



Consultation on Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test

Registered charities have told the CRA that they require more information relating to the criteria applied and the process involved for attaining registered status. As part of our ongoing sector outreach initiative we are now releasing draft guidelines on the test for public benefit, a fundamental requirement for every charitable endeavour. The purpose of the guidelines is to provide basic information about the requirement and to clarify the meaning of the term "public benefit" as we understand and apply it when we make determinations of charitable status under the ITA.

The CRA wants to hear from charities and individuals involved in charitable work as well as government departments and the public generally. We seek your views about whether these guidelines are easy to understand and apply but also welcome comments about all aspects of the proposed guidelines. Please feel free to forward this information to groups who may not be regular visitors to our site, but who may be interested in contributing their views.

We will consider all comments received by December 15 th , 2004.

Where to send your comments

Please send all replies in writing to the attention of Jocelyne Dumoulin, at the address or fax below or by email to consultation-policy-politique@ccra-adrc.gc.ca.

The mailing address is:

Charities Directorate, CRA
Tower A
320 Queen Street
Ottawa ON K1A 0L5

Fax: (613) 948-1320

Guidelines for Registering a Charity: Meeting the Public Benefit Test

Table of Contents

- [Introduction](#)

- [1.0 About this publication](#)
- [2.0 The Fundamentals of Charity](#)
- [3.0 The Test for Public Benefit](#)
 - [3.1 How we Determine 'Benefit'](#)
 - [3.1.1 When is proof required?](#)
 - [3.1.2 Basic Requirements](#)
 - [3.1.3 Variation of public benefit over time](#)
 - [3.1.4 Proof of Benefit](#)
 - [3.2 The Meaning of “Public”](#)
 - [3.2.1 What constitutes a sufficient segment of the community?](#)
 - [3.2.2 Restricting or focussing benefit to a specific group of beneficiaries](#)
 - [3.2.3 Self-help Organizations: A sufficient segment of community?](#)
 - [3.2.4 Private benefit: To what extent may individuals benefit privately?](#)
 - [3.2.5 Is the issue of public benefit affected by charging fees?](#)
- [Appendix A — The Legal Foundation for the Common Law Definition of Charity](#)
- [Appendix B — Case Law Reference](#)

Introduction

The issue of public benefit is at the heart of every inquiry into an organization’s claim to charitable status under the *Income Tax Act* (ITA). Under current law, an organization is only charitable if it meets the definition of charity at common law.¹ Part of that definition requires that in order for an organization to be considered charitable it must be established for public benefit.²

Over the past decade, this notion of public benefit has received considerable notice, and has, in some jurisdictions, emerged as the guiding consideration for determining what constitutes a charity. However, applying the common law test for public benefit under the current regime remains a challenge. Courts, as well as legal commentators, have noted the lack of clarity and certainty, as well as the difficulties inherent in the application of the rules relating to public benefit. The Ontario Law Reform Commission (OLRC), in its comprehensive review of the law of charities published in 1996, commented on the confusion in the case law over the meaning and significance of the public benefit aspect of the common-law test.³ The report notes that the same words are used in the context of each of the three elements of the test for charity: determining charitable purpose; determining whether the purpose is of practical utility (the benefit test); and determining those who will benefit from the purpose.⁴

On the international front, there have been a number of reviews of the definition of charity undertaken in recent years. Most of these propose some version of a legislated definition

of charity, often reflecting the common-law approach, but typically, with a greater emphasis on public benefit.⁵ In the jurisdictions where reviews have been completed, some have: enacted legislation (e.g., South Africa); tabled draft legislation for consultation, (e.g., Australia, the U.K., and Scotland)⁶; or indicated that legislation would be forthcoming (New Zealand).

In Canada, important initiatives have recently been undertaken to improve the legislative and regulatory environment in which the charitable sector operates at the federal level. A joint-policy exploration process with sector representatives—the Joint Regulatory Table (JRT)—was mandated to look into a number of areas for improvement in the regulatory environment and issued its report in March of 2003.⁷ In the 2004 Budget Speech, the Government outlined an agenda for continued reform of the federal regulation of charities. The agenda included measures that directly respond to the JRT recommendations for improving the legislative and regulatory environment within which the charitable sector operates. One of the many initiatives involves the provision of more accessible information regarding Canada Revenue Agency (CRA) policies, as well as decisions and regulatory requirements pertaining to registered charities.⁸

Within this climate of regulatory reform in Canada and internationally, and where the concept of public benefit is being factored in as the cornerstone of the definition of charity in other jurisdictions,⁹ it is important to understand what we mean in theory and practice. The following document is put forth as draft guidance on the issue of public benefit.

1.0 About this publication

This publication clarifies the meaning of the term “public benefit” as we understand and apply it when we make determinations of charitable status under the ITA. For an organization to be considered charitable at law, it must be established for ‘public benefit’.

Although these guidelines are primarily concerned with the application of the test for public benefit during the registration process, it is important to keep in mind that an organization must be established for the benefit of the public at all times for it to be considered a charity.

2.0 The Fundamentals of Charity

To take advantage of special tax privileges given charities under the ITA—the most significant one being the ability to issue tax receipts to donors¹⁰—charities must first register with the CRA. To do so, an applicant organization must meet the requirements of the ITA; namely that it must be charitable at law and devote its resources to charitable purposes and activities.

At common law, an applicant organization will be determined charitable only if it meets two fundamental requirements:

1. The organization's purposes must be exclusively and legally charitable.
2. It must be established for the benefit of the public or a sufficient segment of the public.¹¹

As part of the first requirement, an organization's purposes are considered legally charitable only if they fall within one of the four categories of charity set out in the 19th century decision, *Commissioners for Special Purposes of Income Tax v. Pemsel*, (hereinafter referred to as *Pemsel*),¹² or within the spirit and intendment of the preamble to the *Statute of Elizabeth* (the Preamble). As a result, in order to be found charitable for the purposes of being registered under the ITA, an organization's purposes must be sufficiently similar to others previously recognized to be charitable at law.

Pemsel categories include:

- purposes for the relief of poverty;
- purposes for the advancement of education;
- purposes for the advancement of religion; and
- other purposes beneficial to the community in a way the law regards as charitable.¹³

Within the public benefit requirement, there are several sub-requirements, which are listed below and discussed in more detail later in this document:

- The benefit should generally be tangible.
- The beneficiaries must be the public-at-large or come from a sufficient segment of the public as determined by the charitable purpose being considered.
- The organization may not otherwise benefit private individuals except under certain limited conditions.
- Subject to some exceptions,¹⁴ the organization cannot exist for the benefit of its members. Professional associations, trade unions are not typically considered charitable at law.
- The organization cannot restrict delivery of the benefits to a certain group or class of persons without adequate justification.
- The organization cannot charge fees for its services where the effect of the charge would be to unduly exclude members of the public.

Finally, there are other general factors that are considered when determining whether an entity is entitled to charitable status. If any of these exist, it may disqualify an applicant:

- The organization must not be established for the purposes of making a profit.
- The organization must not be set up for illegal purposes or for purposes that are contrary to public policy.
- The organization cannot be set up for political purposes or be involved in political activities beyond the limits allowed at law.¹⁵

Since this publication is about public benefit, the focus will be on those elements of the legal concept of charity that relate to this subject. That said, however, the test for public

benefit cannot be applied outside the general decision-making context because it is inextricably linked to the overall determination of whether or not an applicant organization is legally charitable. In fact, there is confusion over the fact that the fourth category of charity (purposes beneficial to the public) uses the same words as this broader test of public benefit, which applies to all categories. However, the two are not the same. The fourth *Pemsel* category includes only those purposes, determined to be of benefit to the community, “in a way the law regards as charitable.” This latter part of the test can only be determined through the process of analogy. The broader public benefit test, which is the subject matter of these guidelines, is essentially concerned with the question of “who” will benefit.¹⁶

These guidelines will be complemented in the fall by the release of our draft guidelines on the decision-making process.¹⁷ That document will provide a general overview of the manner in which the CRA approaches an application by an organization for registration as a charity, and will include an explanation of the source and scope of our authority as well as a review of the process undertaken by examiners at the CRA Charities Directorate. These guidelines deal with the basis for, and application of, the test for public benefit.

3.0 The Test for Public Benefit

It is well established in law that all organizations that want to be registered as a charity under the ITA must ensure that their purposes are directed to the public benefit. This requirement attaches to all categories of charity. However, those organizations whose purposes are directed to the relief of poverty face a somewhat less rigorous public benefit review, though only for the second part of the test—the question of who will benefit.¹⁸

The requirement of public benefit involves the application of a two-part test, each part having a somewhat different application to the four categories of charity:¹⁹

- The first part of the test generally requires that a tangible benefit be conferred, directly or indirectly. (More recently, and in the Canadian context, this requirement has also been described as an “objectively measurable and socially useful benefit.”²⁰)
- The second part of the test requires that the benefit have a public character, that is, be directed to the public or a sufficient section of the public.

The “benefit” aspect of the test concerns whether the charitable purpose under consideration is directed towards achieving a universal good that is not harmful to the public—a socially useful endeavour. The “public” aspect involves an examination of who, and to what extent, constitutes the “public.” This notion of public benefit has also been called the “public character” of charity, in that it “seeks the welfare of the public; it is not concerned with the conferment of private advantage.”²¹

The two parts are interrelated. Whether or not a particular group of the public comprises a sufficient segment of the public will depend on, and may change according to, the charitable purpose being conferred.²²

The subsequent sections of these guidelines set out some background to the two-pronged tests for public benefit and outline the main criteria considered by the CRA examiners when applying the tests. The meaning and application of the first test—the test for benefit—is set out in **s. 3.1**. A similar approach follows in **s. 3.2** in respect of the second arm of the test—the test for who constitutes the “public.”

3.1 How we Determine 'Benefit'

Assessing whether an applicant organization has sufficiently established that it is of benefit to the community at large (i.e., that it is a socially useful undertaking) is a difficult task, particularly when a novel or different type of organization is being proposed. In such cases, the CRA will only register an organization if these new or novel purposes are both charitable at law and directed to the public benefit. Though difficult, however, the “benefit” test is generally more simply met than demonstrating a new charitable purpose. Organizations are often found to be of “benefit” to the community, but not charitable, for a number of reasons.²³

Factors affecting the extent to which proof of benefit is required include: the nature of the proposed charitable purpose and the category it falls under; the social and economic conditions of the time; the extent to which the benefit may be quantified; the existence of any harmful impact of the undertaking; and the relationship between the purpose and the intended beneficiaries.

3.1.1 When is proof required?

The extent to which an applicant charity is required to meet the first part of the public benefit test will depend, in large part, under which category the proposed purposes fall. When the purposes fall within the first three categories of charity, a presumption of benefit exists.²⁴ This presumption arises because purposes falling within these categories—relief of poverty, advancement of education, and advancement of religion—have historically been recognized as beneficial to the public. However, this presumption only arises once it has been clearly established that the purposes fall within these categories. For example, trusts for the advancement of religion will only be presumed to be for the benefit of the public if the purposes of the organization first meet the criteria in law that will clearly place it within that particular category of charity. If not, proof of benefit will be required. Moreover, if the organization is not otherwise able to establish that its purpose or purposes are charitable, the organization will not be recognized as such under the ITA.

The presumption however, can be challenged. So when the “contrary is shown,”²⁵ or when the charitable nature of the organization is called into question, proof of benefit will then be required.²⁶ For example, where a religious organization is set up that promotes beliefs that tend to undermine accepted foundations of religion or morality, the presumption of benefit can be challenged.²⁷ When the presumption is disputed, the

burden of proving public benefit becomes once again the responsibility of the applicant organization.

Although a similar presumption arises for some purposes that fall within the fourth category (primarily those that are well-established and the benefit is clear, for example, the provision of healthcare services or services that provide relief for the aged)²⁸, it is otherwise generally understood that the benefit aspect of the test must be proved in applications concerning purposes proposed under the fourth category.

Assessing applicants under the fourth category poses unique challenges for the CRA examiners. As noted in our companion guidance on the decision-making process, examiners largely determine whether a purpose is charitable by the general approach of reasoning by analogy. If, after reviewing similar facts in previous cases, an analogy can readily be found with a previously determined charitable purpose, then the benefit aspect of the test has been effectively established. To the extent that purposes have already been found to be charitable under this category, similar purpose organizations will generally not be required to prove benefit. That is because the courts have already determined the benefit of such organizations²⁹ (e.g., organizations established for the purpose of providing community health care). Thus it is primarily in circumstances where applications for novel, unrecognized purposes are being submitted for registration, that evidence of benefit to the public must be provided. (See section 3.1.4 below for a discussion on the type of evidence that may be required to establish “benefit”).

In practice, if an applicant organization sufficiently demonstrates that the organization’s purposes fall within one of the first three categories, or establishes a connection with a previously recognized purpose under the fourth category, CRA examiners will likely conclude that a benefit exists. But if the application contains information that suggests otherwise³⁰ or raises issues that require further clarification, the examiners may require proof of benefit before registering the organization as a charity.³¹

To sum up, proving benefit under the public benefit test, is effectively only required in the following instances:

- when there are novel purposes to be considered;
- when the presumption of benefit under the first three categories of charity has been disputed; or
- when a presumption of benefit under the fourth category would be considered charitable but for the concerns raised (e.g. a health clinic specializing in alternative therapies).

In such cases, applicants must establish the following:³²

- The benefit must be generally shown to be tangible. If it is intangible, it must be demonstrated that the benefit is regarded as valuable by “the common understanding of enlightened opinion.”³³
- The benefit must be generally shown to be direct, although in some circumstances, examiners may consider an indirect benefit.
- When benefit is proven, it must be weighed against any harm that may arise from the proposed activity and a net benefit must result.

3.1.2 Basic Requirements

1. A benefit should generally be ‘tangible’

At common law, the test of benefit under the overarching public benefit test requires that the charitable purpose confer a tangible, or objectively measurable, benefit on the public.³⁴ The requirement that the benefit be tangible stems from the need to have a benefit that is recognizable, capable of being proved.³⁵

Intangible benefits are acceptable as well—but only in cases where there is a clear general consensus that the benefit exists.³⁶

Intangible benefits can generally be found in charitable purposes arising from the general category of purposes directed to the mental and moral improvement of mankind,³⁷ or promoting the moral or spiritual welfare of the community.³⁸ Charities that are established for the protection of animals are typically registered under the category of the promotion of morality because it is believed that they “promote morality and check man’s innate tendency to cruelty and thus of benefit to humanity.”³⁹

2. A benefit may be either direct or indirect

In assessing this aspect of the benefit test, examiners consider whether the benefit is a direct result and consequence of the organization’s activities and whether under the circumstances, that benefit can be reasonably achieved. In most instances, the benefit provided should be conferred directly, although there is authority in case law to support an indirect benefit as well. Animal welfare organizations, that have long been recognized as charitable, have been justified solely on the basis of benefits that can only be characterized as indirect, for example, charitable purposes benefiting animals directly have been held to benefit mankind under the fourth category.⁴⁰

Indirect benefits can also be found in cases where benefiting one segment of the community can be viewed as an indirect benefit to the greater community, for example, providing accommodations for relatives of critically ill patients will be seen as an indirect improvement or aid to the hospital and the patients.⁴¹ For many charitable purposes, it is quite often the case that there is both a direct benefit to a targeted group of beneficiaries and an indirect overarching benefit to the public at large.⁴²

At times, the indirect benefit may be considered too remote—particularly when the direct benefit is in favour of private individuals. An examination of this issue often involves a balancing of private benefit versus public benefit, the former being generally prohibited (discussed below). In the case of *IRC v Oldham Training and Enterprise Council*,⁴³ the public benefit of relieving unemployment in a depressed area was found to be too remote relative to the more direct benefit of promoting the interests of individuals involved in private business.⁴⁴

3. Requirement that there be a net benefit for the public

The charitable purposes of some organizations may result in a benefit to the public, while at the same time produce some negative effect. Where such a conflict occurs, the public benefit, shown to arise from the charitable purpose, is typically evaluated against any harm that may also arise from the proposed activity.⁴⁵ In determining charitable purpose, we are looking to ensure that a substantial net benefit results.

3.1.3 Variation of public benefit over time

What was once considered a public benefit for a charitable purpose may not necessarily always be so. What is beneficial is considered in light of prevailing standards current at the time and accordingly, the court's notion of what constitutes public benefit may vary with the passing of time. Previous recognition or rejection of a type of public benefit does not end the issue for all time.⁴⁶

This principle has been applied by the Charity Commissioners in the case of promotion of race relations. In *Re Strakosch*⁴⁷ the appeasement of race relations was deemed political and thus not charitable. The Commissioners reversed the position because legislation had since been passed in an attempt to enforce good race relations and accordingly considered it a purpose beneficial to the community. The issue was no longer one for the court to decide.⁴⁸

The Charity Commissioners also reversed their position relating to gun and rifle clubs in the U.K. Civilian gun and rifle clubs in the U.K. had been recognised as charitable by the Charity Commission for many years. The courts having previously determined that such organizations were analogous to organizations established to promote the efficiency of the armed forces. In 1993, the Charity Commission reconsidered the issue and determined that such objects could no longer be recognised as charitable at the end of the 20th century. The original charitable purpose was based on the notion that such activities would be preparatory for promoting the security of the nation. Current skills required for such purposes were clearly different than those acquired through belonging to the gun and rifle clubs, the latter being now more geared toward recreational or sporting activity.

The CRA may similarly consider new purposes charitable when the issue of what benefits the public has been altered through a change in legislation or stated government policy. It may consider this provided, of course, that the proposed new purpose is otherwise of a charitable nature, that is, within the spirit and intendment of the *Preamble*.⁴⁹ The CRA has recently revised and clarified its policy for organizations created for the elimination of racism based on similar reasoning. Organizations established for this purpose were previously only registered if their purposes fell within the educational category.

Within this context, the CRA looks at changes in legislation, changes in stated government policy, other forms of financial support for the organization (particularly support from other local or municipal authorities), and changes in the needs of the

community.

3.1.4 Proof of Benefit

The existence of public benefit must be demonstrated through evidence submitted by the applicant organization. It is not sufficient for an applicant to merely state that in its view a public benefit will derive from the purposes.⁵⁰

Examiners may consider a broad range of materials filed in support of an application for registration as a charity. The nature and extent of the evidence required will largely depend on the purpose the organization is seeking to have recognized, its approach to achieving the purpose, and any limitations the organization places on the class of beneficiaries. Where the purposes are novel or there is some type of restriction on the beneficiary class, additional objective evidence may be required.

An applicant organization is well-advised to consider supporting an application with some of the following to establish public benefit. At the same time, however, it should be mindful of the fact that the submission of such information may not always be enough to demonstrate public benefit in the circumstances:

- Needs assessment studies by academics, government bodies, or non-profit organizations that document the existence of the need being addressed.
- Project and/or funding proposals that address how the proposed activities are best suited to meet the need in question.
- Program evaluations showing that similar programs or this specific proposed program has been demonstrated to meet the need effectively.
- Identification of government programs addressing the need in question along with details on how the program complements or supplements the government program.
- Identification of explicit statements of government policy that may be consistent with the goals and objects of their organization.
- Demonstration of existing public sources of financial support for the organization.
- Identification of new or recent legislative initiatives consistent with the proposed purpose.
- Any other types of objective material that supports the proposal.

Although legislative initiatives may be considered, the mere existence of legislation is not conclusive evidence that an organization is pursuing a public benefit in a way the law regards as charitable. As per Iacobucci, J., in *Vancouver Society*, the benefit must still be determined through "... analogy to cases already found to be charitable."⁵¹ He further notes that he is not saying that legislation is "never relevant to the question of what is charitable." Relying on the decision in *Everywoman's Health Centre*, he noted that the court there "pointed to legislation in order to rebut the argument that the provision of abortions in private clinics was contrary to public policy."⁵²

3.2 The Meaning of “Public”

Charities are required to have a “public character.” This requirement is found in the second part of the public benefit test, which requires that a charitable purpose be for the benefit of the community (at large) or a sufficient segment of the community.⁵³ The necessary public element is required for all heads of charity except for purposes for the relief of poverty where this part of the test is less rigorously applied.

Conversely, a purpose will not be charitable if it confers private benefits. A private benefit occurs when one of the reasons for the organization’s existence is to confer individual benefits to a limited group of persons on the basis of criteria that are not relevant to the charitable purpose at hand.

At common law, this part of the test—identifying the eligible beneficiaries of the charitable undertaking—is least important to the relief of poverty category, somewhat important to the advancement of religion category, but critical to the education and the fourth categories. In the case of the first category of charity, relief of poverty, the target beneficiary group has historically been narrowly limited.⁵⁴

Determining what constitutes the public or whether there is a sufficient public as opposed to private aspect to the undertaking proposed is a difficult task. The law is unclear about how and under what circumstances we may arrive at a conclusion that this aspect of the test has been met. However, various rules have developed in the case law over the years, and these provide some general guidance on how we can determine who may be eligible to benefit in relation to all categories of charity. We discuss some of these rules in the following sections with a particular focus on our interpretation and application.

3.2.1 What constitutes a sufficient segment of the community?

A key part of the process of determining charitable status involves a consideration of the question of who will be benefiting. Although most organizations applying to be registered as charitable under the ITA will be offering services or programs aimed at the public at large, there are others that will be set up for the purposes of providing services or programs directed at or serving specific groups or classes of people (e.g. women’s shelters, organizations addressing people affected with a particular disease, or refugee settlement services directed at a specific racial or ethnic group). Under what circumstances will the CRA consider such groups a “sufficient segment of the community”?

It is difficult to describe, with any precision, what constitutes a sufficient segment of the community. Moreover, this notion of sufficiency seems to imply large enough numbers of beneficiaries whereas, in fact, the number of those benefiting is not a major consideration. Each case must be determined on its merits. Certain general rules / guidelines have emerged in case law, on which examiners rely when faced with the issue of having to determine if a particular group constitutes a sufficient segment of the community.

These general rules include:

1. Certain classes of persons eligible to benefit are generally acceptable at law:
 - Those who need the particular service – Abused women for a domestic shelter; deaf or hard-of-hearing adults or children; or children diagnosed with a particular disease or condition.
 - Reasonable geographical restrictions – Inhabitants of a specific geographical location are generally permitted, if there are no other restrictive qualifications (e.g., clinics set up to provide service to a certain geographic or jurisdictional area).⁵⁵
2. Whether or not a class of eligible beneficiaries is a sufficient segment is determined in relation to the charitable purpose proposed.⁵⁶ A group of beneficiaries may be sufficient for one purpose, but not another. For example, a religious charity may well be limited to those who are adherents of that particular faith, whereas that same limitation would not suffice for an organization established to assist persons with a disability.
3. Organizations that confer a private benefit are not charitable. A private benefit will be found when the beneficiaries of the organization's services are defined solely by some personal connection, such as family relationships or common employment; or another connection unrelated to the organization's purpose, such as colour of hair or membership in a group unrelated to the need served.⁵⁷
4. Generally, limiting or restricting service or program availability will offend the public benefit test, unless it is shown to be relevant to achieving the charitable purpose (e.g., organizations providing general health services but wanting to restrict such services to a particular ethnic group will not be recognized as charitable unless the reason for the restriction is clearly justified). See section 4.2.2 below for an outline of the kinds of criteria applied by examiners when they consider if a restriction is justified.
5. Although the potential number of beneficiaries is an important factor and should not be numerically negligible, the mere fact that only a limited number of persons are able to avail themselves of a benefit at a given time will not necessarily offend the public benefit test. For example, trusts that confer prizes to a single, but different, meritorious musician on an annual basis will be charitable.

3.2.2 Restricting or focussing benefit to a specific group of beneficiaries

The issue of what constitutes the public most frequently arises in the context of an applicant organization placing limitations on the group served by the organization because of, among other things, ethnicity, gender, race, age, sexual orientation, and religion. Although the restriction itself may be directly in line with the nature of the charitable purpose, some organizations want to specifically restrict the benefit to a specified group for other reasons. As well, others want merely to focus the intended benefit on, or offer specialized service to, an identifiable group. All types of limitations have the potential of offending the public benefit test, although to differing degrees. Organizations that want an outright restriction of benefit or exclusion of services have a far greater burden of establishing public benefit than those organizations that want only to focus attention on a specific group, but extend service delivery to the general public.

When a charity proposes to restrict the beneficiaries of the undertaking in any way, the nature of the restriction must be clearly linked to the proposed benefit. Is the restriction

relevant to achieving the charitable object? For example, a restriction imposed on eligibility based on a person's religion when the purpose of the undertaking is not religious in nature (e.g., the establishment of a science museum) will likely fail the public benefit test and disentitle the applicant from being registered as charitable.⁵⁸ At the other end of the continuum are the organizations whose restrictions are directly linked, or part of the charitable purpose, which will be considered acceptable. An example of this latter scenario would be an organization set up to assist women with ovarian cancer or one set up to assist men with prostate cancer. Those organizations, whose purposes fall between these two extremes, must demonstrate why their proposed restriction on who will directly benefit from the purposes is necessary in relation to the charitable purpose proposed.

When dealing with an applicant that proposes to restrict the benefits to a certain segment of the community, or focus the service delivery on a specific group but be open to the public, examiners will generally consider one or more of the following factors to varying degrees of importance (depending on the circumstances) when they determine if the restriction is justifiable:

- The logical connection between the restriction and the benefit provided.
- Whether the restriction precludes the delivery of services to some individuals or parts of the community that also have an identified need.
- Whether the services provided are irrelevant to excluded persons.
- Whether the organization is particularly expert in the proposed service for the proposed restriction.
- Whether the restriction can be supported by evidence of service being more effective if targeted (needs assessment / social science research).
- Whether the restriction arises from an intention to use resources to address a specific acute disadvantage or need identified with a particular group or a particular region.
- The restriction is due, in part, to financial considerations and there is willingness to lift the restriction if the organization becomes better-resourced over time, or a provision of referral to other organizations that offer equivalent or more suitable services.

Examples:

- Evidence supporting a need for separate services for men and women for rehabilitation centres for substance abuse will be sufficient to support a restriction in favour of separate rehabilitation facilities.
- An organization that provides settlement services for refugees—but is also directed at a particular community, which in particular offers such services in the languages of that particular community and targets specific issues that are unique to that community—may be considered charitable providing adequate proof of need is established.

When an applicant organization is unable to adequately establish that an outright restriction is justified, in some circumstances, the CRA may nonetheless allow an organization that is in all respects open and accessible to the public at large, to provide or focus services, of interest only to a narrower community. Although the same criteria is applied, it is applied less stringently, and the overriding requirement is that the service be open to those who want to use the service.

Example:

- An organization that serves elderly people but directs its programs to people who have a natural affinity or share similar problems, such as persons with the same sexual orientation or persons of the same ethnicity or cultural affinity, may be found charitable if the services are otherwise open to the public at large. (*Policy Statement on Relief of the Aged, CPS – 002*, dated July 6, 1990) (Note: It may be possible to establish an outright restriction on these facts provided that the case for such a restriction is made.)

Finally, organizations that seek to restrict benefits must always ensure that the restrictions proposed are not illegal or contrary to public policy. Any such restrictions are incapable of providing a public benefit. Organizations with purposes that are discriminatory or based on notions of racism, may, depending on the nature of the discriminatory purpose, offend the norms in the Canadian Charter of Rights and Freedoms. They may also be in contravention of the various human rights regimes either federally or provincially, or contrary to public policy as expressed in those constitutional and legislative regimes.⁵⁹

3.2.3 Self-help Organizations: A sufficient segment of community?⁶⁰

Organizations established in part for their members, and that provide programs and/or benefits directly for their members, will not generally be considered charitable at law because they lack a sufficient public character. Members groups include professional associations, unions, co-operatives and tenants associations, to name a few. Typically, such groups are established for the direct benefit of their members, often in an advocacy role, and are accordingly not charitable at law.

There are some exceptions.

- Some members groups may be charitable if the purpose for which they are established is the relief of poverty.⁶¹
- Other member groups that are charitable include organizations that have as their object the promotion of racial equality, even though group members may have a stake in the matter. This is because the benefit is not confined to the members but extends to all those affected by racial discrimination.⁶²
- Some self-help groups may similarly be an exception to the general rule. Although they are member groups, in the sense that they are typically a group of individuals and part of an organization established for their benefit, they are different from other member groups in very significant ways.
 - First, membership in such self-help groups is typically open and accessible to either those who meet the criteria relating to the charitable need for which the self-help group was created, or those simply interested in the particular problem.
 - Second, unlike members groups generally, self-help groups are established, typically in recognition of the therapeutic or other benefits of peer support, to help individuals help themselves, often utilizing a peer-support function, rather than function in an advocacy role for the benefit of their members.

The CRA recognizes as charitable those organizations that provide education, support therapy, or rehabilitation to eligible clients through the model of self-help groups, as the overall benefit to the public at large is apparent. Such groups are established to assist individuals, drawn from the community-at-large, in the support of their specific problem or disadvantage. This can include problems associated with discrimination, social exclusion, domestic violence, dysfunctional families, as well as alcohol and substance abuse, to name a few.

Examples

- Groups formed to assist members in rehabilitation efforts from alcohol or substance abuse will be recognized as charitable by the CRA.
- *Groups formed by recent immigrants to Canada that face social isolation, to build self-confidence, provide mutual support, find solutions to common problems experienced by the group, and help members develop the skills to be more active participants in broader civic life, may also be recognized as charitable by the CRA.*

3.2.4 Private benefit: To what extent may individuals benefit privately?

Although charitable organizations cannot be established to confer private benefits, some private benefit may arise in the course of pursuing charitable objects. However, the public benefit of an organization must not be outweighed by any ensuing private benefit. Any benefit to an individual or group of individuals must either arise directly through pursuit of the charity's purposes (e.g., relief of poverty), or be incidental to the pursuit of those purposes (e.g., as in the case of programs pursued by community economic development organizations), by providing inducements to attract needed social and community services to a distressed region.⁶³ The private benefit is only acceptable as a minor and incidental by-product of the charitable purpose.

Differentiating between public and private benefit is difficult. There is no quantitative test for measuring private benefit against the greater benefit to the community at large.

Some of the factors considered include:

- The extent to which private benefits are considered incidental

Private benefits will be considered acceptable when they occur in the delivery of a reasonable charitable benefit to a properly chosen beneficiary. For example, when a religious institution, which is otherwise charitable, holds social activities for the benefits of its members and/or youth groups, such activities, though not charitable in their own right, will be considered acceptable because they are incidental to the main purpose—the advancement of religion;

- The degree to which the private benefits further the charitable purpose

Actions by the charity, which result in private benefits to individuals or business corporations, should be ones that otherwise further the charitable purpose and not

promote a collateral purpose.⁶⁴ For example, in community economic development matters, there is often a tension between promotion of industry and commerce (which is charitable) on the one hand, and promotion and support of private businesses, on the other.⁶⁵

- The amount of private benefit should be reasonable.

When reviewing the private benefit, examiners want to ensure that any benefit conferred is no more than is necessary to achieve the charitable purpose.

3.2.5 Is the issue of public benefit affected by charging fees?

Many charities—for example, museums, arts organizations, and some religious institutions—charge fees for their services. Charging fees does not of itself offend the public benefit principle, although under certain circumstances it may. The concern for public benefit arises when the effect of the charge would be to exclude members of the public, in which case, the organization would ordinarily not be considered charitable.

Several factors are taken into account when determining whether the charging of fees is incompatible with public benefit.⁶⁶

- Charges should be reasonable; typically they should be below-market because they do not have a profit component and should aim at cost recovery at the most. Organizations that charge market rates may bring into question their charitable nature.
- Exceptionally, charges may, if appropriate to the overall purposes of the charity, be set at a rate that generates a surplus to help fund the organization's charitable programs and activities.
- Any charge should not be set at a level that deters or excludes a substantial proportion of the beneficiary class.
- The service provided should not cater only to those who are financially well-off—it should be open to all potential beneficiaries.
- It should be clear that there is a sufficient general benefit to the community, directly or indirectly, from the existence of the service.

Appendix A — The Legal Foundation for the Common Law Definition of Charity

Since there is no definition of charity within the ITA, it is necessary to look to common law to determine its meaning. The basis for the common law definition of charity dates back to the preamble to the *Statute of Charitable Uses, 1601*.⁶⁷ The preamble of the statute lists many charitable objects or purposes and is frequently referred to in its modern English rendition:⁶⁸

Relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

At the time of the enactment of the Statute, the list of charitable purposes set out above was not considered exhaustive. In order to determine charitable character, the courts instead would consider whether a particular purpose was within the equity of the Statute (preamble) or, put in other words, within its "spirit and intendment."⁶⁹ Within that general context, the courts developed a body of charitable purposes by analogizing new purposes to those in the preamble, or to those since found to be charitable by a court of law. That continues to be the approach adopted by the courts today.

In the late 1800s, the list of charitable purposes developed at common law was classified into four categories of charitable purposes by Lord Macnaghton, in the case of *Commissioners for Special Purposes of the Income Tax Act v. Pemsel*.⁷⁰

Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.⁷¹

Although the classification approach to determining charitable purpose is generally of assistance to the process, there are still problems. In particular, the language used to describe the classes is far from clear, particularly as it relates to the fourth category, the interpretation of which has been the subject of substantial litigation.

It is these four categories of charitable purposes, together with the preamble, that serve as starting points for a determination of charity at common law. Courts typically consider first whether the organization's purposes can fall within one or more of the specific categories and, if not, whether the purposes can reasonably fall within the general category typically referred to as the "fourth head." The classification approach was first explicitly approved of by the Supreme Court of Canada in *Guaranty Trust Co. of Canada v. Minister of National Revenue*⁷² and confirmed in the more recent Supreme Court decision in *Vancouver Society*.⁷³

Appendix B — Case Law Reference

Public Benefit

We have noted in the preamble to these guidelines that problems associated with the

application of the test for public benefit in the context of the definition of charity are not insignificant. Varying calls for clarification and/or modernization of the definition of charity have come from judges, legal commentators, and members of the charitable sector alike. Criticisms of the current law include: lack of reasonable precision;⁷⁴ confusing framework and confusion generally;⁷⁵ lack of clarity and guidance;⁷⁶ difficulties in articulating how the law of charities is to keep moving;⁷⁷ and inconsistency in decision-making.⁷⁸

It is within this context that we put forth these policy guidelines and, in so doing, we have articulated the manner and foundation upon which we apply the test for public benefit. Within the text, we have referred to the case law that is the foundation for our interpretive guidance. In this appendix we set out some key quotes from some of the leading cases and legal texts that we have relied on to formulate these guidelines. This appendix is divided into the following categories:

- Case law and authoritative texts relied on for the general application of the test.
- Case law and authoritative texts relied on for our interpretation and application of the test for "benefit."
- Cases relied on for our interpretation and application for the test for the meaning of "public."

Generally

For a general source on the requirement of public benefit, the case of *Verge v. Somerville* is often cited.⁷⁹

Verge v. Somerville, [1924] A.C. 496 at 499

To ascertain whether a gift constitutes a valid and charitable trust so as to escape being void on the ground against perpetuity, a first inquiry must be whether it is public – whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, **or any particular class of such inhabitants**, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot. [Emphasis added]

Statements regarding the confusion surrounding the language used for the overarching public benefit test and the fourth head of charity:

Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 S.C.R. 10.

This language of "benefit of the community" is unfortunate because it creates confusion with the fourth head of charity under the *Pemsel* scheme -- trusts for other purposes beneficial to the community. Nonetheless, this other notion of public benefit is different and reflects the general concern that "[t]he essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage": *Waters*, *supra* at 550.

And as further illustrated by the Court,

“[t]he difference between the *Pemsel* classification and this additional notion of being “for the benefit of the community” is perhaps best understood in the following terms. The requirement of being “for the benefit of the community” is a necessary, but not a sufficient, condition for a finding of charity at common law. If it is not present, then the purpose cannot be charitable. However, even if it is present the court must still ask whether the purpose in question has what Professor Waters calls, at p. 550, the “generic character” of charity. This character is discerned by perceiving an analogy with those purposes already found to be charitable at common law, and which are classified for convenience in *Pemsel*. The difference is also often one of focus: the four heads of charity concern what is being provided while the “for the benefit of the community” requirement more often centres on who is the recipient.”

Evidentiary requirements to establish public benefit.

McGovern v. A.G., [1982] 2 W.L.R. 222 at 234.

Save in the case of gifts to classes of poor persons, a trust must always be shown to promote a public benefit of a nature recognized by the courts as being such, if it is to qualify as being charitable. The question whether a purpose will or may operate for the public benefit is to be answered by a court forming an opinion on the evidence before it: see *National Anti-Vivisection Society v IRC* [1948] AC 31, 44, per Lord Wright. No doubt in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point. In many other instances, however, the element of public benefit may be much more debatable. Indeed, in some cases the court will regard this element as being incapable of proof one way or the other and thus will inevitably decline to recognize the trust as being of a charitable nature.

Re Hummeltenberg, [1923] 1 Ch. 237 at 242.

In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

The Test for Benefit

Challenging the presumption

Benefit under the first three heads of charity is presumed once an applicant organization establishes at law that the proposed purposes meet the legal requirements to enable such purposes to fall within one or more of those categories. Once an applicant establishes that the purpose or purposes is intended to either relieve poverty, advance education, or advance religion, within the parameters required by law, the presumption arises. The presumption, however, may be nonetheless rebutted by concerns raised.

In their decision on the Church of Scientology, the Charity Commissioners concluded that the presumption in that case was rebutted by a number of circumstances and that they would take a wide view of public benefit and consider a number of different factors, including: the fact that it was a new religion; that there was public concern about scientology generally; and, that there was expressed judicial concern about some of its practices both in the U.K. and abroad. They rejected the argument that, in order to displace the presumption of public benefit, it must be shown that the gift is detrimental to

the community.⁸⁰

Proving Benefit Under the Fourth Head

Under the fourth head of charity, this aspect of the test must be proved. The fourth head poses unique problems in the application of this test. As noted by Chesterman:

The requirement that such a benefit exists is integrally bound up with the demarcation of the category itself, so that while it is strictly wrong to say that compliance with this limb is an additional requirement over and above being proved to be within the category, it is also somewhat misleading to speak in terms of ‘automatic’ compliance.⁸¹

And later ...

...the question raised in the first limb – whether purposes confer a tangible benefit – does not arise as a separate issue with regard to fourth category of charitable purpose. It is necessarily concluded one way or the other by the process of determining whether the particular purposes being examined fall within the fourth category.⁸²

As is also noted in the OLRC report, the “benefit” segment of the public benefit test is used to “facilitate consideration of the practical utility—the benefit—of the project.”⁸³ In the case of charitable purposes falling under the fourth head of charity, however, the practical utility of the project is intertwined with its charitable purpose as that category is defined in terms of trusts for the benefit of the community.

Tangible Benefit

The requirement that the benefit be generally tangible stems from the need to have a benefit that is recognizable, and capable of being proved,⁸⁴ although there is authority for the acceptance of benefits that are intangible providing certain conditions are met.⁸⁵ There may be circumstances, though limited in number, where intangible benefits have been determined acceptable—specifically if such benefits would be regarded as valuable “by the common understanding of enlightened opinion.”⁸⁶

National Anti-Vivisection Society v. I.R.C., [1948] A.C. 31

I think that the whole tendency of the concept of the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class.

This test was applied and rejected on the facts of the case in the determination of charitable status for the Church of Scientology by the U.K. Charity Commission.

Application for Registration as a Charity by the Church of Scientology (England and Wales)

Decision of the Charity Commissioners made on November 17th, 1999.

The Commissioners considered the test in respect of an intangible benefit to mean a common consensus of opinion amongst people who were fair minded and free from prejudice or bias.

Variation of Benefit over time

National Anti-Vivisection Society v. I.R.C., [1948] A.C. 31.

Again [charitable] trusts may, as economic ideas and conditions and ideas of social service change, cease to be regarded as being for the benefit of the community, and trusts for the advancement of learning or education may fail to secure a place for charities, if it is seen that the learning or education is not of public value.⁸⁷

Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] 1 SCR 10.

“In the absence of legislative reform providing guidelines, the best way in which to discern the charitable quality of an organization’s purposes is to continue to proceed by way of analogy to those purposes already found to be charitable by the common law, and conveniently classified in *Pemsel*, subject always to the general requirement of providing a benefit to the community, and with an eye to society’s current social, moral and economic context.”⁸⁸

Test for Public

The second arm of the public benefit test is applied across all heads of charity, except for charities whose purposes fall within the first head—relief of poverty. All other purposes, however, must satisfy the public aspect of the test, albeit in each case somewhat differently.

IRC v Baddeley, [1955] A.C. 572.

I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust on any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular purpose. They are, in my opinion, interdependent. There might well be a valid trust for the promotion of religion benefiting a small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity.⁸⁹

Sufficient Segment of the Community

The purposes of a charity must be directed to the whole community or public, or sufficient segment of that community. What constitutes a sufficient section of the community?

Dingle v Turner, [1972] A.C. 601.

The phrase a 'section of the public' is in truth a vague phrase which may mean different things to different people. In the law of charity judges have sought to elucidate it's meaning by contrasting it with another phrase: ' a fluctuating body of private individuals'. But I get little help from the supposed contrast for as I see it one and the same aggregate of persons may well be describable both as a section of the public and as a fluctuating body of private individuals.⁹⁰

Whether potential beneficiaries can fairly be said to constitute a section of the public is a question of degree, and much will depend upon the purpose of the trust.

Springhill Housing Action Committee v. Commr. of Valuation, [1983] N.I. 184.

...All of which leaves one very much on the high seas with the purpose of the trust as the only reliable compass....I think it is not possible to lay down any clearer distinction than has been done by the House of Lords, imprecise though it be. I am satisfied that a trust for a section of the community is normally charitable unless the object or purpose of the trust points to a different conclusion. In the present case the Centre is occupied for a purpose which is normally charitable, and the class of persons for whose benefit it is occupied, being the residents of a sizeable estate, is not so insignificant in numbers as to deprive it of its prima facie public character.

Some of the principles that have been developed by the courts over the years, and which provide some framework within which a determination on whether or not a group of individuals is a sufficient segment of the community, are:

- Examiners look at a class of beneficiaries relative to the charitable purpose proposed.

Davies v. Perpetual Trustee Company, [1959] A.C. 439 at 456.

" [The restriction is] wholly irrelevant to the educational object the testator had in mind. It cannot be said that boys whose Presbyterian ancestors ... trace their descent from emigrants from Northern Ireland are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors ... are descended from emigrants from, e.g., England or Scotland.

(See also the *Baddeley* quote and reference above.)

- The number of beneficiaries should not be negligible.

Oppenheim v. Tobacco Securities Trust Co Ltd., [1951] A.C. 297 at 306.

- These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible...beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual... A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositi, they are neither the community

nor a section for charitable purposes.

- The quality that distinguishes members of the beneficial class from other members of the community must be a quality that does not depend on their relationship to a particular person or persons.

Re Compton, [1945] Ch. 123.

A gift under which the beneficiaries are defined by reference to a purely personal relationship to a named propositus cannot on principle be a valid charitable gift. And this, I think, must be the case whether the relationship be near or distant, whether it is limited to one generation or is extended to two or three or in perpetuity. The inherent vice of the personal element is present however long the chain and the claimant cannot avoid basing his claim on it.

See also *Oppenheim*, above.

- Restricting access to benefit without justification will offend the public benefit test.
- Limiting the beneficiaries to a class within a class may preclude recognition of the purpose as charitable. This concern relates back to the *Baddeley* decision, in which the House of Lords considered whether trusts were charitable when they were established for the benefit of residents of two counties who were "in the opinion of such leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages...".

IRC v Baddeley, [1955] A.C. 572, per Viscount Simonds.

This brings me to another aspect of the case, which was argued at great length and, to me at least, presents the most difficult of the many difficult problems in this branch of the law. Suppose that...the trust would be a valid charitable trust if the beneficiaries were the community at large or a section of the community defined by some geographical limits, is it the less a valid trust if it is confined to members or potential members of a particular church within a limited geographical area? But confine its use to a selected number of persons, however numerous and important: it is then clearly not a charity.....I should, in the present case, conclude that a trust cannot qualify as a charity within the fourth class in Pemsel's case if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed.

There are, however, a number of cases that hold charitable trusts, bequests, and organizations that primarily benefit some subcategory of the public.

¹ Although this is the case for the vast majority of charities, there are a few organizations that derive their charitable status from the ITA, such as Registered National Arts Services Organizations (RNASOS). As well, there are other organizations deemed to be charities under other legislation, such as the Canadian Race Relations Foundation, which has been created through its own act of Parliament.

2 *Verge v. Somerville*, [1924] A.C. 496 at 499 (P.C.) [hereinafter *Verge v. Somerville*].

3 Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: OLRC 1996) at 176 [hereinafter *OLRC Report*]. See also the reasons of the majority judgment of Iacobucci, J., in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 at para. 147ff, Iacobucci J. [hereinafter *Vancouver Society*]. See also *Vancouver Society*, *ibid.* at para 37, Gonthier J.

4 *OLRC Report*, *ibid.* at 166.

5 See in particular, the review completed in the UK by the Strategy Unit, Cabinet Office, *Private Action, Public Benefit, A Review of Charities and the Wider Not-for-Profit Sector*, September 2002, online: Cabinet Office <<http://www.cabinet-office.gov.uk/innovation>>. Acknowledging that the current law is confusing, unclear, and outdated, the report calls for a legislated definition of charity comprising ten categories of charitable purposes, three of which represent new charitable purposes. The purposes have been chosen to represent the main areas of charitable activity that can reasonably be anticipated to continue to represent a public benefit. The aim of the recommendation is to establish a clear framework for the definition while at the same time, retaining the existing case law and the flexibility to evolve as society changes. It also proposes to alter existing parameters of charitable status to allow for organizations, that would otherwise be denied charitable recognition, but that provide a clear public benefit. See also, U.K., National Council on Voluntary Organizations, *For the Public Benefit? A Consultation Document on Charity Law Reform*, London 2001, online: National Council on Voluntary Organizations <<http://www.ncvo-vol.org.uk>>; Scotland, Charity Scotland, *The Report of the Scottish Charity Law Commission*, May 2001, online: Scottish Charity Law Review Commission <<http://www.scotland.gov.uk/justice/charitylaw/csmr/cssd-01.htm> >; Australia, *Report of the Inquiry into the Definition of Charities and Related Organizations*, June 2001, online: Charities Definition Inquiry <<http://www.cdi.gov.au/html/report.htm>>; South Africa, *Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa – Fiscal Issues Affecting Non-Profit Organizations (NPOs)*, 1999 (the Katz Commission report), online: Ministry of Finance <<http://www.finance.gov.za/documents/katz/default.htm>>; New Zealand, *Tax and Charities*, June 2001, online: Inland Revenue Department <<http://www.taxpolicy.ird.govt.nz/>>.

6 As of the date of this consultation draft, Australia has been reported as having withdrawn the proposed charities bill and is opting instead with retaining the Common Law approach and remedying some minor anomalies from the Common Law through legislation.

7 Voluntary Sector Initiative (Canada), Joint Regulatory Table, *Strengthening Canada's Charitable Sector: Regulatory Reform*, March 2003, online: Voluntary Sector Initiative <http://www.vsi-isbc.ca/eng/joint_tables/regulatory/index.cfm> [hereinafter *Regulatory Reform*].

8 *Ibid.* Recommendation 6.

9 Almost all recommendations from the report in the UK have been accepted by the Government and a draft Charities Bill was released for consultation in May, 2004. In South Africa, since 2001, legislation has been in place that provides for tax exemptions for

“Public Benefit Organizations”.

10 The receipts are then used for non-refundable tax credits for personal income taxpayers or taken as deductions in the case of corporations.

11 *McGovern v. A.G.*, [1982] 3 All E.R. 439 [hereinafter *McGovern*].

12 *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.) [hereinafter *Pemsel*]. See Appendix “A” for an overview of the definition of charity at common law.

13 Although the language used to describe the last category, “purposes beneficial to the community,” is almost identical to the over-arching public benefit test that is the subject matter of these guidelines, the two are not the same. See the discussion on page 7.

14 Umbrella groups or facilitator organizations and some self-help organizations may be considered charitable if they otherwise meet the requirements under the ITA and the common law. See the discussion on self-help groups below.

15 For information on political activities see CRA, Summary Policy CPS-022, “Political Activities” (25 October 2002), online: CRA <<http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp-p02-e.html>>.

16 The distinction is aptly drawn in *Vancouver Society*, *supra* note 3 at para. 148. See Appendix B, Case Law Reference for the case quotation.

17 The draft guidelines are to be released for consultation in November, 2004.

18 At common law, charitable trusts for the benefit of poor relations and poor employees have been upheld, where in all other categories, such beneficiaries would not pass the public benefit test. This anomalous group of cases, however, has been the subject of much criticism and is generally considered to be a reflection of the social and economic conditions of their time. Whether or not such cases would survive the scrutiny of the court today is questionable.

19 But see the discussion on public benefit in the OLRC *Report*, *supra* note 3 at 183, where the variation in standard is questioned: “These observations confirm rather than deny, the existence of a single standard. The appearance of variation is only an appearance.”

20 *Vancouver Society*, *supra* note 3 at para. 42, Gonthier J.

21 D. Waters, *The Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 550.

22 “I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in another category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent.” *I.R.C. v. Baddeley*, [1955] A.C. 572 at 615, per Lord

Somervell of Harrow [hereinafter *Baddeley*].

23 See for example *Vancouver Society*, *supra* note 3, where an immigrant and visible minority women's society was found to be of benefit to the public but not charitable.

24 *National Anti-Vivisection Society v. I.R.C.*, [1948] A.C. 31 at 42: "The test of benefit to the community goes through the whole of Lord Macnaghton's classification, though as regards the first three heads, it may be *prima facie* assumed unless the contrary appears." [hereinafter *National Anti-Vivisection Society*].

25 *Ibid.* at 43.

26 *Ibid.*

27 *Ibid.*

28 See *Everywoman's Health Centre v. M.N.R.*, [1992] 2 F.C. 52 at 60, Decarie, J., finding that the women's health center provided a public benefit, stated, "hospitals *prima facie* qualify as charities at common law on the basis that 'the provision of medical care for the sick' is accepted as conferring a public benefit." [hereinafter *Everywoman's Health Centre*].

29 *McGovern*, *supra* note 11 at 44, Slade J. "The question whether a purpose will or may operate for the public benefit is to be answered by the court forming an opinion on the evidence before it. ...No doubt that in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point. In many other instances, however, the element of public benefit may be much more debatable."

30 In *Re Pinion*, [1964] 1 All E. R. 890, the court refused to hold charitable a bequest to a museum of the testator's paintings, which may otherwise be charitable as educational, as they had no artistic merit and were thus neither educational nor of public utility [hereinafter *Pinion*].

31 For an interesting approach to the issue see Charity Commissioners for England and Wales, *Decision of the Charity Commissioners for England and Wales* (17 November 1999). *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, Charity Commission, London, 1999 at 41.

32 These criteria are discussed in detail below.

33 *National Anti-Vivisection Society*, *supra* note 23 at 31.

34 M. Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld and Nicolson, 1979) at 136 [hereinafter Chesterman].

35 See generally, *Gilmour v. Coats et al*, [1949] 1 All E.R. 848 [hereinafter *Gilmour*].

36 *National Anti-Vivisection Society*, *supra* note 23 at 49. The Charity Commission has interpreted this test to mean, "a common consensus of opinion amongst people who are

fair-minded and free from prejudice or bias. See *Decision of the Charity Commissioners for England and Wales* (17 November 1999). *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, *supra* note 30 at 45. Courts in Canada have taken a more cautious approach to such evidence, believing that a consideration of evidence of public opinion would be injudicious, courts being ill-equipped to “assess public consensus, which is a fragile and volatile concept”. See *Everywoman’s Health Centre*, *supra* note 27 at 68-69, Decarie J.

37 A trust established to carry on the teachings of Dr. Rudolph Steiner was held to be charitable as the teachings may have resulted in such mental or moral improvement. *Re Price*, [1943] Ch. 422.

38 In *Re Orr* (1917), 40 O.L.R. 567, the court found charitable a trust to elevate the community spiritually.

39 H. Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) at 157.

40 *National Anti-Vivisection Society*, *supra* note 23 at 45.

41 See in particular the cases referred to by G.H.L. Fridman, *Charities and Public Benefit*, (1953) Can. B. Rev. 537 at 539, as authority for the provision of an indirect benefit [hereinafter Fridman].

42 See *Baddeley*, *supra* note 21 at 532, regarding the importance of indirect benefit to the public in fourth head cases where the direct benefit is to a limited class of beneficiaries.

43 *I.R.C. v. Oldham Training and Enterprise Council*, [1996] B.T.C. 539 [hereinafter *Oldham Training*].

44 See generally CRA, Summary Policy CP-C03, “Community Economic Development (CED)” (25 October 2002), online: <<http://www.cra-arc.gc.ca/tax/charities/policy/csp/csp-c03-e.html>>

45 See *National Anti-Vivisection Society*, *supra* note 23 at 42, where the House of Lords weighed the relative value of the material and direct benefits of vivisection against the moral benefit (indirect and intangible) assumed to flow from the work of the anti-vivisectionists.

46 *Ibid.*

47 *Re Strakosch*, [1949] 1 Ch. 529.

48 U.K., Charity Commissioners, *Report of the Charity Commissioners 1983*, at para.18.

49 See the draft consultation document on the decision-making process for an overview of the CRA’s approach to novel purposes generally.

50 *Re Hummeltenberg*, [1923] 1 Ch. 237 at 242 [hereinafter *Hummeltenberg*]. Cited with

approval in *National Anti-Vivisection Society*, *supra* note 23 at 44.

51 *Vancouver Society*, *supra* note 3 at para. 182.

52 *Ibid.* at para. 183.

53 *Verge v. Sommerville*, *supra* note 2 at 499, per Lord Wrenbury.

54 Note that many have called for the abolition of these anomalies. See for example the OLRRC *Report*, *supra* note 3 at 190, where the authors recommend that a provision be enacted which excludes these charities from the currently available tax privileges.

55 *Verge and Sommerville*, *supra* note 2.

56 *Davies v. Perpetual Trustee Company*, [1959] A.C. 439 at 456 [hereinafter *Davies*]; *Baddeley*, *supra* note 21 at 615, per Lord Somervell. See Appendix B, Case Law Reference for the case quotations.

57 *Oppenheim v. Tobacco Securities Trust Co Ltd.*, [1951] A.C. 297 at 306 [hereinafter *Oppenheim*].

58 *Baddeley*, *supra* note 21 at 534, per Viscount Simonds.

59 See the discussion in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 38 E.T.R. 1 at 38, Tarnopolsky J.

60 This issue is more fully discussed in CRA, Policy Statement CPS-016, "Distinction between self-help and members' groups" (7 September 2000), online: CRA <<http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-016-e.html>>.

61 *Re Clark's Trust* (1875), 1 Ch. D. 497.

62 See CRA, Policy Statement CPS-016, "Distinction between self-help and members' groups" (7 September 2000), *supra* note 59.

63 See CRA, *Registered Charities: Community Economic Development Programs*, RC-4143 (23 December 1999), online: CRA <<http://www.cra-arc.gc.ca/E/pub/tg/rc4143/README.html>>.

64 *Oldham Training*, *supra* note 42.

65 *Ibid.*; CRA, Summary Policy CP-C03, "Community Economic Development (CED)" (25 October 2002), *supra* note 43 at 11.

66 See Appendix B for a review of the relevant case law.

67 43 Eliz. 1, c.4 (U.K.) [hereinafter *Statute of Elizabeth*].

68 *McGovern v. A.G.*, [1982] 3 All E.R. 439.

69 H. Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) at 23, 9.

70 [1891] A.C. 531 (H.L.).

71 *Ibid.*

72 [1967] S.C.R. 133.

73 *Ibid.*; *Vancouver Society*, *supra* note 3 at para. 147.

74 Fridman, *supra* note 40 at 541.

75 *Vancouver Society*, *supra* note 3 at paras. 147, 153, regarding confusion around purposes and activities. See generally, *OLRC Report*, *supra* note 3.

76 *Human Life International in Canada Inc. v. M.N.R.*, [1998] 3 F.C. 202 at 214 (C.A.), Strayer J.A. [hereinafter *Human Life*].

77 *Vancouver Society*, *supra* note 3 at para. 150.

78 See generally Fridman, *supra* note 40.

79 See e.g. *Vancouver Society*, *supra* note 3.

80 *Decision of the Charity Commissioners made (17 November 1999). Application for Registration as a Charity by the Church of Scientology (England and Wales)*, *supra* note 35 at 41.

81 Chesterman, *supra* note 33.

82 Chesterman, *supra* note 33 at 183.

83 *OLRC Report*, *supra* note 3 at 176.

84 *Gilmour v. Coats et al*, [1949] 1 All E.R. 848.

85 *National Anti-Vivisection Society*, *supra* note 23.

86 *Ibid.* at 49, per Lord Wright.

87 *Ibid.* at 42.

88 *Vancouver Society*, *supra* note 3 at para. 159, Iacobucci, J.

89 *Baddeley*, *supra* note 21.

90 *Dingle v Turner*, [1972] A.C. 601.
