

Establishing A Charity*

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This article provides an overview of some of the things to think about if you are wondering whether or how to form a charitable organization, especially in the arts. It looks at some activities that might be charitable, briefly reviews the advantages and drawbacks of being a charity, considers what kinds of activity qualify as charities, then spends some time on possible forms of organization and some of the implications of each. It is not intended to explore every legal or organizational detail of the topics covered, but rather to help readers to understand why the legal options are what they are. It may demystify some aspects of corporations and trusts, which are simply ways of organizing one's relations with colleagues, with property, and with people outside the organization.

Some Case Studies

Allan lives in a garret, painting stunning canvasses about the world as he sees it. Barbara is an artist living in a loft, writing wonderful poetry. Chris is an artist working in a co-op, pushing back the frontiers of video art. All three artists apply to the Ontario Arts Council for grants to support their art. All three get the money. None of them is a charity.

Dana forms a dance company and takes modern dance into the schools. Edward forms a dance company and performs modern dance in theatres across the province. As an investment, Fay forms a dance company and presents *Cats* for six months. All three companies apply to the Ontario Arts Council for funding. Dana and Edward get the money, Fay does not. Dana and Edward's companies are charities, Fay's is not.

What can we tell about charities so far?

First, calling something a charity is not a moral judgment. Non-charities may be just as respectable and worthwhile as charities.

Second, calling something a charity is not an artistic judgment. Fay's company may be every bit as good as Dana's or Edward's.

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Third, calling something a charity is not the only way to qualify for public support for one's activities. The Arts Council may be doing its job entirely properly by distributing public money to Allan, Barbara and Chris though they are not charities.

A Working Concept

Calling something a charity is a way of saying that it qualifies for public favour in defined ways, such as tax advantages. (A longer list of the benefits appears later.) A charity is treated differently from individuals or organizations that are not charities. While being a charity is not the only way to qualify for public favours, as can be seen from the examples above, charitable status is useful because it is a more or less automatic qualification for them. Once an organization is legally defined as charitable it does not have to apply separately for each public advantage, nor to persuade each source of benefit that it is worthy. Being a charity is a package deal, as it were. This saves energy and duplication of effort for both applicants for and grantors of public favours.

A Note Of Caution

The advantages that flow from charitable status are given in return for the benefits that the charity provides to the community. The charity has to earn those advantages by demonstrating the benefits. Registering is only the first, and in some ways the easiest, step. Charities are subject to a number of rules of conduct that do not apply to non-charitable organizations. They must account to a number of public authorities. Their freedom of action is limited in important ways. Their ability to handle and dispose of money is restricted. Their directors or trustees may have personal responsibilities that they would not have in a different kind of organization. These rules are described throughout this paper. Someone contemplating setting up a charity or registering it has to keep these obligations in mind. It may be simpler or more flexible to avoid that status altogether. As noted earlier, non-charities may be just as worthy and just as popular as charities.

Charities

We will now examine charities more closely: how they are defined, how those definitions affect people in the charitable sector, in short, whether a particular activity may qualify. We also look at what the public provides to those who do qualify. We will then consider different ways of organizing a charity and some of the practical implications of the different choices.

Definitions

The legal tests of charitable intent are essentially, at least in theory, expressions of current judgment about the kinds of activity that qualify for these more or less automatic benefits.

A charity is an organization that carries out a charitable purpose, or that uses property for a charitable purpose. The essence of a charitable purpose is that it must benefit the public in some particular way. This public purpose component is so strong that it affects our usual sense of ownership. It can fairly be said that no one “owns” a charity, the way people own other forms of organization. Likewise, a charity can, itself, own property but its ownership may be limited or even invalidated if it stops using the property for charitable purposes.¹

The real challenge for someone wishing to set up a charity is to establish an organization that meets the test of providing a benefit to the public.

While the general principle can be stated as broadly as it is above, the law has declared some particular kinds of activity to be charitable. The “law” in this case is the common law, based on decisions of the courts over the years. No generally applicable statute supplements the common law in Canada. The current list is roughly as follows²: the relief of poverty, the advancement of religion (for which continuity of existence and of doctrine are required)³; the advancement of education (“formal training of the mind” and “the improvement of a useful branch of human knowledge”)⁴; and other purposes that benefit the public in ways analogous to those previously held to be charitable. Argument from analogy allows the courts to reflect current social values and what constitutes a public benefit may therefore change over time.⁵

The “public” does not have to be everyone in society. It cannot be defined so narrowly that the purpose is held to serve a merely private interest. For example, serving everyone in a small community will probably be charitable. One does not have to be able to reach everyone to serve the public, if the aims are general. That everyone, or a general sector of the public, is eligible to receive the benefit is important. Serving the employees of a particular company, even if they are numerous, will probably not be charitable.⁶ Giving a donation to a charity in order to get something of equivalent value back is not charitable either, since such a donation does not serve a public but a private purpose.⁷

The primary purpose of the charity may not be political. This means at least that it may not be linked to political parties’ platforms and it must not be aimed primarily at changing legislation. The courts say that they cannot judge whether such a purpose serves the public because such a judgment would require the courts to take a political position by agreeing or disagreeing with the party or lobbyist. That is not the courts’ expertise. However, charities may try to influence public policy—on the side, as it were. General statements of what may be desirable policy are more likely to be charitable than campaigns for particular candidates. In recent years both Revenue Canada and the courts have been slightly more relaxed than previously about what will disqualify a purpose

from having charitable status, but the basic rule is very much in force.⁸ This demonstrates again that refusing to call something charitable is not a statement about its moral or social worth. Participation in political choices is essential in a democracy but it is simply not charitable.

Two other aspects of politics and charities are worth noting. First, activities or attitudes that are not considered beneficial for “political” reasons, or reasons of public policy, may not be, or may stop being, charitable. The leading case considered whether to maintain the charitable status of scholarships restricted in large part to white Christian males.⁹ Second, an activity that is politically controversial may still be charitable if it qualifies under the usual categories and if it does not stray into the prohibited territory of direct politics.¹⁰

In addition, a charity is not a business enterprise, and vice versa. This is not to say that solvency is not compatible with charity; however, making money is not itself a charitable purpose. This is why Fay’s dance company did not qualify although the other two companies did. Carrying on activities that make money for the charitable purpose is a more difficult situation. Charging admission for performances is clearly acceptable. The most recent court ruling on the question suggests that the limits may be pretty broad.¹¹

The Arts As Charities

Artistic activity as such is not charitable in law. Our artists are not carrying out a charitable purpose, even if the public may benefit from their activities. The reason is twofold. First, charities have to be “organizations” in some sense. (In what sense, we will see later.) Second, the public benefit must fall within one of the categories listed above. In general, artistic endeavours are most often held to be charitable because they contribute to education. On occasion they are found to be “other activities that benefit the public”. The purposes of a particular organization may not fall into both classes. For this reason, applications for charitable status from arts organizations often claim educational purposes, along the lines of “to educate and inform the public, in particular by performing dance works ...”¹² It is possible to speculate, but not demonstrate, whether traditional or “high” artistic organizations find registration easier than novel or folk arts.

Applying the Definitions

A partial list of those who must decide whether an organization is charitable, for different purposes:

- Revenue Canada uses the common law definition to decide who is entitled to be registered as a charity under *Income Tax Act*.
- The Public Trustee of Ontario uses the common law definition to decide who should report the creation of a charitable purpose under the *Charities*

*Accounting Act*¹³ (though charities must take the initiative and report to the Public Trustee).

- The Public Trustee of Ontario uses the common law definition in supervising the creation of charitable corporations and in determining whether property held for charitable purposes is properly used.
- Government departments and agencies often apply the common law rules to decide who is eligible for grants or special benefits.
- Donors who are bound to give only to charities, such as many foundations, rely on the common law rules to decide to whom they may properly give their money.¹⁴

In practice, many people rely on Revenue Canada's decision as a shorthand qualification. The main group that does so is, of course, charitable donors in general, who can get a tax credit for donations to registered charities (and some other registered organizations that may not be charities in law). The other main "user" of Revenue Canada's registration is Revenue Canada itself since the *Income Tax Act* exempts some registered charities from taxation.

Some Benefits of Charitable Status

The public accords favourable treatment to charities in a number of areas. For example, registered charities are, as noted, exempt from income tax. They may also be exempt from the Goods and Services Tax, though in some circumstances they may wish to forego the exemption.¹⁵ They have a significant advantage in raising money from the public because they can offer their donors a receipt that brings a tax credit, thus reducing the cost of the donation.

Some benefits do not depend on registration. Charities at common law are eligible for grants from charitable foundations, as noted. Ontario (and possibly other provinces) exempts some charities from business assessment on property owned and occupied for charitable purposes.¹⁶ Charitable trusts are exempt from the rule that requires other trusts to wind up within a defined period from their creation (the rule against perpetuities). Property held for charitable purposes that become obsolete will be helped to a more useful end by the courts, through the doctrine of *cy-près*.

Organizing the Charity

Organizing Generally

When more than one person intend to co-ordinate their activities for a purpose, they face the question of how to organize themselves. The form of organization will govern their relations to each other and the relations between themselves and the outside world, known to lawyers as "third parties". Their choice of organization will depend largely on how much they value certainty, flexibility

and continuity in each sphere, i.e., internally and with third parties. Different forms of organization offer these characteristics in different degrees.

The legal categories of organization are, broadly stated, the partnership, the unincorporated association, the corporation and the trust. The last three categories are available to people who wish to organize a charity. Since a partnership is defined by the splitting of the profits of an enterprise, and taking profits is not allowed to the members of a charity, charities may not be partnerships.

Can one person be a charitable organization? One person cannot be a charity as an individual; however, one person may declare himself or herself to be a trustee to hold property for charitable purposes. If the trust then employs people to carry out the purposes, this can be charitable; however, Revenue Canada prefers to see a slightly broader base for a registered charity, perhaps to ensure continuity if the single person dies or loses interest.

Trusts in General

A trust is an arrangement by which one person holds property for the benefit of others. If the “others” are the public in a category recognized by charities law, then we have a charitable trust. The trust begins when a person gives property to a trustee—himself or herself or others—“in trust” for such purposes.

To consider the criteria mentioned earlier, the trust has certainty. It exists as a legal entity and the trustees will be recognized as operating separately from their own personal affairs when they carry out their activities for the trust. Once property is transferred to the trust, the person creating it cannot change his or her mind and take the property back. On the other hand, a declaration of trust may be totally private, and even oral rather than written, so proving the existence of the trust can present problems. Revenue Canada insists on documentation of the existence and purpose of a trust before registering it as a charity.

The trust can have some flexibility in operations if the document creating the trust (usually a trust deed) permits it. Trustees can be given all the powers of a natural person. If the trust deed does not provide wide powers, however, the law restricts the activities and investments of trustees.¹⁷ Changing the trustees can be difficult in some circumstances.

The trust has continuity so long as the trustees remain in place. Their succession can be arranged and must be arranged separately each time a trustee retires or dies. While a trust will not fail for want of a trustee, managing the succession can be cumbersome. Using a corporate trustee, such as a trust company, can ensure greater continuity in the affairs of the trust.

Unincorporated Associations in General

People may associate to carry out a charitable purpose; however, if the association has no legal form, the law will not recognize it as existing separately from its members. The association cannot enter into contracts in its own name. The members are all liable for the activities of the association, and for its debts.

These characteristics give the unincorporated association little certainty: it is hard to know just who is in charge or of what, or what promises it has given and what promises it can be made to keep. While its lack of legal structure gives it great flexibility, it can also make its dealings very cumbersome in practice. Finally, its continuity will strike many as doubtful; if some of the members (or even one) leave, what is left? The answer is unclear. The association re-forms itself with every change of membership. In addition, the current members can wind up the association and take the property personally.

Unincorporated associations can be registered as charities if they can demonstrate sufficient permanence of operation and financial responsibility over time. They also have to show that the members are blocked in some way from taking the property themselves on a winding-up.¹⁸

Corporations in General

A corporation is a legal person, that is, a person created by the law. As someone has said, “God may make a tree, but only a lawyer can make a corporation”. In fact the government makes it, through procedures in corporations statutes enacted by the federal government and all the provinces. The characteristics of the corporation and the rights and responsibilities of those who run it and those who deal with it are found in those statutes and in other sources of law. Here we will look briefly at the essence of any corporation before turning to the special considerations that apply to a charity that wants to take the form of a corporation.

The corporation is legally separate from its members or owners. This means that someone dealing with the corporation does not have to know who is behind it.¹⁹ Likewise, the owners are not legally liable for the debts of the corporation. The owners may lose their investment in the corporation, but they do not risk other property too.

Next, the management of the corporation is separate from its owners or members. The people running the business may or may not own a significant part of it. This allows those who create the corporation to hire competent professionals to run its operations. It also allows people to set up operations that they could not run themselves and yet have some control over those operations, by selecting those who do run them.

A corporation thus offers certainty to the outside world—its existence can be proved on the public record, it owns its own assets and can transfer them freely,

it can make contracts and keep them. It also offers certainty to its owners or members, since the relationships and rights are spelled out by statute or other documents, such as corporate bylaws. It does this at the expense of some formality: holding meetings, passing resolutions, and the like. These formalities are easily mastered.

The corporation offers flexibility, since it can tailor its operations to the circumstances in which it finds itself.²⁰ While the basic structures and tasks are known, they are also very adaptable.

Finally, the corporation provides continuity. Owners or members can come and go without affecting the rights or obligations of the corporation itself. It has what is called “perpetual succession”—it is immortal, if it is properly managed and if its owners and members want it to be.

Not-For-Profit Corporations

Most of these characteristics of the corporation extend to all corporations. Charities that incorporate take advantage of them through a special form of corporation called a “not-for-profit” corporation, or a corporation “without share capital”. These two terms point to the two big differences between this form of corporation and the ordinary business corporation. First, any “profit”, i.e., net revenue after expenses, may not be distributed to members or “owners”, but must be retained in the corporation and used for its operations.²¹ Second, as a rule, the corporation does not have shareholders at all. The equivalent position is that of “member”. Members do not buy shares of the corporation but may pay fees, usually annual fees, to become and remain members.

The purposes of the not-for-profit corporation, and the reason that people would want to pay the price to become members, are generally described as “social”. This term encompasses a broad range of activities from running clubs and shared recreational facilities to social activism and community benefits in the arts.²² Some provinces have separate statutes authorizing the creation of such corporations.²³

Charitable Corporations

While all charitable corporations (at least in Ontario) are not-for-profit corporations, the converse is not true. Numerous social organizations do not qualify or want to qualify as charities. Charitable corporations must operate only for charitable purposes, as defined by law. Ultimate control of the corporation rests with members. Memberships are rarely transferrable. Members, like shareholders of business corporations, are not liable for the debts of the corporation. The corporation is not taxable on its income if it is registered as a charity. The earnings of a charitable corporation may not be distributed to members. Further, if the corporation is wound up, any net assets must be distributed to another charity with similar objects.

In Ontario, the intention to set up a charitable corporation must first be cleared with the Charitable Property Division of the Office of the Public Trustee as well as with the Companies Branch of the Ministry of Consumer and Commercial Relations that deals with all corporations.²⁴

Choosing the Corporation

By this time it may be clear why most charitable organizations in Canada are created as corporations. The corporate form gives a high degree of certainty to both insiders and outsiders about the rules under which the organization must operate. It offers considerable flexibility in deciding how the corporation is to be controlled in the longer term and managed day to day. It has the potential to be immortal.

A particular advantage of a corporation over a trust is in the role of members of a corporation. The members, like shareholders of a business corporation, select the directors, so they can have real influence on the direction of the charity. Since memberships can be made available to the public, a charitable corporation can have a broad effective base in the community it serves. While broadly based memberships may be as innocuous to management as shareholders of widely held shares of a business corporation, such dilution is not necessary. The potential exists for a creative relationship. Trustees, on the other hand, answer only narrowly to beneficiaries, who have next to no opportunity to select or direct them. In the case of a charitable trust, the only beneficiary is the “public”. Formal participation by that beneficiary is impossible. The Attorney-General, through the Public Trustee, may stand in for the public, so outside regulation replaces internal controls.

It may be that small or narrowly focused charities can operate as trusts as readily as in corporate form. However, such charities might have more difficulty in finding professional advisors to create and assist the operations of the less standardized and flexible form.

Trusts are more frequently used to supplement the operations of a not-for-profit corporation. Several organizations that cannot themselves qualify as charities because of their political purposes have established charitable trusts to focus on purely charitable activities that support the aims of the primary organization. The Canadian Civil Liberties Union and the Women’s Legal Education and Action Fund are two examples of non-charitable organizations that offer supporters the choice of donating to a related charitable trust—with the offer of a tax receipt for such donations.

Governments that deal with charities often insist that the charities be incorporated. The Ontario Arts Council requires corporate status of the organizations to which it gives operating grants. No doubt the predictable standardization of procedures in a charitable corporation is an important factor in this policy.

Choosing to incorporate a charity means choosing a federal or a provincial corporation. Part II of the *Canada Corporations Act* applies to charities with purposes that are federally regulated constitutionally, or that are likely to be pursued in more than one province. Provincial statutes apply to local charities though provincially chartered corporations may operate in other provinces as well. The choice of jurisdiction may be influenced by how modern the incorporation statute is, e.g., British Columbia and Saskatchewan have relatively new statutes on the subject while Canada does not. The choice may also turn on the accessibility of the registering offices or the fees for incorporation. The rules themselves may make a difference, e.g., the federal statute requires charitable corporations to submit bylaw amendments for approval while Ontario’s statute does not.²⁵

Managing the Charity

This section will provide a very brief outline of the structure of management of a charitable trust or corporation. Some of the particularly pertinent rules of operation will be discussed in more detail afterwards.

Managing the Charitable Trust

The trust deed sets out the rules of operation, subject to the relevant statute²⁶ and the rules of “equity”, a form of court-made law that applies to trusts in particular. The creator of the trust, called the “settlor”, names the trustees. The trust deed may deal with how the trustees may be changed. The law allows some limited flexibility to the courts to help trusts adapt to changing times. Selecting a corporate trustee, such as a trust company, reduces the need to change trustees as individuals retire or die.

The trustees own the property of the trust and manage it for the benefit of the public, that is, for the charitable purpose. Trustees are subject to very strict rules about conflicts of interest. They are bound by law to be diligent and to use what skill they have. Their powers to invest trust property may be limited by statute but may also be broadened by the trust deed.

So long as they keep to the charitable purposes in the original deed, the trustees have little need to consider changing views of how those purposes are served—though of course the trustees may be as sensitive as anyone else to keeping up with the society that the trust is intended to help.

Managing the Business Corporation

Perhaps the single most important characteristic of the corporation is the separation of ownership and management. The directors of a corporation are elected by the shareholder/owners. Once elected, the directors have a duty to manage the affairs of the corporation in the best interests of the corporation, which generally means the long-term interests of the shareholders.²⁷

The objects of the corporation are set out in the corporate charter. Nowadays most corporations have the capacity of “a natural person”, meaning that they can do anything the directors want, in theory. The bylaws of the corporation describe how the officers are to be elected and what they are to do, how meetings are called, how contracts and cheques may be signed, and similar points of detail.

Directors have a duty of loyalty to the corporation (their “fiduciary duty”) to avoid conflicts of interest. Most business corporation statutes set out rules about how such conflicts can be avoided. Directors also have common law duties to be prudent, diligent and as skilful as their skills permit in the interest of the corporation. The liabilities of directors are not limited by law. Directors may be liable for losses to the corporation suffered through lack of diligence or skill. Statutes may impose extra responsibilities, such as paying back wages to employees unpaid by the company, or back taxes that the company does not withhold for Revenue Canada. The corporation has the right to indemnify directors for some of these losses, and to buy insurance to make good on the indemnity.

The courts can enforce the duties owed by directors to shareholders. Corporate statutes now list numerous remedies for “oppression” of various kinds that directors and officers might inflict on shareholders and others.

Managing the Charitable Corporation

The directors of a charitable corporation are elected by the members. Often the law sets a minimum number. (In Ontario the minimum is three, while a business corporation may have a single director.) The bylaws often describe in some detail the qualifications of directors, including background, regional distribution, term of office, and the like. Generally directors must be members, which means that they must make a contribution to the charity. Once they are elected, their decisions for the corporation must take account of the law governing the use of charitable property as well as the general law applicable to corporations. In Ontario the Office of the Public Trustee asserts authority over the use of charitable property by corporations.

The fiduciary duties of directors of charities are interpreted broadly. Whether directors of charitable corporations are to be treated entirely as trustees of charitable trusts has been much debated.²⁸ Probably directors will not be classed as trustees for all purposes, since some strictly trust purposes will not be appropriate for corporate organizations; however, directors will be treated more strictly than directors of business corporations.

Statutory liabilities are similar for directors of all corporations. However, in Ontario, after considerable debate, legislation that extended the liability of directors for unpaid severance and vacation pay to employees did not extend this liability to directors of not-for-profit corporations.²⁹

While the investment powers of corporations are theoretically unlimited (contrary to those of trusts), inappropriate (because imprudent) investments that lose money would result in liability of the directors to the corporation.³⁰

Charitable corporations have the power to indemnify their directors and insure the indemnity against breaches of duty; however, the power does not extend to breaches of the duty of good faith, which is for directors of charitable corporations perhaps the broadest, or hardest duty to know with certainty. Such insurance is also expensive, and many charities simply cannot afford it, so the legal power to offer it to directors may be small comfort to them in practice.³¹

Operating the Charity

Reporting Rules

All registered charities must file an annual information return with Revenue Canada (form T3010), along with a copy of their financial statements. Some of the information is available to the public, some is kept confidential. Corporations also file corporate information returns that differ according to the jurisdiction of incorporation. For example, federal corporations file annual notices and corporate documents; Ontario corporations file only notices of change of directors and officers. An Ontario charitable corporation is required to have its annual financial statements audited, though the statements are not required to be made public.

In Ontario, all charities, indeed anyone who holds property for a charitable purpose, are supposed to inform the Public Trustee of their creation and major changes in their activities.³²

Rules About Directors and Trustees

Generally no director of a charitable corporation may receive any remuneration for acting as such. The principle behind this is that of conflict of interest, i.e., a conflict between the duty to promote the best interest of the corporation and the interest in making personal profit.³³ In Ontario, some cases have held that a director may not take compensation from the corporation for acting in any capacity, whether as an employee or as the provider of services, such as those of a lawyer or an accountant.³⁴ The Public Trustee takes a strict position in theory about such payments; however the trust doctrine of “necessity” may operate to excuse particular cases from the rule. The clearest example is that of the small arts organization whose artistic director is employed and (often poorly) paid by the organization and who also serves on the board of directors.

Contracts for the sale of goods or services between a charity and a director in Ontario are difficult. While business corporation statutes have formal ways of avoiding the appearance of conflicts of interest in these situations, the not-for-profit statute does not. Avoiding a conflict of interest is the heart of the fiduciary duty which, as noted, is imposed strictly for charities.

Conclusion

This paper has sketched some reasons why some activities are classified as charitable and some are not. It has also looked at how a charity can be organized, showing the advantages of setting up a corporation in many circumstances. It may also have given some warning that the public benefits that flow to charities have to be earned by appropriate behaviour. Whether charities are effectively accountable to the public could be debated. That they are in principle accountable and that they should be accountable is indisputable. Some of the discussion in this paper may help those starting a charity to organize themselves in a way that can meet the highest standards that the public will apply to them.

SOME FURTHER READING .

- Bourgeois, Donald. *The Law of Charitable and Non-Profit Organizations*, Butterworth, 1990.
- Kingston, R. *Ontario Corporations Manual*, section on Not-for-Profit Corporations, Carswell/Thomson Professional Publishing, looseleaf.
- Revenue Canada. *Information Circular* 80-10R on registering a charity; IC 87-1 on political activities of charities.
- Waters, D.M.W. *The Law of Trusts in Canada*, second edition, Carswell, 1984.

FOOTNOTES

1. Although all of a charity's property is held for charitable purposes, the use of some of it may be regulated by one authority and of another part by another authority. *Re Centennial Hospital Association* (1989), 60 O.R.(2d) 1 (H.Ct.)
2. As stated in *Commissioners for Income Tax v. Pemsel*, [1891] A.C. 531, most recently confirmed in Canada by *Native Communications Society v. Canada*, [1986] 3 F.C.471 (C.A.).
3. See Marriott, "The Possible Impact of the Charter on the Law of Religious Charitable Trusts" (1988), 7 *Philanthrop.* No. 4, p.4.
4. *Re Positive Action Against Pornography and the Minister of National Revenue* (1988), 49 D.L.R.(4th) 74 (Fed.C.A.).
5. An abortion clinic was held to qualify as a charity in *Everywoman's Health Clinic* 92 DTC 6001 (Fed.C.A.). This was not by analogy so much as by extension of existing categories of health facilities. See "Case Comment" by J. Phillips in (1992), 11 *Philanthrop.* No. 1, p.3.
6. *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 (H.L.).
7. *Burns v. The Queen* 90 DTC 6335 (Fed.C.A.). The case concerns a donation to a ski school that was a registered amateur athletic association (which has similar status under the *Income Tax Act* to a registered charity) which was made as tuition for the donor's daughter's classes. The Court held that no "gift" was made. This policy also lies behind Revenue Canada's policy that donation receipts may be issued only for the excess of the entry price over the actual cost of an event. (IT Bulletin 110-R2.) In other words, buying something from a

charity is not a charitable transaction. Buying something for more than it is worth may be charitable to the extent of the excess.

8. The leading recent cases on political activity are *Positive Action Against Pornography v. MNR*, 88 DTC 6186 (Fed.C.A.) and *Toronto-Volgograd Committee v. MNR*, 88 DTC 6192 (Fed.C.A.). Revenue Canada laid out its views in Information Circular 87-1, February 25, 1987. See earlier comments on political activity in (1980), 2 *Philanthrop.* No. 4, p.5; (1982-3), 3 *Philanthrop.* No. 3, p.35; (1984), *Philanthrop.* No. 3, p.26.
9. *Re Canada Trust Company and Ontario Human Rights Commission* (the Leonard Foundation case), (1990), 69 D.L.R.(4th) 321 (Ont. C.A.). See *Comment* by J. Phillips (1990), 9 *Philanthrop.* No. 3, p.3. The Court of Appeal found the trust's objectives to be no longer charitable; it provided a remedy by reading out the objectionable provisions so that the beneficiaries would be more widely and acceptably defined.
10. *Everywoman's Health Clinic*, *supra*, footnote 5, and the *Case Comment* mentioned in that note.
11. *Alberta Institution on Mental Retardation v. The Queen*, 87 DTC 5306 (Fed.C.A.). This case states the nature of a related business for Income Tax purposes. It is probably too broad as a statement of charities law. One reason for excluding businesses from the definition of charity is to ensure that the benefits of charitable status are not accorded unfairly to those who are in competition with businesses that cannot qualify for such benefits. For some aspects of the "unfair competition" debate, see Bennett and DiLorenzo, "Unfair Competition" in (1989), 8 *Philanthrop.* No. 3, p.51, and Hughes, "A reply to Bennett and DiLorenzo" (1990), 9 *Philanthrop.* No. 3, p.43.
12. This discussion is based on conversations with several people active in the arts and charities. Views differ on whether it is becoming harder to get arts activities recognized as charitable or whether, on the other hand, the arts are on the verge of being recognized as a separate class of charity that will no longer have to qualify as "education" or under the "other" classification.
13. R.S.O. 1990 c. C.10. In *Re Levy* (1989), 68 O.R.(2d) 385, it was held that section 7 of the *Charities Accounting Act* was the statutory definition of a charity in Ontario; however that definition must be read in the light of the cases on charities, so it adds little to the common-law tests discussed in this article.
14. The Court in *Re Laidlaw Foundation* (1984), 48 O.R.(2d) 549 (Surr.Ct and Div.Ct) held that the common law definition may reach beyond what is a "registered charity". The case also shows why the definition is important. See "Case Comment" by D.M.W. Waters (1985), 5 *Philanthrop.* No. 1, p.46. The Devonian Foundation's attempt to establish a review agency for charities was foiled by a ruling from Revenue Canada, based on the common law, that setting up such an agency would not itself be a charitable purpose for the foundation. See F. Dichl, "The Family That Gave It All Back", review in (1991), 10 *Philanthrop.* No. 3, p.59.
15. See Holly MacLachlan-Toonders on the GST and charities in (1989), 8 *Philanthrop.* No. 4, p.46.
16. *Assessment Act*, R.S.O. 1990 c. A.31, s. 3, especially para 12.
17. Even trustees with full powers must exercise them in a way compatible with charities law. Legal power is less often an issue than the proper exercise of power. Limits on investment powers in the *Trustee Act* do not make other investments invalid; they deprive the trustees

of protection if the investments lose money. The trustees may then be personally liable for the losses.

18. It is likely that a court would find that an unincorporated association operating as a charity held its property in trust for the charitable purposes and the usual trust rules would apply.
19. This discussion is, of course, very schematic. People lending money to corporations often want financial backing from the shareholders. The business of related corporations—that have similar share owners—is often important to those dealing with a corporation.
20. The trend in corporate law is to broaden the “objects” for which a corporation may operate. Few corporations are stuck in a single line of work any more. Not-for-profit and charitable corporations are often forced to be less flexible by the statutes themselves. As noted later, the objects of a charitable corporation must all be charitable.
21. This does not mean that a not-for-profit corporation is any “purer” than a business corporation, or that its money is being managed more competently or more honestly. The not-for-profit structure offers many opportunities for the unscrupulous to exploit the corporate assets for their own gain. Not-for-profit status is only the beginning, not the end, of the enquiry.
22. Section 118 of Ontario’s *Corporations Act*, R.S.O. 1990 c. C.38, allows the incorporation of a non-share-capital corporation for “objects that are of a patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic nature or that are of any other useful nature”. The corresponding federal statute is Part II of the *Canada Corporations Act*, R.S.C. 1970 c. C-33.
23. *Society Act*, R.S.B.C. 1979 c. 390. Section 2 permits incorporation under the *Act* for a list of purposes very similar to Ontario’s, but it expressly excludes incorporation for purposes of carrying on a business, trade, industry or profession for profit or gain. Saskatchewan has its *Non-Profit Corporations Act*, S.S.1979 c. N.4.1. See also W.H. Hurlburt, “Towards a Reformed Non-Profit Corporations Statute” (1988), 7 *Philanthrop.* No. 3, p.17.
24. The two agencies have combined to publish the *Non-profit Incorporator’s Handbook*, a useful guide to these procedures. The second edition is due out in the spring of 1993. For a review of the first edition, see (1989), 8 *Philanthrop.* No. 4, p.55.
25. Some provinces require corporations from other provinces—and sometimes federal corporations as well—to register as “extra-provincial” corporations. Others may simply permit registration. [See also Blake Bromley at p. 42.]
26. Such as the *Trustee Act*, R.S.O. 1990 c.T.23.
27. This is not the place to examine the debate about whose interests the “interests of the corporation” should reflect. Some people advocate that directors should consider the interests of employees and customers of the corporation, the public at large, the environment, and other more or less definable factors.
28. See D.W.M. Waters, “Case Comment: Re Centenary Hospital Association” in (1990), 9 *Philanthrop.* No. 1, p.3 and references in that article at footnote 31.
29. *Employment Standards Amendment Act*, S.O.1991 c.16 (Bill 70), notably section 58.19(3) of the amended *Act*.
30. *Feldman* applied that same standards to a charity’s investments as it would have applied to those of a trust. *Re Feldman (David) Charitable Foundation* (1987), 58 O.R.(2d) 626 (Surr.Ct.).

31. It is arguable that the directors could not exercise the general power to indemnify because this would involve them in a conflict of interest. They might have to apply to a court for permission to grant the indemnity.
32. See “Notice to Charities” from the Public Trustee, listing the material to be filed, at (1989), 8 *Philanthrop.* No. 2, p.12.
33. See Dona L. Campbell, “Case Comment: Remuneration of Directors” (1990), 9 *Philanthrop.* No. 1, p.36.
34. *Ibid.* The leading case is *Re Toronto Humane Society* (1987), 60 O.R. (2d) 236. This was also the subject of a “Comment” by Maurice Cullity at (1988), 7 *Philanthrop.* No. 3, p.12.