

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**CARTERS SPRING 2020
CHARITY & NFP WEBINAR SERIES
May 20, 2020**

**EVOLVING TRENDS IN
PHILANTHROPY: MORE THAN
JUST CHARITABLE DONATIONS**

By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent

tcarter@carters.ca
1-877-942-0001

© 2020 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
BARRISTERS . SOLICITORS . TRADEMARK AGENTS
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville

www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

**CARTERS SPRING 2020
CHARITY & NFP WEBINAR SERIES
Wednesday, May 20th, 2020**

Evolving Trends in Philanthropy: More Than Just Charitable Donations

By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
tcarter@carters.ca
1-877-942-0001

© 2020 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

2



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, 2020), 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 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.

www.charitylaw.ca

www.carters.ca

INTRODUCTION

- The face of philanthropy is evolving
- This is in part due to rapid changes in information technology, particularly:
 - on the internet
 - through reliance on social media
 - changing character of donors through shifts in demographics in using social media
 - changes in donor expectations when interacting with charities on the Internet
- As well, COVID-19 is forcing charities to re-think how they can engage donors in different ways



- Donors are looking for opportunities to participate in funding innovative projects through inventive methodologies
- Donors are demanding efficiency and accountability in what charities do
- Donors also want to see more of a direct relationship between their donations and what the charity does with their gifts
- This presentation explains the ways in which philanthropy is evolving and what charities need to know in order to keep abreast of these trends, as well as applicable legal issues



A. OVERVIEW OF EVOLVING TRENDS

- Increased Reliance on Restricted Gifts
- Funding Social Enterprises
- Funding Social (Impact) Investments
- Donor-Advised Funds
- Cryptocurrency Donations
- Crowdfunding
- Third-Party Fundraising Campaigns
- Fundraising Through Influencer Marketing
- Sponsorship versus Donations
- Cause-Related Marketing



B. INCREASED RELIANCE ON RESTRICTED GIFTS

- Donors are becoming less likely to make a gift to the general fund of a charity than in the past
- Instead, donors are more interested in giving donations to projects or causes of a charity through restricted gifts
- The use of restricted gifts provides donors with purpose in giving and accountability by the charity
- Restricted gifts can be initiated by the charity through asking donors to give to a particular cause or fund
 - It is important that the charity establish clear terms of reference for a restricted fund



- Restricted gifts can also be initiated by the donor through a gift agreement, a letter, or even a will
 - The charity should provide templates for gift agreements to ensure that the terms of the restrictions will be acceptable to the charity
- Two basic types of restrictions:
 - Time restriction, e.g. the capital of a gift is to be spent over a particular period of time or maybe held in perpetuity as an endowment to be invested with only the income to be expended
 - Use restriction, e.g. the donation is to be used for a particular project or program, such as for a social enterprise or social impact fund discussed below



- Whenever there is a restricted gift created, whether it be at the initiative of the charity, or at the initiative of the donor, the board of the charity needs to understand that they have a legal obligation to comply with the terms of the restricted gift
- Failure to comply with the restricted gift, e.g. diverting funds to another use, could result in the directors being exposed to personal liability through breach of trust
- While the use of restricted gifts is an effective tool to empower donors with a purpose and ensure more accountability, they carry risks to the charity and its board if they are not complied with

RESTRICTED ACCESS

C. FUNDING SOCIAL ENTERPRISES

- Charities are able to participate in social enterprises to a limited extent and as such may start looking for donations to fund social enterprise programs
- In general, “social enterprise” can be described as
 - 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. Community Contribution Companies (B.C.); Benefit Companies (B.C.); Community Interest Companies (N.S.)
- Ontario has been looking at introducing “dual purpose” corporate legislation, but not clear when that will occur
- However, 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, though, 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
- Registered charities are generally able to invest in a subsidiary for-profit corporation and receive receiptable donations of up to 75% of net income of that company
- 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 (see CG-014)
 - Employment-related training for the unemployed (see CG-014)

- Low income rental housing (see CG-022)
- 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 (see CG-014)
- 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 (see CG-014)



D. FUNDING SOCIAL (IMPACT) INVESTMENTS

- 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



www.charitylaw.ca

www.carters.ca

- “Financial return” is defined in the CAA as an *“outcome in respect of the trust property [that] is better for the trust in financial terms than expending all the property”*
- 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 repayment 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

www.charitylaw.ca

www.carters.ca

- 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 described below
 - 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 as part of a “total return” approach
 - Social investment must follow CAA requirements:
 - Must meet the dual purpose of furthering a charitable purpose and achieving financial return
 - Board members must consider if “advice” is needed
 - Board members must be satisfied that it is in the interest of the charity to make a social investment

- No ability of the board to delegate decision making on social investments
- Liability protection of directors in making social investments is more limited than regular investments
- 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?
 - Ordinary investment under the *Trustee Act*;
 - Social investment under the CAA; and/or
 - Program-related investment under the CRA’s “Community Economic Development Guidance” (CG-014)



E. 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
- 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

- 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

- One of the more pressing concerns regarding DAFs is how much ongoing control can a donor 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 are the recipients from the DAFs, the amounts and timing of disbursements, and even their investment decisions
- 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

F. CRYPTOCURRENCY DONATIONS

- Cryptocurrencies are virtual currencies that use distributed ledger technology (e.g. Blockchain networks) to facilitate payments without financial intermediaries, and for transparency, such as to trace donations and the beneficiaries involved, increasing donor confidence
- Receipting issues
 - They are considered a commodity for income tax purposes (not “money” or “currency”) (see CRA’s “Guide for cryptocurrency users and tax professionals”, June 27, 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

- Mining cryptocurrencies by a charity, either directly or through a pooled fund, might not meet the “prudent investor standard” or, alternatively, may not constitute a permitted “related business”
- 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)
 - Costly mistakes if incorrect transfer because transactions are not reversible
 - Potential greater exposure of director and officer liability

G. 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
- Crowdfunding generally involves three elements: the campaigner, the crowd, and the platform
- 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 campaigns can be done by both charitable organizations and non-charitable organizations

- Crowdfunding platforms establish their own terms of use and the charity's or NFP's only option is to either accept those terms or not, with no bargaining power
 - An example of IP conditions on one crowdfunding site:

“If you provide material or post content onto the [the platform] website, you are hereby waiving all moral rights you may have in the material you have provided or posted. By providing or posting this material onto [the platform], you hereby grant to [the platform] a nonexclusive, royalty free, perpetual, and irrevocable license which allows [the platform] the right to use, edit, modify, adapt, reproduce, publish, distribute and display such material”

- Crowdfunding, other than by charities, may be subject to informal public appeals legislation (e.g. Saskatchewan's *Informal Public Appeals Act*)
 - This legislation was applied to crowdfunding campaigns (e.g. Humbolt Broncos)
 - The Uniform Law Conference of Canada's ("ULCC") model legislation from 2011 has only been adopted in Saskatchewan
 - The ULCC recently released a Consultation Paper in 2019 for a proposed *Uniform Informal Public Appeals and Crowdfunding Act* to revise the model legislation
 - It is possible that other provinces may also introduce similar legislation



- 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?

H. THIRD-PARTY FUNDRAISING CAMPAIGNS

- Several legal issues arise when third parties are undertaking fundraising events, particularly when promoted on social media e.g. P2P campaigns
- Because the name of the charity is being used in conjunction 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
- Some of the legal issues that could come up include:
 - Civil liability for injuries at a fundraising event, including the abuse of children or vulnerable persons
 - Lack of necessary permits to hold an event
 - Misuse of IP as well as failure to exercise control required for appropriate licencing of IP
 - Misrepresentation to the public of how much money goes to the charity, *i.e.* gross or net proceeds



- Failure to obtain a waiver and/or release from participants for the charity and its board
- Failure to obtain indemnification of the charity and its directors and officers
- Failure of the third party to obtain appropriate insurance coverage that includes the charity and its directors and officers as additional insureds
- Failure to advise the insurer of the charity about the event, possibly resulting in loss of insurance coverage for failure to advise of a material risk
- Lack of appropriate agency appointment for the third party to receive and/or remit funds to the charity
- Failure to monitor and approve the crowdfunding site and/or giving portals with regard to the terms of use
- Lack of ability to audit third-party campaigns

I. FUNDRAISING THROUGH INFLUENCER MARKETING

- Influencer marketing falls under the scope of the *Competition Act*, which prohibits false and misleading advertising, and failure to disclose material information
- On January 13, 2020, the Competition Bureau published new guidance for influencers to provide adequate disclosures when they are being paid by advertisers (which can include charities)
 - These disclosures need to be as clear as possible and contextually adequate
- Additionally, *Ad Standards* published “Disclosure Guidelines”, which were last updated in January 2019, contain a list of Do’s and Don’ts for “Influencer Marketing”, including the use of disclosure hashtags such as #ad or #sponsored, and the disclosure of any compensation given to an influencer

J. SPONSORSHIP

- As an alternative to traditional philanthropy, businesses may support a charity through sponsorship and 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

- 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”

K. 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 they donate 100% of proceeds from all coffee purchases made on that date to support Tim Hortons Foundation Camps

- e.g. 7-Eleven® Canada holds an annual “Slurpee Name Your Price Day” where customers decide the price paid for a Slurpee, and 100% of the proceeds are donated to charities, such as Food Banks Canada

- 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

BENEFITS



- 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
- 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

CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

Disclaimer

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2020 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
TOLL FREE: 1-877-942-0001

Toronto Ottawa Orangeville
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca