

# Bookshelf

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## **The Law of Charitable and Not-for-Profit Organizations, 3<sup>rd</sup> ed.**

*By Donald J. Bourgeois*

*Published by Butterworths, 2002, 595 pp. \$139.*

REVIEWED BY JOHN D. GREGORY of the Ontario Bar and Editor emeritus of *The Philanthropist*

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Human beings are social creatures. Some of our earliest collective action was devoted to survival, to making a way in the world, to getting a living. It is not surprising that societies have had to develop rules to govern this kind of activity – rules that we know as commercial and corporate law. Activities are given structure. The forms of organization – proprietorships, partnerships, corporations – have well defined legal implications and frameworks.

The desire to do good to one's fellow beings is also a perennial part of human nature. This desire too is often expressed collectively, by joining with others to carry out good works. The people engaged in this collective action have naturally looked to the same types of organizations to structure their relationships and to permit the effective focusing of their activities. However, the rules devised for commerce do not always suit non-commercial purposes. The motives of the participants and the ways they want to interrelate are different.

In addition, our society gives special value to activities carried on for the public benefit and thus accords special privileges to those who carry them on. They may have less rigorous rules applied to them, and their income may be subject to less tax, to encourage their good works.

As a result, the rules by which these activities in the public good are conducted are similar to, but not the same as, the rules for business. Questions arise as to who should be subject to the different rules and just how they differ in practice. Over the years, much less attention has been focused on these questions than on aspects of business law, perhaps because there was more money to be earned in commercial activities.

The continued expansion of the charitable and nonprofit sector in our society, prompted in part by evolution in opinions about how certain services should be provided, has required greater attention to the rules that govern it. One of the first in Canada to step up to that task in a comprehensive way was Donald Bourgeois. His book on charities and not-for-profit law first appeared some 15

years ago. It has now reached its third, much expanded edition. It is an admirable effort at a guide to “all you need to know” about the rules that affect his chosen subject.

The author aims his work not just at lawyers, but also at people involved in charities and nonprofits, both staff and senior volunteers. He does not restrict his text to “the law” in a narrow sense. Much of the book is filled with sensible advice about how to make the legal principles work in the practical world of organizations, and how the daily projects and challenges of managing these organizations sometimes confront the legalities. While the focus is on federal and Ontario law, an effort is made to highlight key differences elsewhere in the country, and appendices set out the statutory references for all Canadian jurisdictions in a useful comparative chart and give contact information for relevant government offices across the country.

The book starts off, logically enough, with a discussion of what charities are and how they are distinguished from other not-for-profit organizations. It discusses the original English legal cases and how they have been interpreted in Canada by courts and by supervisory authorities like the Canada Revenue Agency and Ontario’s Public Guardian and Trustee. The chapter also notes the special status of political activities and, at a bit more length, the extent to which either kind of organization can carry on for-profit activities without jeopardizing its special status.

A very short chapter describes the legal forms available for collective non-profit action: trusts, unincorporated associations, and corporations either provincial or federal, including cooperatives. The elements and advantage of each are dealt with. This is followed by a slightly longer chapter on the formalities of setting up a corporation in Ontario or under the federal law. This is fairly straightforward and will certainly cause no surprises among legal readers, while helping non-lawyers know what to expect. Another brief discussion follows on organizational formalities: by-laws, statutory provisions, and rules of procedure for meetings.

These technicalities out of the way in about a hundred pages, the book turns to the dynamics of the organization, in other words, what happens after the legal organization is in place. Attention is paid first to the formalities: keeping books and records, holding meetings, reporting financial results for members and for tax authorities, and maintaining the documentation required to keep charitable status. There is useful material here on different kinds of accounting regimes, notably for keeping track of contributions. Much of the text is influenced by the Handbook of the Canadian Institute of Chartered Accountants (CICA), which guides officially recognized conduct in these matters. The chapter continues with notes on how to amend the formal structures as required.

An additional section of the same chapter talks of “organizational structural change,” though change is not a particular theme of the section. The author

canvasses options for structuring national organizations: how much central control is desirable or possible, and how can organizations achieve it? He devotes a page or two as well to parallel foundations, “strategic alliances,” foreign activities, and the management of relations with related businesses and political activities.

The liability of directors and officers is a frequent concern to people who hold those positions and those who advise them. Bourgeois offers a lengthy discussion, not only of the technical legal position but, more important, a practical description of what appropriate compliance policies might look like and how they can be run. Half the chapter appears under the title “Board management of risk” and deals with issues like conflicts of interest, privacy protection, insurance and indemnification, and investment policies. In theory, it is a description of how directors fulfill their legal duties of honesty and prudence; in practice, it is more like a manual of administration. It might even justify a separate chapter.

For some readers this will be the most valuable part of the book. Much of this advice and information is not readily available elsewhere, at least in consolidated form. The author has read the literature on his subjects, whether publications from the Canada Revenue Agency or other regulatory authorities, periodicals (like this one), or proceedings from continuing legal education meetings. He makes good use of it in his advice to directors. However, he does not pretend that all the answers are available. Frequently the text states a set of rules, gives some practical guidance, and then asks a series of pointed questions about the implications for related activities. This is not only a good educational tool; it is a recognition that the law in the field is in evolution. Lawyers, staff, and volunteers alike have a lot of room for judgment.

After dealing with directors and officers, the book turns to the members and their rights, by contract for unincorporated associations and by statute for corporations. This is an area to which many organizations do not pay sufficient attention. Even the basic question “who is a member?” is often answered carelessly, in a phrase such as “any person who shares the goals of the organization.” The author reminds us that some formal admission process is desirable. Anyone who has seen a serious challenge to corporate policies extend to an effort to unseat the directors at a special members’ meeting will appreciate the importance of a persuasive record to show who is or is not a member at a particular time.

A discussion on taxation deals in detail with the formalities of registration as a charity, including how to describe one’s activities to meet the qualifications. The chapter contains useful material on consumption taxes – GST and retail sales tax – that is frequently the subject of questions by those operating charities. The note on assessment for property taxes also clarifies a sometimes vexed question.

The book goes on to note the other main sources of supervision of charities, besides the Charities Division of the Canada Revenue Agency, which for most provinces is the most important regulator. The text deals with Ontario's Public Guardian and Trustee and also with the role of the courts, either in permitting changes to the use of charitable property through the *cy-près* doctrine or in enforcing the obligations of trustees or other fiduciaries.

A lengthy closing chapter outlines the legal and practical framework of fundraising, the lifeblood of many charities and nonprofits. The author reviews the impact of laws already mentioned, like those on privacy and intellectual property, and the handful of provincial laws that regulate fundraising directly. He keeps a practical eye on the field, setting out, for example, a list of reasons why a charity might not want to accept particular donations – not every charity's first problem in fundraising!

Bourgeois goes deeply into the rules about gaming, on which he has written a separate treatise, and on special events. He recognizes that things can go wrong in fundraising and offers advice on risk management and avoidance, including insurance issues. He describes special considerations about planned giving of different kinds of property. Finally, he mentions the increasing use of the Internet in fundraising. His comments on the subject are fairly preliminary but sensible in this quickly evolving technology: the principles of the rest of the book continue to apply despite the glamour and the mystery of the new medium.

Substantial appendices set out checklists of considerations for those setting up charities or not-for-profit organizations and offer model documents for by-laws, so that readers can see what the principles might look like when implemented. The author cautions readers to apply the models flexibly to their own circumstances. The models themselves are refreshingly low in legalese.

As this book is aimed at a legal and non-legal audience, and as it gives practical as well as legal advice, it is less rigorous and more conversational in tone and style than the average law book. This doubtless makes it more accessible to the lay reader, though it may mean that the lawyer looking for a quick guide may labour a bit longer. Like many worthwhile conversations, however, it sometimes tends to ramble, it is sometimes a bit repetitive, and some of its phrasing would not give pleasure to grammatical purists. Some important points are raised in passing, or only in introductory passages, and then not dealt with again in more focused or detailed discussions. Sometimes related points appear at widely spaced intervals (though the index can help track them down.) And on the rare occasion the message seems mixed. The process of applying for registration as a charity is described as “usually straightforward” (p. 316), “at first blush, a complicated one” (p. 317), “not a complicated one” (p. 317), “time consuming and expensive” (p. 320) and “involved” (p. 333).

Readers' judgments may vary about emphasis or presentation, of course. I would have liked to see a bit deeper treatment of the distinction between

administrative activity of a charity and its charitable activities, in part because the distinction is frequently emphasized by donors and regulators, and in part because it is often artificial or misleading. The discussion of political activities is scattered through the book but does not in my eyes pull the picture together satisfactorily. The question of judicial supervision seems unfocused. But overall such concerns are minor. The substance is here, and it is right.

Bourgeois' work will certainly disabuse anyone of the notion that there is not much law "out there" on charities and not-for-profit organizations or that the law in this field is simple. It will be a healthy warning for lawyers in other areas of practice who are asked to help out their family or friends by doing the legal work for a charity. The law of charities is not rocket science, it is not harder than other areas of the law, but it has its own rules and concerns and practices that affect the choices to be made. Having this book as a reference will make the task of the lawyers and the staff and volunteers that they advise a good deal easier.

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## **Bequest Management for Charitable Organizations**

*By M. Jasmine Sweatman*

*Published by LexisNexis Canada Inc., 2003, 342 pp. \$75.*

### **REVIEWED BY COLIN GRAHAM**

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Jasmine Sweatman, a lawyer practicing in Toronto, has written an excellent guide, from the perspective of those within charities, to the management of gifts from the estates of benefactors. The emphasis is on due diligence and identifying risks.

Many nonprofit organizations are sustained materially in their program offerings by the income from their endowments, which often are set up by bequests. Nevertheless, inadequate historical record keeping and changing administrative staff in many situations mean less than desirable knowledge is available in the charity about the original intents of the donors, leading to administrative errors.

Increased emphasis on "planned giving" and the greater sophistication of those leaving bequests, as well as the scrutiny, in Ontario, of the Public Guardian and Trustee, make the improvement in policies and procedures advocated by this book of great importance to many charities. While the emphasis is on bequest administration in Ontario, there is additional specific material with respect to Alberta and British Columbia.

The introduction gives a series of definitions, from that of an estate, a will, and the estate administrator, to a charitable beneficiary. It then moves on to the various steps of estate administration, including probate and the eventual releases and compensation for these processes by the estate.

There is a chapter on estate accounting, with a discussion of the “passing of accounts” in certain circumstances. Another useful chapter for the charity administrator is that on estate litigation and its management, an area in which a number of Canadian charities have found themselves embroiled, with its accompanying possibilities of bad publicity and loss of funds the donor had intended that they should receive.

A helpful addition for the layperson is a case study that takes up 90 pages of the book. It focuses on whether the charity receiving a bequest understands the administration that has taken place for the estate of its benefactor and now should sign a release of the estate trustees so as to enable the distribution of the bulk of the estate. The temptation for the charity as a primary beneficiary, of course, is to sign quickly and get the funds.

*Bequest Management for Charitable Organizations* is an excellent book to help the administrator in a charity understand the process of a bequest. This is important, first for the surprises that may be involved when a bequest is left and the charity is notified, but as importantly to help the charity understand how to talk to a potential “planned-gift donor” with assurance and how to follow through with the donor’s wishes, often in perpetuity.

A bequest may be expendable over a short time for the general purposes of the charity or for a narrower purpose, or it may be an endowment with the income to be spent in perpetuity for a quite specific purpose. Many of the bequest problems in a charity arise with the endowment that has quite specific purposes. These problems relate first of all to the challenge of keeping track of the multiple purposes for the various endowments that a charity may have and, second, to actually carrying out these purposes. There is a good discussion in this book of the *cy-près* doctrine, which allows a court to honour the intentions of a person who intended to benefit the public via a charity by ensuring a benefit is upheld by a charity with the closest name and objects and, where the gift is impossible to carry out, to modify it so that it can be carried out.

This book leaves the reader with the bequest now in the charity, having jumped all the hurdles from the donor’s intentions to the will, probate, and distribution.

A related aspect for the charity, of course, is developing the framework with written policies for appropriately investing the endowment received, bearing in mind the wishes of the donor, applicable trust law, and the directions of the organization’s board. Also covered are policies for maintaining the capital in a time of inflation, when capital gains and income are often mixed and

indistinguishable, depending on the investment vehicle, and there is a fixed payout of income required, for example, to fund the salary of a chair.

At this point the companion pieces of advice the charity administrator needs are, first, having found a “planned-gift donor,” how do you help this donor make a bequest that is of the most benefit to your organization and, second, now that you have the gift, how do you carry out the donor’s intentions, not only in the first year, but in perpetuity. Good reading in this regard are *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (reviewed in *The Philanthropist*, Volume 18, No. 3), and *Donor-Restricted Charitable Gifts: A Practical Overview* by Terrance Carter in *The Philanthropist*, Volume 18, No. 1 and No. 2.

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## **Governing Charities: Church and State in Toronto’s Catholic Archdiocese 1850-1950**

By Paula Maurutto

Published by McGill-Queen’s University Press, 2003, 208 pp. Cloth: \$65.  
Paper: \$24.95

REVIEWED BY DONALD BOURGEOIS

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*Governing Charities* is a recent volume in the McGill-Queen’s Studies in the History of Religion. That series includes over 50 books, most of which are more readily recognized as histories of “religion.” As with much of history and historiography, the purpose behind any analysis – especially in the good histories – can be seen as part of more than one field of history.

Professor Paula Maurutto’s *Governing Charities* falls into this category. It is a “good history” in that it attempts to answer the typical history questions of “who did what, when, where and why,” but it does so from different perspectives, creating a nuanced understanding of the “church and state in Toronto’s Catholic Archdiocese” for the hundred-year period between the mid-19<sup>th</sup> to mid-20<sup>th</sup> centuries.

The “history of charities” is a relatively recent topic for analytical research in Canada. While “charity” and “philanthropy” are sometimes included in a number of Canadian historical studies, such as histories of education or of religion, they are not generally seen as topics worthy of direct research and analysis. Indeed, the fact that Prof. Maurutto’s text is part of a series on the history of religion is testament to this reality.

The historiography of charity and philanthropy in Canada parallels the level of development of other areas of literature pertaining to charity, such as law and accounting. Not surprisingly, Canada is not in the lead. The history of charity is much more advanced in the United States, where there is even an institute, The Rockefeller Archive Center, whose purpose is to study the Rockefeller Foundation. By comparison, the study of the history of charities in Canada is in its infancy. *Governing Charities* sets a very high standard for any subsequent studies on this broad topic. It presents a nuanced analysis based on comprehensive research, displays a strong understanding of the times and of the materials, and provides direction and suggestions for future research and analysis.

Equally important, Prof. Maurutto tells a compelling and intriguing story. At times the book reads like a thesis or dissertation, but this is a quibble and not a serious concern. The author's linear approach makes developments clearer but may sometimes oversimplify historical dynamics. But this comment, too, must be tempered by the fact that historiography must start somewhere and that *Governing Charities* is an exceptionally good start.

*Governing Charities* tells the story of the Toronto Catholic Archdiocese over a 100-year period, but it does so in context of broader historical trends. It explains the history of government relationships with charities and how those relationships developed in response to sectarian, economic, social, cultural and other dynamics. In many ways, although the book focuses on the Catholic community(ies) in Toronto, it provides the backdrop for an analysis of the relationship between charity and public policy and its implementation. Public policy results in the regulation of charities in one form or another and in the "governing" of charities, be they Catholic, Protestant or secular.

Prof. Maurutto divides her text into six chapters, each of which leads us through a broader context. The first chapter, "The Origins of a Catholic Benevolent Enterprise, 1850s-1890s," examines the origins of mixed social economy in Ontario and traces the emergence of a Catholic "voluntary infrastructure." This was, of course, a period of substantial change in the Catholic community in Toronto, which moved from a French Canadian to an Irish Canadian demographic. The next chapter examines the start of the professionalization of charitable organizations, a phenomenon that paralleled the adoption of the scientific approach in other spheres of human endeavour in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. During this period, charities started to become accountable – a subject that remains important in the early 21<sup>st</sup> century.

While the first two chapters generally set the stage from a Catholic perspective and a broader societal perspective, the next two chapters, "From Catholic Charity to Catholic Welfare: The Impact of Social Work" and "Social Case-work During the Depression," discuss the areas of social reform and social work during the interwar period and examine the response of governments, which tended to look to charities to address social problems and which also



attached an increasing number of strings to any government revenue and support.

The last two chapters review the role of the Catholic Church and its agencies in law enforcement and the maintenance of social norms. This role of the Church parallels that of other institutions as society dealt with the changes in the economic status and desires of workers and others. The period of the 1920s to the 1960s, which is covered in Chapter 5, “Private Policing and Surveillance of Catholics, 1920-1960,” was one in which the state was concerned about Communism and other ideological responses to the desires and needs of workers. Democracy needed protection from internal threats; the state often turned to its partners, including the Church, to provide assistance.

Chapter 6, “The Role of Catholic Private Agencies in Community Corrections, 1890-1940,” provides a similar examination from another perspective. Whereas Chapter 5 focused on political threats, Chapter 6 examines the juvenile justice system and the Catholic Church’s involvement in it. This period witnessed changing views of children and youth and of what causes crime and how to prevent it. Rehabilitation in the community, rather than punishment, became the objective.

The Depression changed much in Canada, perhaps more than we have yet fully understood. Prof. Maurutto provides another prism, that of the charitable institutions of the Catholic Church in Toronto, from which to view the Depression and its aftermath.

The most serious criticism of Prof. Maurutto’s work is that it has a political purpose. It is readily apparent that she was not supportive of the changes that occurred in Ontario in the late 1990s with the election of the Harris government and similar governments. While no historian can be divorced from his or her context and political beliefs, it is preferable that these beliefs not be a fundamental part of the analysis. Having said that, Prof. Maurutto is upfront with her purpose. Her research and analysis allow the reader to understand what happened and why, notwithstanding her political purpose. The text succeeds because of the quality of the research, the nuanced analysis and the firm grasp of the materials. It bodes well for further research into the history of charities in Canada.