Total value of all DAFs held at the end of the fiscal period
 - (c) Total value of donations to the DAFs received during the period
 - (d) Total value of qualifying disbursements from DAFs made during the period



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4. Qualifying Disbursements – Gifts to Grantee Organizations

- ITA was amended in June 2022 to allow registered charities to make qualifying disbursements to grantee organizations if 3 requirements are met:
 - a) The disbursement furthers one of its charitable purposes
 - b) The disbursement is exclusively applied to charitable activities to further its own charitable purposes
 - c) Documentation is maintained to demonstrate (a) and (b)
- DAF Holding Charities with sole charitable purpose of making gifts to qualified donees cannot make gifts to grantee organizations – a new charitable purpose(s) will be required, which takes time and CRA approval
- CRA Guidance, CG-032, *Registered charities making grants to non-qualified donees*, was released on December 19, 2023
- This Guidance imposes additional requirements on charities intending to make qualified disbursements: (1) need to focus on risk matrix and (2) accountability tools to be put in place

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5. Anti-Directed Giving Provision

- Paragraph 168(1)(f) of the ITA states that a registered charity that accepts a gift “the granting of which was expressly or implicitly conditional” on it making a gift to “another person, club, society, association or organization other than a qualified donee” may have its registered charitable status revoked
- CRA Guidance CG-032 provides some clarification on these provisions:
 - The aim of this provision is to prevent charities from being conduits, or solely a fundraising arm, for a non-qualified donee (“Non-QD”), i.e. no ability by the charity to decide on use of its resources
 - Explicitly conditional gift is where donor states that gift must be used to grant money to a specific Non-QD and, if not done, then funds must be returned
 - Implicitly conditional gift is where a charity has name of a Non-QD in its own name or purposes, thereby implicitly ensuring that the said Non-QD is sole recipient of grants from the charity
 - Charities need to communicate that donors can express program preference for use of their gifts but final decision-making authority rests with each charity
 - Could a donation to a DAF followed by a donor request that a gift be made from the DAF to a local non-profit org (i.e. non-qualified donee) as a qualifying disbursement trigger this provision?

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6. Importance of Granting Policies

- Need to ensure DAF gifts made to recipient charities are not offside of the ITA, which could result in complaints, audits and possible sanctions
- Some DAF Holding Charities place limitations on the type of qualified donees able to receive gifts from their DAFs, e.g. geographic, religious, cultural/philosophical or program-based
 - Make all of these restrictions clear to donors in granting policy or guidelines, which should then be cross-referenced in the DAF agreement itself
- Granting policies also address how gifts from DAFs can, and cannot be, used, e.g. gifts from DAFs to other charities cannot be used to pay for a donor’s ticket to a fundraising event or to pay school tuition related to donor’s children, etc.
- But not enough to just have a granting policy in place, there also needs to be ongoing monitoring and enforcement by the DAF Holding Charity
- As well, the DAF Charity should have a robust gift acceptance policy in place

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7. Successor Fund Advisors of DAFs

- A DAF Holding Charity may receive recommendations about gifts from the DAF from successor fund advisors
- Where the DAF agreement is silent, a donor's attorney (under power of attorney) or executor may have the ability to act as the successor fund advisor
- The DAF agreement (or policies which are cross-referenced in the agreement) should address various scenarios:
 - What to do if donor does not designate a successor
 - How many times can successor fund advisors be appointed
 - What to do if multiple successors give contrary grant recommendations
 - Whether successor fund advisors must only be individuals, e.g. not a corporation or a group of unrelated people

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8. Impact of “Anonymous” Donations from DAFs

It is possible for donors to a DAF to remain anonymous when the DAF Holding Charity subsequently makes a gift to a charity out of that DAF

The recipient charity may find it difficult to keep the donor informed about the effectiveness of the DAF gift

The recipient charity may also not have the information it needs to determine if it should decline the gift (e.g. because of concerns about foreign interference or conflicts of interest)

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F. Practical Advice for Charities with DAFs

- **Do your homework**

- Do appropriate due diligence so that your charity knows how to manage DAFs correctly based on trust/tax law

- **Create templates**

- Develop and implement written gift acceptance and granting policies for DAFs and other gifting vehicles
- Prepare template DAF agreements to cover various situations

- **Ensure your charity runs the process**

- Your charity – not the donor or their legal counsel – must be in control in establishing DAFs, utilizing consistent procedures as set out in the gift agreements and all related policies

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- **Be Vigilant**

- Avoid language suggesting that (1) DAFs belong to the donor, (2) donors are “clients” with “accounts” and (3) a DAF is a donor’s own private foundation

- **Identify Opportunities**

- DAFs represent opportunities for ongoing connection and engagement with donors
- DAFs could also be a new way for a charity to attract more gifts and potentially larger ones from donors
- Donors may appreciate the flexibility of DAFs
- A DAF could be structured so that the donor advice could request gifts be made to different programs within the charity from one year to the next

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Jacqueline M. Demczur, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*, *The Best Lawyers in Canada*, and *Chambers and Partners*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations* and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Charity & Not-for-Profit Law Seminars* and is a member of the CAGP DAF Working Group.

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Terrance S. Carter, B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2025), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a former member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. Mr. Carter is also a member of the CAGP DAF Working Group.


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Donor Advised Funds: An Overview of Key Operational Issues

Malcolm Burrows, Aqueduct Foundation
Nicola Elkins, Benefaction Foundation
June 3, 2025

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Overview of the CAGP DAF Working Group

- Established in January 2024 to bring together DAF foundations and other interested members of the charitable community. Big tent approach.
- Mandate:
 - Convene interested members of the charitable sector to share information and discuss issues of mutual interest related to donors advised funds and foundations.
 - Develop positions on legal and regulatory issues related to donors advised funds in Canada.
 - Develop best practice guidelines for foundations with donor advised funds.
- Membership: 27+ from Foundations with DAFs, Community Foundations, operating charities, professional advisors
- Co-Chairs: Nicola Elkins and Malcolm Burrows
- Chief Researcher & Drafter: Keith Sjogren

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What Canadian charities hold DAFs?

- Canada has approximately 300 registered charities with multiple DAFs
- In 2024, represents \$12.4 billion in assets
- Average payout rate of is 12%
- Most are public foundations
- Vancouver Foundation established Canada's first DAF in 1952, and Community Foundations are still the most numerous foundations with DAFs
- Community Foundations still most numerous. FI associated foundations are fastest growing.
- Each foundation defines its DAF based on mission and policies. For example, some just grant to qualified donees, while others have charitable programs like scholarships
- Many foundations with DAFs also have other types of funds

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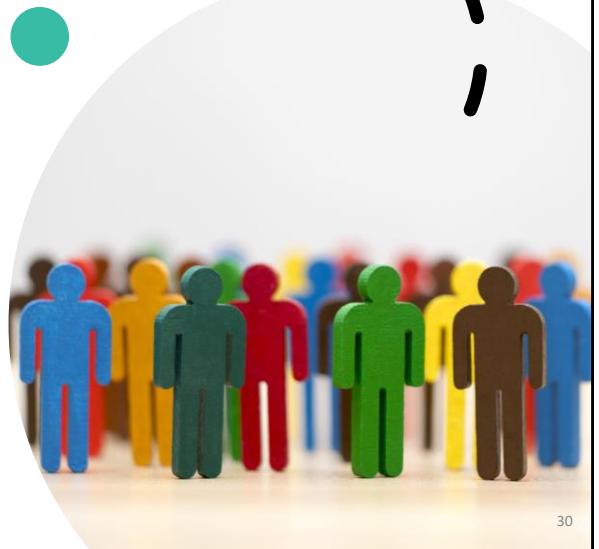
DAFs in US versus Canada

- DAFs are US invention and the launch of Fidelity's Charitable Gift Fund in 1991 changed scale and politics. Seen as financial product, not charity fund.
- Became fastest growing charitable structure due to wealth concentrations, larger donations and desire for ongoing involvement with granting.
- In US, *charities* with DAFs associated with financial institutions are called "DAFs" or "Sponsoring Charities". Critics say that they are charities in name only and too much control rests with donors.
- There have been legislative attempts to create more restrictive rules for "DAFs" and current government proposing tax on charitable endowments.
- In Canada, we have "foundations with DAFs" or "DAF foundations". The focus is charity first and Canadian charity law obligations.

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Canadian Law

1. Foundations must be exclusively charitable and dedicated to their charitable purposes.
2. Boards have a fiduciary responsibility and oversight of all charitable property owned by the foundation. Implications for investments, grants and programs.
3. Disbursement Quota is at charity level, but most foundations impose annual minimum payout rates at fund level.
4. Obligation to ensure no undue private benefit to either donors or supplier. Fair market value.
5. Public disclosure through T3010 as well as best practice standard of charitable sector.



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Donor Experience

- Donors use DAFs to unify planning and charitable giving, which typically increases commitment.
- Flexible and simple granting.
- Foundation is responsible for administrative/compliance and integrate investments, often with donor's investment advisor.
- At some foundations, support for granting and charitable programs.
- Support for larger, more complex donations, sometimes integrated with estate plan.
- Legacy funds and discretionary granting. (Not DAFs)
- Privacy

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Charity Experience

- Growing source of funding via grant. \$1 billion+ annually
- More partnerships and agency/charity funds.
- Desire for better communication about granting practices and source of grants. Assume letters are sent, but now often by email.
- Confusion and frustration:
 - Personal donation or a foundation grant? Grant.
 - Are grants tax receipted? No.
 - Counting practices. For example, should grants from foundations funded by estate donations be counted as bequests by the grantee?
 - Should foundations be recognized? Usually not.
 - Donor agreements: with foundation or donor/fundholder?
 - Relationship of foundation to financial institutions
- More work to be done within the sector.


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Diversity of Practice

- Governance
- Minimum vary from \$10,000 to \$100,000
- Minimum annual disbursement at fund level
- Public disclosure and reporting
- Granting practices – letters and agreements
- Granting – qualified donees and Non-QDs
- Degrees of donor discretion and choice
- Donations: accepted property
- Charitable purposes and activities

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Key Issues - Nicola

 Accumulation and retention of DAF assets

 Operating charities and granting

 Investment governance and financial advisors

 Succession and estates

 Responsibilities

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Accumulation & Retention of DAFs

The Numbers: how much money do DAF charities have?

	2021	Estimated 2025
Total Assets	\$8.5 billion	\$12.5 billion
Total Grants	\$922 million	\$1.3 billion
Disbursement level	10.8%	10.8%

In 2021, DAF grants represented nearly 10% of revenue granted from “other registered charities”.

CAGP Foundation and KC Study May 2023 Influence, Affluence and Opportunity see <https://www.cagp.ca/pdfs/cagp-foundation-kc-study-may-2023-influence-affluence-and-opportunity.pdf>
CRA Report on the Charities Program 2022-2023 <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/report-on-charities-program/report-on-charities-program-2022-2023.html>

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Operating Charities and Granting



Improving collaboration

Provide education and information resources for charities
Ensuring grants have corresponding communication (even when by EFT)
Identifying DAF contact for charity



Improving stewardship

DAFs to be more transparent and publicize granting and payment policies
Strategies to ensure charities can source and manage DAF grants
Steward DAF donors as any direct donor



Anonymity

Understanding privacy preferences

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Grant Administration

Qualified Donees & New Qualifying Disbursement rules

Administration: steps and timelines

Disclosure requirements: privacy issues

Payments: push to electronic funds transfer

International granting

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Investment Governance & Financial Advisors

- Donors are not permitted to direct how funds donated to a DAF are invested
- DAF foundation boards have fiduciary duty regarding assets held in the foundation's DAFs
- Investment of assets held in DAFs can be outsourced to one or more investment managers
- The financial advisors' role should not be confused with the role of the DAF advisor, the person allowed to give grant recommendations to a DAF foundation
- Impact investing

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Succession & Estates

- DAFs donors typically provide granting advice during their lifetime and have rights to appoint successor for when they pass
- What happens when there is no successor?
- Termination of a DAF is possible at many foundations.
- There are options for donors who separate or divorce.
- Individuals can simplify the support they provide to charities through designating a DAF as a beneficiary of their estate in their will
- POA or the Executor of an estate has no ability or authority to make recommendations granting advice to a DAF foundation
- The use of a DAF provides flexibility and enables an individual to make changes to their estate plan without the costs and administrative issues associated with amending planning documents

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Responsibilities of the Foundation

- DAFs create an ongoing exchange of responsibilities between the donor and the foundation.
- It is the responsibility of the foundation to comply with regulatory and legal requirements and to undertake all administrative matters
- The foundation will have a set of investment policies approved by the Board of the foundation that will guide and limit the type of investments able to be held in a DAF.
- Each foundation has the ability and responsibility to establish its own terms and conditions with respect to:
 - Minimum initial and ongoing contributions.
 - Minimum balances to be maintained.
 - Minimum and maximum granting amount.
 - Investment options available to the DAF.
 - Fees associated with the day-to-day management and administration of the fund.
- The required annual disbursement quota imposed on foundations the Income Tax Act is currently set at 5% for foundations with investment assets over \$1 million.

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Resources

- Donor Advised Funds: Foundations and Borrowed Assumptions <https://www.ctf.ca/EN/EN/Newsletters/Perspectives/2022/1/220105.aspx>
- Fair and Transparent Granting <https://www.malcolmburrows.ca/policy/fair-amp-transparent-granting>
- Donor Advised Funds are not Trusts <https://www.malcolmburrows.ca/planning/donor-advised-funds-are-note-trusts>
- The Two Charity Structure <https://www.malcolmburrows.ca/planning/the-two-charity-structure-1>
- Donating Internationally <https://www.malcolmburrows.ca/planning/donating-internationally>
- [Impact Investing and Donor-Advised Funds in Canada, May 2025](#)
- The Spectrum of Investment Powers https://www.carters.ca/pub/seminar/charity/2025/CBA_Charity_Law_Conference-The_Spectrum_of_Investment_Powers_of_Charity_Including_Impact_Investing.pdf

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Nicola Elkins is President of Cause Strategies Inc., a charitable foundation management solutions provider since 2008. She is also Founder and CEO of [Benefaction Foundation](#). She has built a reputation as a valuable resource for those who want to integrate charitable giving into their client's financial, estate and succession plans and to help them to leave a legacy. Prior to establishing Benefaction, Nicola spent 20 years in the financial services industry holding several senior roles. She has an MSc from the London School of Economics and a BA from McGill University. She is the managing editor of the Master Financial Advisor - Philanthropy course offered by the CAGP, Spire Philanthropy and the Knowledge Bureau. She is a big supporter of the Canadian Association of Gift Planners, both personally and through Benefaction Foundation. She also sits on its Government Relations Committee and is co-chair of its new DAF Working Group which is about building a better relationship between the DAF community and the charitable sector.

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Malcolm Burrows is a philanthropic advisor and gift planner with over 30 years of experience working at charities and in wealth management. In addition to being Head, Philanthropic Advisory Services at Scotia Wealth Management he is founder and Executive Director of [Aqueduct Foundation](#), a public foundation with donor advised and other charitable funds. Malcolm is an active educator, writer, and volunteer in the charitable sector. He is a proud Friend of CAGP, class of 2003.

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Q & A

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