O'SULLIVAN
ESTATE LAWYERS

April 2026

Advisory

Charitable Giving Through a Private Foundation

When considering setting up a private foundation, and with charitable giving generally, it is important to identify your philanthropic objectives including your motivations for giving, the level of control you wish to have in your giving, your family's involvement, and your overall legacy. Establishing a private foundation can be a way to achieve both tax planning objectives and long-term philanthropic goals.

In this Advisory, we present an overview of the considerations for and general information on establishing, donating through and operating a private foundation. Advisory, "Charitable Giving", provided general information on charitable giving as part of an estate plan. This Advisory focuses on establishing a private foundation. References throughout this Advisory to a "foundation" are references to a private foundation unless otherwise specified.

REGISTERED CHARITIES UNDER THE *INCOME TAX ACT* (CANADA)

A private foundation must be registered as a charity under the *Income Tax Act* (Canada) (the "*ITA*"). There are three types of charities that can be registered under the *ITA*:

- a charitable organization;
- a public foundation; or
- a private foundation.

The designation a charity receives depends on its structure, its source of funding, and the way it operates.

Registered charities must use their resources for charitable activities and have "charitable purposes" that fall into one or more of the following categories:

- the relief of poverty;
- the advancement of education;

O'Sullivan Estate Lawyers LLP
TD Bank Tower, Toronto-Dominion Centre
66 Wellington St. W, Suite 3430, P.O. Box 68
Toronto, ON M5K 1E7

osullivanlaw.com
T 416-363-3336
F 416-363-9570

- the advancement of religion; and/or
- other purposes that benefit the community.

The last category of charitable purposes includes various purposes that do not fall within the other categories but which the courts have recognized as charitable, such as protection of the environment and promotion of health.

Registered charities are different from non-profit organizations, which do not need to go through a registration process. Non-profit organizations are associations, clubs, or societies that are organized and operated exclusively for social welfare, civic improvement, pleasure, recreation, or any other purpose except profit.

A non-profit organization is generally exempt from paying income tax if it meets certain requirements. Non-profit organizations cannot issue official donation receipts for income tax purposes.

CHARITABLE FOUNDATIONS - PRIVATE VERSUS PUBLIC

Contributing to a public foundation or establishing a private foundation are both vehicles for long-term charitable giving. People may also choose to make gifts directly to certain charities, either during their lifetime or in their will, including gifts of cash, shares, or other property, or to use other means for gifting such as designating a charity as the beneficiary of proceeds of a life insurance policy or retirement plan. There are tax benefits to each method of charitable giving, which are discussed below in the context of private foundations.

Foundations, whether public or private, enable donors to make long-terms gifts and provide an opportunity for intergenerational philanthropic giving. It is important to understand the difference between public and private foundations.

Funding and Management

Private foundations are generally more closely held than public foundations, meaning that they are usually funded and/or managed by one family. For example, a private foundation may receive most, if not all, of its funding from one member of a family and/or the trustees or board of directors may be made up of family members.

To determine the designation of a registered charity, Canada Revenue Agency ("CRA") applies various criteria provided for under the *ITA*, including looking at the makeup of the trustees or board of directors and the source of funding.

With respect to a public foundation, more than half of the trustees, directors or like officials must deal with each other at arm's length, meaning that they are not related by blood, marriage, or common law partnership, or have close business ties. If the majority of the trustees, directors, or like officials do not deal with each other at arm's length, then the charity will be designated as a private foundation.

A public foundation generally receives its funding from a variety of arm's length donors but cannot receive more than half of its funding from a person or group of persons who controls the charity in any way or make up more than half of the directors, trustees, or like officials of the foundation. More than half of the funding for private foundations can come from a person or group of persons who controls the foundation or make up more than half of the trustees, directors, or like officials of the foundation.

Qualified Donees

"Qualified donees" are organizations that can issue official donation receipts for gifts they receive from individuals and corporations and include the following:

- a registered Canadian charity;
- a registered Canadian amateur athletic association;
- a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged;
- a registered Canadian municipality;
- a registered municipal or public body performing a function of government in Canada;
- a registered university outside Canada, the student body of which ordinarily includes students from Canada;
- a registered charitable organization outside Canada to which His Majesty in right of Canada has made a gift;
- His Majesty in right of Canada, a province, or a territory; or
- the United Nations and its agencies.

Both public and private foundations are established by either a corporation or a trust and can only have charitable purposes. A public foundation generally gives more than half of its

income annually to other qualified donees, but it may carry out some of its own charitable activities. A private foundation can carry on its own charitable activities and/or fund other qualified donees.

Public Foundations: General

A person can contribute to an existing donor-advised fund or establish a donor-advised fund with a public foundation. The public foundation will be responsible for the administration, investment, and maintenance of the various donor-advised funds established with the foundation and will charge an administrative fee. The donor can advise on the charities that he or she wishes to support, but the public foundation has the ultimate control over the distribution of funds.

Each public foundation will have minimum contributions to establish a donor-advised fund, which are significantly lower than the recommended minimum to start a private foundation in light of the set-up costs and ongoing administrative costs. Public foundations have bookkeeping, administrative services, and investment expertise in house which allows them to manage a large volume of funds.

Private Foundations: General

A private foundation allows an individual complete control over how foundation assets are invested, and which charities are supported. If a private foundation is established during the principal donor's lifetime (as opposed to on death), he or she can participate in the charitable giving process and instill the foundation with his or her personal vision for philanthropic giving. The principal donor will be responsible for setting up and maintaining the foundation. Some of the advantages of a private foundation include retention of control over the decision-making process and family involvement. Further benefits of private foundations are discussed in more detail below.

There is no minimum required amount to start a private foundation. The set-up and ongoing maintenance costs should be considered. Additionally, there should be enough invested capital to permit the foundation to meet the annual disbursement quota (discussed below) without encroaching on its capital in order to preserve it to maximize continued growth.

ESTABLISHING A PRIVATE FOUNDATION

A private foundation is created in two steps. First, the underlying entity, whether a trust or a corporation, needs to be established or created. Second, an application for charitable status must be made with CRA.

Trust versus Corporation

A private foundation can be set up by way of a trust or a corporation. If it is set up as a trust, the foundation will be managed by trustees, and if it is set up as a corporation, the foundation will be managed by directors. The choice will generally be determined by the individual's personal preference. Depending on whether the foundation is set up as a trust or a corporation, there are different annual reporting and filing requirements, which are discussed below.

A corporation must be incorporated under the relevant provincial or territorial or federal legislation. A trust, however, will be established by way of trust deed.

Registration with CRA

A private foundation, whether established by a trust or a corporation, must be registered as a charity with CRA. An application must be submitted to CRA in the required form, accompanied by a copy of the governing document. Various information is required in the application, including information about the trustees or directors, the foundation's purposes and activities to fulfill those purposes, and an initial proposed operating budget.

The Charities Directorate, the department of CRA that oversees registered charities, will determine the designation of the charity as a charitable organization, public foundation or private foundation based on the source of the funding and the relationship of the trustees or directors.

BENEFITS

There are various benefits to establishing a private foundation. Some of them are discussed below.

Tax Benefits

a. Donation Receipts

As a registered charity, a private foundation can issue donation receipts for gifts received from individuals and corporations. The donation receipt is issued at the time the gift is made, but distributions to other charities from the private foundation can be made in the future.

b. Charitable Tax Credits

There are charitable tax credit rates for both federal and provincial or territorial. As of 2023, the federal charitable tax credit rate is 15% on the first $200 and 29% on any amount over

$200 donated to a registered charity. The provincial or territorial tax credit rates vary. In Ontario, for example, the tax credit rate is 5.05% on the first $200 and 11.16% on any amount over $200.

A donor may claim tax credits for total gifts in a year up to 75% of his or her net income, subject to exceptions for gifts of certified cultural property or ecologically sensitive land (a donor may be able to claim up to 100%). The tax credit can be carried forward for up to five years.

The limit for using the charitable donation tax credit is increased from 75% to 100% of net income in the year of death. Any unused charitable donations in the year of death can be carried back one year.

A donor can deduct 80% of the charitable tax credit to reduce any Alternative Minimum Tax ("AMT") payable. The AMT system imposes a minimum level of tax on individuals who claim certain tax deductions, exemptions, or credits to reduce their taxes to very low levels. Changes to the AMT rules are effective for tax years 2024 and onwards (previously a charitable tax credit could be fully applied against AMT owing). AMT does not apply on death.

If a gift to a foundation is made under a will and the deceased's estate is designated as a graduated rate estate ("GRE"), then there is flexibility to allocate donation credits between the deceased and the GRE. The deceased may use the donation credit in the year of death and in the year immediately prior to death. As well, the GRE can claim the donation in the year of the donation, carry it back to any of its prior taxation years, or carry it forward for up to five years.

c. Maximizing Gifts

Private foundations are exempt from paying income tax. This allows the foundation to make larger gifts to registered charities. As long as the foundation meets its minimum annual disbursement quota (discussed below), it can accumulate income and grow its capital on a tax-free basis.

There are additional tax benefits for gifts of certain types of property, including publicly traded shares, mutual fund shares, segregated fund units, ecological property, and Canadian cultural property. Generally, the disposition of capital property would be subject to capital gains tax on any gain on the property. However, when publicly traded shares, for example, are donated to a registered charity, including a private foundation, there will be an elimination of the taxable capital gain on the appreciated value of the shares for income tax purposes and a partial reduction for AMT purposes. Effective January 1, 2024, for the purposes of the AMT, the inclusion of the capital gains realized on the donation of the

qualifying security was increased from 0% to 30%. The donor is issued a tax receipt for the fair market value of the gift at the time of the donation. The donor may take advantage of the reduced inclusion rate on any capital gains realized on a gift of certain capital property.

The donor is issued a tax receipt for the fair market value of the gift at the time of the donation. The donor may take advantage of the reduced inclusion rate on any capital gains realized on a gift of certain capital property.

As well, since the assets contributed to a private foundation while a donor is living would not be held personally, on death, the assets held in the private foundation would fall outside of the donor's estate and would not be subject to Ontario Estate Administration Tax. Depending on the value of the private foundation, this may result in significant savings of Ontario Estate Administration Tax, which is currently levied at approximately 1.5% of the value of an estate subject to probate or approximately $15,000 per $1,000,000. This allows a larger amount to be available for charitable purposes.

Control over the Foundation

The principal donor of a private foundation can retain control over decision-making for the foundation, including investment of assets, which charities are supported, amounts, and timing of distributions. This control allows for flexibility in the future as charitable objectives and intentions may develop and adapt.

There is flexibility in the timing of making donations from the foundation, which can be controlled by the donor. Timing of donations to certain charities do not have to be tied to end-of-year tax planning. Donations from the foundation can be made to certain charities to support various projects when the trustees or directors determine.

The principal donor can choose his or her co-trustees or assemble a board of directors. This can include the principal donor's family members.

Additionally, the principal donor can have more control with respect to the charities and projects that are benefited and the foundation's mission generally.

Family Involvement and Lasting Legacy

Private foundations give people the opportunity to involve their family in the giving process and to achieve the succession of philanthropic values to future generations. Children and even grandchildren can be involved in a private foundation in a number of different ways, including acting as trustees or directors and setting the charitable objectives of the foundation.

RUNNING THE FOUNDATION

Role of Trustees or Directors and Governance

Once the foundation is registered, the role of the trustees or directors is to ensure that the foundation is working to achieve its charitable purpose(s), in addition to ensuring compliance with legal and regulatory requirements. The foundation must keep adequate books and records for the prescribed time period at an address in Canada that is on file with CRA.

As fiduciaries, the trustees or directors must act honestly, in good faith, and in the best interests of the foundation. It is important to have good internal policies and practices in place.

The governance framework for a private foundation will be set out in the governing documents of the foundation, which for a corporation would be the articles of incorporation or letters patent and the by-laws and for a trust would be the trust deed. A foundation can adopt written policies and sets of practices to guide its trustees or directors and staff.

Additionally, a foundation can also have a mission statement further setting out its charitable objectives. The principal donor can help shape the focus of the foundation's giving, which can continue to be reframed and adapted to changing objectives. This will be a good basis for making distribution decisions and will also set the framework for future generations to carry on the principal donor's philanthropic vision.

Investments

The trustees or directors are responsible for managing investments and investing funds of the foundation prudently. The powers to invest are usually set out in the foundation's governing documents. A foundation can adopt an investment policy with specific objectives that are aligned with the foundation's charitable objectives.

Use of Foundation Funds

A private foundation has the flexibility to carry on its own charitable activities and/or fund other qualified donees. A foundation can carry on its own charitable activities through its staff, including volunteers, trustees or directors, and employees, or through an intermediary (for example, a consultant or contractor) acting on its behalf. Additionally, a foundation can make gifts to qualified donees.

According to CRA, there are more than 86,000 registered charities in Canada. The choice of organizations to benefit can be overwhelming. The governing documents, which will set out the charitable purposes of the foundation, as well as a mission statement, will provide

helpful guidelines to the trustees or directors in considering which organizations to benefit, including how to evaluate incoming funding proposals. It is also useful to develop a set of criteria for evaluating grant proposals that fit within the foundation's charitable purpose(s) and goals.

LIMITATIONS AND OTHER CONSIDERATIONS

Setup and Ongoing Maintenance

There are costs involved in establishing and maintaining a private foundation.

There will be initial professional fees with respect to establishing the foundation by way of trust or corporation and registering the foundation with CRA.

There are also annual costs for the maintenance and administration of the foundation. There will be fees for the ongoing investment and management of assets. A foundation has to file an annual T3010 information return with CRA, along with its most recent financial statement.

Additionally, if the foundation is established as a corporation, there are additional compliance requirements. A corporation must file annual returns and must hold annual meetings or in lieu thereof pass annual resolutions.

Annual Disbursement Quota

Private foundations have an annual disbursement quota that requires that the foundation spend a specified percentage of the value of its assets not used directly in charitable activities or administration per year. In general, the disbursement quota for a private foundation with assets that are not used directly in charitable activities or administration is 3.5% of the average value of its property up to $1,000,000 and 5% on the portion exceeding $1,000,000.

Under certain circumstances, if a foundation cannot meet the annual disbursement quota by using previous accumulated excesses or by encroaching on capital because it has insufficient funds, then it can apply for administrative relief to CRA.

The annual disbursement quota is to ensure that private foundations use their investment assets to actively pursue their intended charitable purpose(s). It can be met by spending funds directly on the foundation's own activities or directing funds to other qualified donees.

Privacy

Certain information about the foundation is available to the public, which may not be desirable for donors who wish to maintain complete anonymity. This includes the value of

assets of the foundation, expenses of the foundation and the names of the trustees or directors, among other information.

Donation Limitations

a. Use of Foundation Assets

Private foundations can only benefit qualified donees. This may be limiting to donors who wish to benefit certain non-profit organizations, charities outside of Canada that do not qualify as qualified donees or to benefit certain individuals or groups directly. Additionally, once assets have been contributed to a foundation, they cannot later be used for any personal benefit.

There are no restrictions as to what organizations or individuals a person may benefit when making donations directly, as opposed to through a private foundation, although he or she will not be able to claim any donation tax credits in all cases. For example, an individual can give a donation to another individual directly, but a foundation cannot.

b. Types of Donations to the Foundation

The principal donor can donate cash or gifts in-kind to the foundation. There are some limitations to be aware of when donating certain gifts in-kind.

There are complex rules surrounding the donation of private company shares to a qualified donee, including to a private foundation. Where the donor is not at arm's length with the foundation and donates private company shares, these shares are categorized as non-qualifying securities. No tax receipt can be issued until the shares are sold within a 60-month period or the gift is no longer considered a non-qualifying security.

CASE STUDY

The case study below highlights some of the considerations in establishing a private foundation.

> *Sally and Ted Jonas are active philanthropists. They donate to a number of local charities each year and have helped support projects to which they are personally committed. They have been considering more structured giving for a number of years, but don't know where to start. They also want to get their children involved in their giving with the hope they may pass on their philanthropic values to the next generation.*

Sally and Ted considered establishing a donor-advised fund with a community foundation or establishing a private foundation. A donor-advised fund was initially attractive because the community foundation takes care of the ongoing administration, compliance, and investments. However, they ultimately felt that they wanted an entity to provide for more control and a stronger role in the decision-making process with regard to the use of donations, including after their deaths. Additionally, they felt that their professional advisors could help as necessary with the set-up, administration, compliance, and investment management.

They decided to set up the foundation by way of a trust. They are familiar and comfortable with the administration of a trust and prefer the flexibility it allows. Sally and Ted also like the fact that they will not have to attend to annual corporate compliance requirements and that there is less ongoing maintenance. After settling the trust, they applied for charitable registration on the CRA's online platform, with the help of their lawyer.

Sally and Ted attend to any annual compliance matters with the help of professional advisors, as necessary, and their investment advisor manages the foundation's investment portfolio.

Sally and Ted together with their children are the trustees of the foundation. The family spent a summer weekend preparing a mission statement and considering the types of charities they wish to benefit. Sally and Ted are so proud to see their children engaged in the foundation. They are confident that the establishment of the private foundation will allow for their values to be instilled in their children who will be well equipped to continue the foundation after they are gone.

CONCLUSION

How a private foundation can fit into your philanthropic and estate planning requires consideration of your individual circumstances and whether it is the optimal way to reach your charitable objectives.

The comments offered in this Advisory are meant to be general in nature, are limited to Ontario law and are not intended to provide legal advice on any individual situation. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances.