

**Tax & Philanthropy:  
A Current Perspective On How Planned Giving  
Can Reduce Taxes While Helping To Build A  
Vibrant Community**

Presentation to Victoria Professional Advisors  
Hosted by The Trustees of the Pacific Opera Victoria  
Foundation  
January 14, 2016

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**OUTLINE**

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1. A Few Thoughts on the Current Environment
2. Recent and Pending Changes in the Taxation of Charitable Donations (2013 – 2017)
3. Where Do We Go Now?

## Thoughts on the Current Environment

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1. Recent And Pending Changes to Legislation Regarding Charitable Donations
2. CRA Activity
3. Securities Markets
4. Real Estate Market
5. Exchange Rates
6. Mining, Oil & Gas

## Recent and Future Developments in the Taxation of Charitable Donations - 2013

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### First Time Donor Stretch (super) Credit (ITA, s. 118.1(3.1))

- Enhanced federal donation tax credit for the first \$1,000 of eligible amount of gifts to qualified donees for individuals who have not (and whose spouses and common-law partners have not) made gifts since 2007
- For 2016, the federal credit will be 40% (45.06% federal and BC) of donations up to \$200, and up to 58% (72.7% federal and BC) for donations between \$200 and \$1,000
- Applies to taxation years 2013 to 2017 inclusive

## Recent and Future Developments in the Taxation of Charitable Donations - 2013

### Enactment of Split-Receipting Rules (ITA, s. 248(30) – (34))

- Donation tax credit is now available in respect of the “eligible amount” of a gift, even in cases where the donor has received some benefit
- The “eligible amount” is the amount by which the fair market value of the gift exceeds the “advantage”, if any, in respect of the gift
- The “advantage” in respect of a gift is the value of any property, service, compensation, use or other benefit that the donor, or person who does not deal at arm’s length with the donor, has received, obtained or enjoyed, or is or may become entitled to receive, obtain or enjoy as consideration for, in gratitude for or in any other way related to the gift, plus any limited recourse debt in respect of the gift. The advantage cannot exceed 80% of the value of gifted property
- *De minimus* rule for a benefit or advantage with a value of less than 10% of the value of property transferred to the charity and \$75 (IT-297R2, Gifts in Kind to Charity and Others, para. 3)
- Generally applicable to gifts made after December 20, 2002

## Recent and Future Developments in the Taxation of Charitable Donations – 2013 (cont’d)

### Enactment of Deemed FMV Rules (ITA, s. 248(35) – (40))

- Deemed Fair Market Value Rule applies to a gift made after December 5, 2003 where the gift is a gift of:
  - Property received by donor under a gifting arrangement that is a tax shelter; or
  - Property acquired by donor less than 3 years before donation; or
  - Property acquired by donor less than 10 years before donation where one of main purposes was to gift the property to a qualified donee.
- Where it applies, FMV of the gift is deemed to be the lesser of:
  - FMV otherwise determined; and
  - Cost of the property
- Exceptions or look-through rules apply to certain gifts made on donor’s death, gifts of certain types of property, and where gifts acquired by donor in rollover transfer

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014

Budget 2014 included proposals designed to provide more flexibility in the tax treatment of charitable donations made in the context of deaths occurring after 2015 (i.e. effective beginning in 2016)

Although they increase flexibility in certain respects, they come with strict conditions, and introduce some significant limitations

These proposals were enacted in December 2014, and apply to the 2016 and subsequent taxation years (S.C. 2014, c. 39, Royal Assent December 16, 2014)

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – The Basic Rule

- Donations made by Wills and plan designations are no longer deemed to be made by an individual immediately before the individual's death (old s. 118.1(5)).
- Instead, a donation will be deemed to have been made by the estate of a deceased individual, at the time at which the property that is the subject of the donation is transferred to a qualified donee, where it is:
  - Made by the individual by the individual's will;
  - A transfer made pursuant to a beneficiary designation under a life insurance policy, RRSP, RRIF or TFSA; or
  - Made by the estate.

This rule applies whether or not the estate is a graduated rate estate (GRE) at the time the gift is made.

(ITA 118.1(4.1), (5), (5.2))

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – Gifts Made by Graduated Rate Estates

- If a gift made by the graduated rate estate of an individual is:
  - a transfer made pursuant to a beneficiary designation under a life insurance policy, RRSP, RRIF or TFSA; or
  - A gift of property that was acquired by the estate on and as a consequence of the individual's death, or of property that was substituted for such property,

Then the trustee of the graduated rate estate may allocate the available donation among any of:

- the taxation year of the estate in which the donation is made;
  - Any of the five following taxation years of the estate (ten years for ecological gifts);
  - an earlier taxation year of the estate; or
  - The last two taxation years of the individual.
- (ITA, s. 118.1(1), definitions "total charitable gifts", "total cultural gifts" and "total ecological gifts")
- The current limits that apply in determining the total charitable gifts that are creditable in a year will continue to apply (i.e. 100% of income in the year of the individual's death or the immediately preceding year, or in any other year 75% of income, plus 25% of taxable capital gains and recapture arising from the making of a gift of capital property).

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – Gifts Made by Graduated Rate Estates

#### **NEW SLIDE – January 15, 2016 Draft Legislation**

- Draft legislation announced on January 15, 2016 proposes to extend the tax treatment described on the previous slide for a graduated rate estate to an individual's former graduated rate estate if the gift is made more than 36 months, but no more than 60 months, after the individual's death by the estate, *i.e.* where the individual's estate ceases to be a graduated rate estate because it remains in existence for more than 36 months after the individual death and, at the time the gift is made by the estate, the estate continues to meet the other requirements set out in the definition "graduated rate estate" in s. 248(1) to be the individual's graduated rate estate.

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – Gifts Made by Estates and Trusts Other Than GRE's

- A gift made by a trust or estate that is not a graduated rate estate may still be included in calculating total gifts of the trust or estate (but not the deceased individual) in the year in which the gift is made or any of the five following taxation years (or ten following taxation years for ecological gifts).
- Again, the current limits that apply in determining the total charitable gifts that are creditable in a year will continue to apply (i.e. 75% of income, plus 25% of taxable capital gains and recapture arising from the making of a gift of capital property).

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – Spousal Trusts, Alter Ego Trusts and Joint Partner Trusts

- Spousal Trusts, Alter Ego Trusts and Joint Partner Trusts ("Life Interest Trusts") are not GREs and thus do not enjoy the special treatment afforded to GREs under these new rules.
- Without further changes, it would no longer be possible to shelter gains resulting from the deemed disposition by such a trust on the death of the relevant individual. This is because:
  - The gain resulting from the deemed disposition is now deemed to be payable to the deceased individual, and taxed in that individual's hands, while the donation receipt can be used only by the trust
  - Even if the gain were taxable in the trust, the trust has a year end at the end of the day on which the individual dies, so in virtually all cases it will be impracticable for a donation to be made before the relevant year end of the trust (the ability to claim the donation in a previous year is not available to life interest trusts because they are not GREs)

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

New in 2016 – Gifts Made by Graduated Rate Estates

### NEW SLIDE – January 15, 2016 Draft Legislation

Draft legislation announced on January 15, 2016 proposes to modify these rules as follows:

- S. 104(13.4)(b) would be amended to keep gain and corresponding tax bill in the life interest trust in most instances – reuniting the tax liability and the assets in respect of which it is imposed
- A life interest trust would be permitted to allocate the eligible amount of a donation to the taxation year in which the death occurs if:
  - it is made after the death of the relevant beneficiary, but before the trust's filing-due date for the particular year (i.e. March 31 of the following year (March 30 in a leap year), and
  - the subject of the gift is property that is held by the trust at the time of the individual's death or is property that was substituted for that property

This is an improvement on the pre-2016 rules, in that it allows a limited (90 day) carry-back of the donation tax credit which did not previously exist. However it also restores the pre-2015 situation in which alter ego and joint partner trusts are not good options for US citizens and green card holders.

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2014 (cont'd)

### New in 2016 – Miscellaneous

- The ITA now expressly permits an individual to claim a donation tax credit in respect of gifts made by the individual's spouse or common-law partner (see e.g. definition "total charitable gifts" in s. 118.1(1)) – this was previously permitted as a matter of administrative policy
- The election for a rollover of capital property appears to no longer be available for gifts by Will – s. 118.1(5.4) has been amended to eliminate the reference to a gift by Will, and by the time the property passes to the estate the accrued gain will have been triggered by s. 70(5)
- In contrast, the election for a rollover of gifts made by an artist out of the artist's inventory has been amended to extend this option to gifts made by the graduated rate estate of the artist, i.e. to allow a rollover from the artist to the artist's GRE and from the GRE to a qualified donee (s. 118.1(7) and 7.1))

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2015

Budget 2015 included a proposal to provide an exemption from tax on capital gains realized on certain sales of private company shares and real property in Canada where:

- Cash proceeds from the disposition are donated to a qualified donee within 30 days of the sale; and
- The sale is a bona fide sale to a purchaser who deals at arm's length with the vendor (donor) and the qualified donee to whom the proceeds are donated

(To be effective beginning in 2017)

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2015 (cont'd)

### Exemption for Gifts of Proceeds from Sales of Privco Shares and Land

- Draft legislation released on July 31, 2015 (ITA ss. 38(a.4), 38.3, 38.4)
- To qualify, a taxpayer (other than a GRE) must:
  - sell shares of a private corporation or real property situated in Canada after 2016;
  - Make a cash gift to a qualified donee within 30 days of the disposition; and
  - Be resident in Canada at the end of the year in which the disposition occurs.



## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2015 (cont'd)

### Exemption for Gifts of Proceeds from Sales of Privco Shares and Land (cont'd)

If the taxpayer is a GRE of an individual, the rules are modified as follows:

- The shares or real property sold must have been acquired by the GRE on and as a consequence of the individual's death (or be substituted for such property)
- The gift must be made within 30 days of a sale of the of the shares or property made after the individual's death and within the 36 month GRE period – *and is limited to the amount designated in the individual's terminal return*
- The individual must have been resident in Canada immediately before death

The disposition in respect of which the gain can be avoided is the deemed disposition on death, despite that the gift must be made only within 30 days of the subsequent actual disposition

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2015 (cont'd)

### Exemption for Gifts of Proceeds from Sales of Privco Shares and Land (cont'd)

The draft provisions include a series of anti-avoidance rules designed to ensure that this treatment is available only for bona fide sales to purchasers who deal at arm's length and are not affiliated with the vendor/donor and the recipient qualified donee.

The anti-avoidance rules can apply where a prohibited transaction occurs in a subsequent year. The previous exemption will be reversed retroactively to the year of disposition, and will be taxed with interest accruing as if the taxable capital gain had arisen in the year of disposition.

## Recent and Future Developments in the Taxation of Charitable Donations – Budget 2015 (cont'd)

Budget 2015 also included a proposal to permit private foundations to hold certain interests in limited partnerships without running afoul of the prohibition on carrying on a business


(To be effective as at Budget Day (April 21, 2015); Draft legislation released on July 31, 2015, ITA s. 253.1(2))

## Recent and Future Developments in the Taxation of Charitable Donations – New Government 2015

Pending Amendment (Bill C-2, First Reading December 9, 2015)

- Proposes to amend the federal donation tax credit mechanism to provide three tax credit rates, as follows:
  - 15% of the first \$200 of gifts in a taxation year
  - 33% of the amount of gifts in excess of \$200, to the extent that an individual has income subject to tax at the new 33% rate; and
  - 29% of the amount of gifts in excess of \$200 which is not eligible for the 33% credit rate.

( ITA, s. 118.1(3))

- Consequential to proposal to add a 4<sup>th</sup> federal tax bracket of 33% for income over \$200,000 

## Where Do We Go Now?

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- Gifts of Publicly Traded Shares Still A Great Option – For top marginal rate taxpayer, gifting a share that has FMV of two times ACB will cost the donor only \$0.40 per dollar of gift.
- Gifts made by corporations largely unaffected by recent legislative changes, and have their own attractions. For example, gifts of publicly traded shares result in:
  - Charitable deduction for the full value of the gifted securities
  - No tax on the capital gain
  - Addition of 100% of the capital gain to the corporation's capital dividend account (CDA)

## Where Do We Go Now? (cont'd)

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- Consider Waiting Until 2017 to Make Gifts Funded From Private Corporation Shares or Real Estate (Alternative approach is still to give the shares / property to charity immediately before the sale)
- Review and Reconsider Estate Plans Where Life Interest Trusts Might Make Charitable Donations
- Reconsider Post Mortem Planning Options. For example, the ability to use donation tax credits resulting from gifts by Will or beneficiary designation may make wind up and loss carryback more attractive because deemed dividend will be taxed in the estate and the donation tax credit can be claimed there as well.

## Where Do We Go Now? (cont'd)

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- Consider donation planning using insurance policies, including:
  - Beneficiary designations
  - Gift of policy ownership (esp where FMV of policy > CSV of policy)
- Flow-through share donation arrangements still work (availability and valuation issues come into play)
- Do not forget to consider possible impact of NQS and loanback rules

## Where Do We Go Now? (cont'd)

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### Random Thoughts

- Remember that the 75% limitation relates to income and not taxable income (except with respect to capital gains deductions/exemptions) – deductions under s. 110(1)(d) may reduce taxable income to a level where 75% of income equals or exceeds 100% of taxable income, e.g.
  - Stock option deductions
  - Prospector's and grubstaker's shares

## Where Do We Go Now? (cont'd)

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### Random Thoughts

#### US Citizens – Gifts Inter Vivos

- Citizens and residents of the US can generally deduct gifts to Canadian charities which would qualify as US charitable organizations if resident in the US only to extent of Canadian source income (Art. XXI(6))
- Similarly, gifts by residents of Canada to US 501(c)(3) charities can generally be claimed only to the extent of US source income (Art. XXI(7))
- Exemptions apply for gifts to college or university attended by donor or family member

## Where Do We Go Now? (cont'd)

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### Random Thoughts

#### US Citizens – Gifts on Death

- Resident of US can deduct gifts to Canadian charities which would qualify as US charitable organizations if resident in the US as if charity were in the US (Art. XXIXB(1)(a)) - But it is usually unnecessary to rely on the Treaty – IRC s. 2055 allows a US taxpayer to make gifts to charities anywhere in the world as long as the charity is not engaged in political / legislative lobbying
- Residents of Canada who make gifts to US charities can elect to have the disposition occur on a rollover basis (Art. XXIXB(1)(b)).

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