

Canada

Current as of March 2016. Comments related to any information in this Note should be addressed to [India Adams](#).

I. Summary

A. Types of Organizations

Canada is a federal jurisdiction with ten provinces and three territories. There are no statutory requirements under either federal or provincial law governing the legal form in which a not-for-profit organization (NPO) must be organized. The most common legal forms are:

1. "Non-share" (membership) corporations, incorporated under either federal or provincial law;
2. Trusts, which are recognized in common law provinces (Quebec, which is a civil law jurisdiction, also recognizes forms similar to trusts); and
3. Unincorporated organizations or associations.

With the exception of federal incorporation, the creation of any organization is a function of the applicable provincial law. These vary somewhat – but seldom substantially – from province to province.

B. Tax Laws

1. General Classification

The federal tax legislation in Canada makes distinctions among not-for-profit organizations that may be relevant for U.S. donors. Canadian federal income tax law distinguishes between "non-profit organizations" (hereinafter "NPOs") and "registered charities" (hereinafter "charities"). Although most potential grantees in Canada will be "charities," it is possible that NPOs may also seek funds from U.S. donors.

To qualify as an NPO, an entity must meet three tests. [1] First, it cannot be a charity or an organization that could be registered as a charity. Second, it must be organized and operated exclusively for a purpose other than profit. Third, no part of its income may be paid or made available for the personal benefit of any proprietor, member, or shareholder (with an exception for amateur athletic organizations).

The category of "charities" is divided into charitable organizations and charitable foundations (consisting of private foundations and public foundations). A charitable organization, whether incorporated or not, must devote its resources to charitable activities carried out directly by the organization. A charitable foundation must provide funding to other charitable organizations, although it can also directly engage in charitable activities. All charities, like NPOs, are subject to the non-distribution constraint.

2. Income Tax Exemption and Tax Treatment of Donations

NPOs and registered charities are not subject to income tax. Additionally, Canada recognizes a statutory list of organizations which are not technically "charities," but which are treated as such for the purpose of giving tax relief for donations. Together with charities, these listed organizations are collectively known as "qualified donees." Neither NPOs nor qualified donees

are subject to income taxation of any sort. They may be subject to property taxes and may have to register for Goods and Services Tax/Harmonized Sales Tax (GST/HST) purposes, however.

In addition to being qualified donees, as of January 1, 2012, most organizations must be listed by the Canada Revenue Agency (CRA) in order to be able to give charitable receipts. The listing may be found on the [CRA website](#).

Individuals are entitled to a tax credit (as opposed to a deduction) for contributions to qualified donees. Since January 1, 2013, there has been an extra, one-time tax credit bonus for first-time donors who give up to \$1,000 in one year. Corporations, however, receive a tax deduction for their donations to qualified donees.

3. Other Tax and Fiscal Provisions

Canada has a 5% federal tax known as the Goods and Services Tax (GST), however the GST does not apply to foreign grants. Moreover, while charities and NPOs are subject to the GST regime, there are many potentially applicable exemptions. With regard to customs duties, there are no particular exemptions for charities or NPOs. Real property taxes, which are part of provincial and/or municipal jurisdiction, are applied on a haphazard basis depending upon the jurisdiction.

II. Applicable Laws [2]

Because Canada is a federation with ten provinces and three territories, there are potentially fourteen different jurisdictions with laws applicable to NPOs and charities. Federal law is the most important of these, however. Key federal legislation consists of:

- [The Income Tax Act](#);
- [The Canada Corporations Act](#); [3]
- [The Canada Not-for-Profit Corporations Act](#); and
- [The Charities Registration \(Security Information\) Act](#). [4]

While the provinces have jurisdiction over charities, there is little legislation in this area; instead, most provinces rely primarily on the common law powers of the Attorney General to act when there has been a breach of fiduciary duty. However, Ontario and Alberta have enacted legislation which is of some consequence for charities, namely:

- The Charities Accounting Act (Ontario); [5]
- The Religious Organizations' Lands Act (Ontario); and
- The Charitable Fund-Raising Act (Alberta).

Regarding trusts, the Trustee Acts of all provinces are relevant. Finally, for membership corporations, each province also has legislation that deals with the incorporation of corporations without share capital.

III. Relevant Legal Forms

Neither federal nor provincial law sets forth requirements for the organizational form of an NPO or charity. The most common forms are "non-share" corporations, trusts, and unincorporated organizations or associations. The Federal Income Tax Act does, however, distinguish between NPOs and charities – a distinction that may prove useful in making equivalency determinations. [\[6\]](#)

1. Not-for-profit Organizations (NPOs)

The Income Tax Act provides the primary definition of a non-profit organization (NPO), as follows:

"[A] club, society or association that, in the opinion of the Minister, was not a charity within the meaning assigned by subsection 149.1(1) and that was organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit, no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof..." (Income Tax Act, Paragraph 149(1)(l)).

The term "club, society or association" includes corporations and trusts. The key criterion is that the pursuit of profit cannot be a purpose of the entity. This does not mean that activities generating a profit are forbidden, however, so long as the *motive* for the activity is not the generation of profit. Also, because the Income Tax Act does not require registration of NPOs, they essentially self-assess their status.

2. Charities

The Income Tax Act distinguishes between "charitable organizations," "public foundations," and "private foundations" based on the entity's structure, source of funding, and mode of operation. As a practical matter, charitable organizations are operational charities, while foundations are almost always grantmakers.

Charitable Organizations

A registered charity is designated as a "charitable organization" if:

- a. it devotes its resources mainly to charitable activities conducted by itself; and
- b. more than 50% of its directors/trustees deal with each other at arm's length (i.e., are not related by blood, marriage, common law relationships, or close business ties).

Public Foundations

A registered charity is a "public foundation" if:

- a. it is constituted and operated exclusively for charitable purposes;
- b. it is a corporation or a trust; and
- c. more than 50% of its directors/trustees deal with each other at arm's length (i.e., are not related by blood, marriage, common law relationships, or close business ties). [\[7\]](#)

Private Foundations

A registered charity is a "private foundation" if:

- a. it is constituted and operated exclusively for charitable purposes;
- b. it is a corporation or trust; and
- c. it is not a "charitable organization" or "public foundation."

A private foundation is one in which more than 50% of the board is *not* at arm's length with each other (i.e., it does not meet condition c. for public foundations.)

Grants to private foundations may raise "out of corpus" and other issues for U.S. donors. For a detailed discussion of issues arising with grants to private foundations (as defined under U.S. law), please see [Beyond our Borders](#), page 35-36.

IV. Public Benefit Status

NPOs are not required to serve the public benefit. Indeed, most of the major NPOs in Canada are organized for the benefit of their members. Such organizations include professional bodies such as the Canadian Bar Association, sporting and social clubs, labor unions, and political parties. However, some NPOs may be organized for public benefit or social welfare purposes.

In contrast, charities must satisfy the common law test of "charity." There is no federal or provincial statutory definition of this term, and the concept of what constitutes charitable activities draws heavily on traditional English common law dating back several centuries. Over the years, the courts have generally based their interpretation of "charity" on four categories described in English common law:

- the relief of financial hardship;
- the advancement of education;
- the advancement of religion; and
- certain other purposes for the benefit of the community.

For the most part, the Canadian provinces and territories have not defined "charity" or "charitable purposes" in legislation but – similar to the federal approach – have left it to the courts to apply common law. However, in some jurisdictions there are statutory definitions, which, to varying degrees, expand or modify the common law definition. [8] Finally, it should be noted that in the case of other organizations that comprise the category of "qualified donees" (apart from registered charities), a public benefit purpose is not a requirement.

V. Specific Questions Regarding Local Law

A. Inurement

The Income Tax Act contains the following provision which applies to both NPOs and charities:

"no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee, or settlor thereof" ([Income Tax Act, Paragraph 149\(1\)\(l\)](#)).

This is interpreted to mean that no dividend or similar payment or a liquidating distribution can be made for the personal benefit of individual proprietors, members, etc. in an organization. It

does not preclude, however, members or others being paid for services actually rendered. [9] These requirements, specified in law and practice, are generally consistent with U.S. prohibitions on private inurement.

B. Proprietary Interest

In the case of an NPO, members may have a proprietary interest and may, for example, be entitled to a return of contributed capital upon retirement as a member or upon the dissolution of the organization.

In the case of a charity, no proprietary interest is possible, and the legislative framework precludes a member from receiving any assets, whether out of income or capital. Indeed, if such a transfer takes place, the Income Tax Act imposes at least 100% tax on the amount so paid ([Income Tax Act, Subsection 188.1\(4\)](#)).

C. Dissolution

The dissolution of a corporation is governed by the applicable federal, provincial, or territorial law under which it was set up. In the case of a trust, the dissolution would be governed by the trust deed or, if the deed were silent on the subject, might require the intervention of a court.

In practical terms, aside from the legal procedures, the key element remains the federal Income Tax Act. For NPOs, there are statutory rules that deal with the conversion of such an organization into a taxable entity, including the winding up and distribution of assets to members. When this occurs, the law requires that the organization's tax-free status be terminated, deeming a disposition of all the assets for tax purposes, and taxing the recipients of any money or assets.

On the other hand, in order to be registered as a charity, the entity's incorporating documents or by-laws must include a clause stating that upon winding up (or upon a loss of registered status) all the assets must go to another qualified donee. If this is not done, there is a 100% tax on recipients of any assets (Income Tax Act, [Subsection 149\(10\)](#) and [Subsection 188\(1\)](#)).

D. Activities

1. General

As discussed above, an NPO can be set up for any purpose other than to generate profit. In practice, this means that almost any sort of activity can be a legitimate purpose. Indeed, the Income Tax Act does not require registration of these organizations, and they self-assess their own status.

On the other hand, registered charities are limited to activities which are charitable as defined by common law, namely the relief of poverty, the advancement of education, the advancement of religion, or "such other purposes which are beneficial to the community" as recognized by case law ([See 3 T.C. 53, \(1891\) A.C. 53, \(1891-94\) All E.R. Rep. 28 H.L., and the CRA's Registering a Charity for Income Tax Purposes T4063](#)).

The Income Tax Act also deems certain activities to be charitable, including the transfer of funds to a qualified donee, the carrying on of a "related business" and, within very strict limits, "political activity." These issues are discussed below.

2. Economic Activities

NPOs, by definition, cannot be organized or operated for the purpose of making a profit. However, NPOs can engage in a range of activities that generate revenue and, indeed, may generate a profit, if it is clear that this is not a purpose of the organization.

Registered charities (other than private foundations) are allowed to carry out "related business activities" ([Income Tax Act, Paragraph 149.1\(6\)](#)). This term is undefined. As a practical matter, when the issue first arose before a court, a two-to-one majority held that if the profits of an activity were used in charitable activities of the organization, that activity was a related business activity. This case was later distinguished by the same court, however, and it seems fair to say that the "destination test" will no longer apply in determining what qualifies as a related business. A discussion of this term can be found in the CRA [policy statement CPS-019](#).

E. Political Activities

There are no limits on the political activities of NPOs; indeed, political parties are a sub-category of the NPO category of organizations (as they are in the U.S.).

Charities pose a more complex case. The Income Tax Act provides that political activities must be "ancillary and incidental" to the organization's charitable activities, and requires that they "do not include the direct or indirect support of, or opposition to, any political party or candidate for public office" ([Income Tax Act, Paragraph 149.1\(6.2\)](#)). While this latter limitation would seem to meet the U.S. ban on "electioneering" activities by qualified donees, the lack of guidance with respect to what is "political" under Canadian law may pose some issues for U.S. donors. [10]

In addition, the courts in Canada have consistently expanded the notion of what is meant by the term "political activities," making it increasingly difficult to distinguish between education, advocacy, and political statements. The Canada Revenue Agency has issued a paper, [CPS 022](#), which attempts to explain its view of these issues. In March 2016, the government announced in the Federal Budget that it would initiate a public consultation, led by the Canada Revenue Agency, in order to further clarify the definition of "political activities" and the rules governing political activities carried out by charities.

Definitions notwithstanding, as of January 1, 2013, registered charities are required to report on funds used for political activities. In particular, the charity is required to report information on funds received from foreign sources. [11] The following is reported on the charity's [T-3010](#) form, which must be filed annually and is publicly available:

- Schedule 7, *Political Activities*, is to be completed if a charity reported conducting political activities in Section C5. The schedule collects information on:
 - o the type of political activities carried out and how these relate to the charity's charitable purposes, as well as the methods and type of resources used; and
 - o the amount, the political activity, and the country of origin for any foreign funding that the charity was directed to use for political activities.

As a related matter, the federal budget of 2014 introduced a new ground for the revocation of an organization's charitable status, namely the receipt of funds from a country that sponsors terrorism. At present, only two countries – Iran and Syria – are listed, and it appears that the funds must come from the state itself or an entity controlled by the state. Presumably, therefore, payments from individuals or corporations that reside in the state would not trigger a revocation of charitable status.

F. Racial Discrimination

Canada has produced a great deal of legislation to combat racial discrimination and the promotion of racial hatred, and the courts have not hesitated to apply this legislation to NPOs. In case after case, the courts, bolstered by legislation, have sought to ensure that any form of discrimination in the field of charities and NPOs is barred. [12]

That said, the tax authorities also have legislative power to recognize foreign universities as being the equivalent, for tax purposes, of a Canadian registered charity. Because the statutory test is simply that the institution “usually” has Canadian students and that it is accredited in its own jurisdiction, it is possible that some such universities might practice some forms of discrimination. A full list of such institutions will be found on the CRA [website](#).

G. Control of Organizations

No restriction exists on the control of Canadian not-for-profit organizations by other organizations or persons. For public foundations, which are formed by a government entity, control is exercised by such entity. With respect to other forms of organizations, it is possible that a Canadian association or foundation may be controlled by a for-profit entity that establishes it, even though it does not own it (which will lead to additional IRS scrutiny). The same would be true for a Canadian association or foundation controlled but not owned by an American grantor charity (which requires that the charity specifically so provide in the affidavit).

VI. Tax Laws

The following section discusses relevant tax legislation, recognizing that taxes may affect the amount of the grant actually flowing to the donee.

A. Tax Exemptions

Neither NPOs nor registered charities are subject to any taxes on income. [13] Nor are there taxes on any activities falling outside of an organization’s statutory powers. That is to say, if an NPO actually turns out to have a profit motive, then it loses its NPO status and is treated as an ordinary taxable entity.

Similarly, a registered charity is not subject to income tax. Any breach of the statutory rules might lead to a revocation of its registration. However recently-enacted legislation creates a series of potential fines for breach of the rules; such breaches may also lead to a temporary suspension of the privilege of issuing receipts. As of this writing, only two charities have been subject to these penalties, but it is likely that more will be penalized over time. A list of charities which have had their privileges suspended will be found on the CRA [website](#).

B. Tax Treatment of Donations

For practical purposes, the main distinction between NPOs and charities (and other qualified donees) is that gifts to the former cannot qualify for tax relief for donations, while gifts to the latter may. [14] Canada relies on a system of tax credits (as opposed to deductions) to give tax relief to individuals, while corporate donors receive tax benefits through the conventional

deduction system. The rules are fairly complicated, and details – which are particularly relevant to grantmakers with entities established in Canada – can be found in Revenue Canada’s guide entitled, "Tax Advantages of Donating to Charity." [15]

In addition, it should be noted that Canada does not have gift taxes. There are also no death duties, per se, though there may be a deemed disposition of capital property on death.

C. Sales Taxes

Charities and NPOs are generally part of the federal and provincial sales tax regimes, and though they may have some special rules based on specific activities, there is no general exemption available. That said, the federal Goods and Services Tax does have a special feature: Once an organization has calculated its net tax liability, if any (GST collected net of input tax credits), if it is either a registered charity or a NPO which receives 40% of its funding from one or more levels of government, it is entitled to receive a rebate of one-half the net tax paid. [16] Moreover, there is no GST due on foreign grants.

On July 1, 2010, Ontario, British Columbia, and Prince Edward Island adopted a “harmonized” sales tax (HST) whereby existing provincial sales taxes will be linked to the federal GST as a single levy. Subsequently, as the result of a province-wide referendum, British Columbia was forced to abandon the HST and revert to the old system (GST and provincial sales tax) on April 1, 2013. Charities and non-profits in those provinces will have identical treatment under the HST as they did under the GST.

D. Tax Conventions

The United States and Canada have entered into a tax treaty that addresses cross-border donations. Specifically, the tax treaty permits charitable deductions for contributions made to Canadian charities if certain requirements are met. The most important part of the tax treaty rules is that the deduction may not exceed the amount of the donor's Canadian source income, which significantly diminishes the utility of this provision to many U.S. grantmakers. Moreover, under IRS Notice 99-47, I.R.B., 1996-36, page 344, all Canadian registered charities are deemed to be the equivalent of a tax-exempt organization under the Internal Revenue Code. Unfortunately, Notice 99-47 does not address whether private foundations may rely on this equivalency, so prudence suggests that U.S. grantmakers still undertake equivalency determinations. For a detailed discussion of this tax treaty, please see Appendix II of Beyond our Borders. [17]

VII. List of Knowledgeable Contacts

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Footnotes

[1] The Federal Budget of 2014 announced that there would be a major consultation concerning the rules relating to NPOs. No action was taken, however, and with a change of government in late 2015, there has been no indication that that consultation will proceed.

[2] Other legal authorities consulted in preparing this Note include the following:

The best single source of information about the federal regulation of charities and NPOs is found on the website of the Charities Directorate of the Canada Revenue Agency ([CRA](#)). This site has interpretation bulletins, forms, newsletters and a searchable database for registered charities.

The definitive work on the incorporation of NPOs and charities in Canada, covering all jurisdictions, is the [Corporate and Practice Manual for Charities and Not-For-Profit Corporations](#) by the late R. Jane Burke-Robertson and Terrance S. Carter, which is a newly revised publication available from Carswell, the Canadian arm of Thomson Professional Publishing.

The pre-eminent source of all law relating to charities and non-profits is the multi-volume work entitled *Charities Taxation, Policy and Practice* by Arthur Drache and Robert Hayhoe, also published by Carswell.

[3] Federal corporate legislation is most commonly used where the organization is operating in more than one province or internationally. Provincial legislation is used most often when the organization is operating within a single province or territory.

The Canada Not-for-Profit Corporations Act came into effect on October 17, 2011. All corporations created under the old federal Corporations Act were required to “continue” under the new legislation within three years, or be subject to dissolution by the authorities. The new legislative regime is substantially different from the old one; it is more modern, and more demanding in terms of reporting and members’ rights. Commentary and procedure are discussed on the [Corporations Canada website](#).

If a corporation did not continue under the new legislation by October 17, 2014, it should have received a series of notifications. In practical terms, dissolutions may not actually take place until later in 2015. Federal tax authorities also say that if an organization is dissolved, it will subsequently lose its charitable status. However, again, the process is such that many additional months may elapse before the organization’s loss of status. It is therefore recommended that a Canadian organization’s corporate and charitable status is confirmed before any transfer is made. As of June 2015, no corporations are known to have been dissolved, other than those which use non-continuance as a cheap method of dissolution.

In May 2010, Ontario introduced legislation to revise its laws relating to non-share corporations, which is similar in many respects to the new federal legislation. However there have been regular delays in the legislation’s implementation, and it seems likely that its actual enactment may not take place until late 2016, at the earliest.

[4] This legislation, enacted after the events of September 11, 2001, deals with direct and indirect financing of terrorism by charities. Interestingly, however, this legislation does not cover NPOs.

[5] The Charitable Gifts Act of Ontario was repealed in late 2009 after being law for more than seven decades.

[6] Each province and territory has its own income tax act, but in the area of NPOs and charities, almost all precisely mirror federal legislation. Only Quebec has a separate registration regime for charities, but that registration is functionally automatic when evidence of federal registration is presented.

[7] In 2011, a change in the law eliminated the “contribution test” for public foundations. The test had required that “not more than 50% of the funds that the charity has received have come from one person or organization, or from a group of people or organizations that do not deal with each other at arm’s length.”

[8] In Alberta, for instance, the Charitable Fund-Raising Act extends the common law by defining "charitable purpose" as including "a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business." Similarly, in Manitoba, the Charities Endorsement Act defines "charitable purpose" as including "any charitable, benevolent, philanthropic, patriotic, athletic, artistic, or civic purpose that has as its object the promotion of a civic improvement or the provision of a public service."

[9] Ontario, however, following its interpretation of common law, takes the position that no payment can be made to a director or trustee of a charity, even if actual work is performed for the organization.

[10] In 2012, the Canadian government made a number of negative comments about foreign NPOs funding alleged political activities in Canada, with the main target being Canadian environmental charities receiving funds from American grantmakers. Minor changes were proposed for Canadian charity-to-charity gifts, where it could be assumed that the transferred funds would be used for “political” purposes. This is a highly contentious area which may in the future result in specific constraints being applied to foreign grantmakers, but as of March 2016 this has not occurred and there have been no legislative changes.

[11] It is also important to note that the notion of “political activities” is substantially broader in Canada than in the United States. But as of now there is no legislative attempt to limit or tax foreign funding.

[12] See, for example, *Canada Trust v. Ontario Human Rights Commission* 74 OR (2d) 481; 69 DLR (4th) 321; *Gould v. Yukon Order of Pioneers* [1996] 1 SCR 571; re *Ramsden Estate* 139 DLR (4th) 746.

[13] There is in fact one small exception: Where a non-profit organization is set up to provide "dining, recreational or sporting facilities" to its members, it is subject to tax on any passive investment income it might earn in excess of \$2,000.

[14] Payments made to an NPO may qualify for tax relief as business deductions in appropriate cases. Thus, lawyers would normally be able to deduct the fees they pay to the Canadian Bar Association (a non-profit) if the lawyer is practicing.

[15] Please see the [CRA website](#).

[16] While for most organizations this may be a relatively small concession, it is very valuable when major purchases are made or when a building is being constructed. Indeed, many

organizations which might not otherwise wish to be registered as a charity do so in order to qualify for GST rebates.

[17] There is some question as to whether registered charities are subject to the limitations on grantmaking from Canada to the U.S. based on the donor's U.S. source income; however, according to the CRA, they are. A foundation known as The Prescient Foundation asked the Supreme Court of Canada to revise this interpretation of the Treaty, but the Court declined to do so.