The UK's Raging Public Benefit Debate and its Relevance in Canada

By Kathryn Chan

Table of Contents

I. INTRODUCTION .................................................................................................................... 2
II. PUBLIC BENEFIT UNDER THE CHARITIES ACT 2006 ..................................................... 2
   A. THE STATUTORY PROVISIONS .................................................................................... 2
   B. THE CHARITY COMMISSION'S GUIDANCE ............................................................. 4
III. CONTROVERSIAL ISSUES IN THE PUBLIC BENEFIT DEBATE ................................. 8
   A. THE PUBLIC BENEFIT OF INDEPENDENT SCHOOLS .......................................... 8
   B. THE PUBLIC BENEFIT OF RELIGION AND THE IMPACT OF HUMAN RIGHTS .... 12
IV. THE RELEVANCE OF THE PUBLIC BENEFIT DEBATE TO CANADA ..................... 15
V. CONCLUSION ...................................................................................................................... 19

---

1 Principal, Benefic Lawyers, and D.Phil candidate, University of Oxford Faculty of Law. The author would like to thank the Trudeau Foundation and SSHRC for their generous support in the writing of this paper.
I. Introduction

Since the enactment by the British Parliament of a statutory definition of charity, the outstanding debate over the shape or scope of the charitable sector in England and Wales has focused on one question: what does it mean for a purpose to be ‘for the public benefit’ under the Charities Act 2006? The answer to this question, which has yet to be conclusively resolved, will impact both the objects of, and the activities carried out by, a huge range of voluntary organizations, including religious groups, independent schools, and trusts for the relief of poverty. This paper reviews the major developments in the UK’s ‘raging public benefit debate’ as it has unfolded to date, and considers the relevance of these developments in Canada.

II. Public Benefit under the Charities Act 2006

a. The statutory provisions

Until the passage of the Charities Act 2006, the definition of charity in England and Wales was based, as in other Commonwealth jurisdictions, on the long line of cases dating back to the Statute of Elizabeth and the House of Lords decision in Pemsel.\(^2\) In order to be charitable, an organisation had to be established for the relief of poverty, the advancement of education, the advancement of religion, or another purpose beneficial to the community within the meaning of the case law. A charity also had to be established for the public benefit, although this did not emerge as a distinct legal requirement until sometime after the Pemsel case.\(^3\) The public benefit of purposes falling under the first three heads of charity was ‘presumed’ unless there was evidence to the contrary. As we will see, there is some debate over what this presumption entailed, or whether it was really a presumption at all. In

---

\(^2\) *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL)

practice, however, the administrative reality was that only ‘fourth head’ charities had to demonstrate the public benefit of their purposes.\textsuperscript{4}

In 2006, the UK Parliament modified this longstanding common law approach to the determination of charitable status. The Charities Act 2006 has produced major changes to the statutory framework for English charities, most conspicuously by defining a charitable purpose for the purpose of the law of England and Wales. Pursuant to section 2 of the Act, a charitable purpose is now defined as a purpose that falls within any of the thirteen purposes described therein, and that is for the ‘public benefit’.\textsuperscript{5} The thirteen enumerated purposes basically represent a generous interpretation of the common law understanding of charity, with a few significant extensions such as the prevention (as well as relief) of poverty, and the promotion of amateur sport. Despite the attention that their statutory format has attracted abroad, they have not aroused much debate or discontent in England and Wales since the passage of the Act.

The same cannot be said of the statutory public benefit requirement, which is expanded upon in sections 3 and 4 of the Act. Subsection 3(3) appears, on its face, to preserve the status quo, stating that ‘for the purposes of this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales’.\textsuperscript{6} However, subsection (3) is explicitly made subject to subsection (2)\textsuperscript{7}, which states that in determining whether the public benefit requirement is satisfied in relation to any charitable purpose, ‘it is not to be presumed that a purpose of a particular description is for the public benefit’\textsuperscript{8}. The ongoing controversy over the public benefit requirement hinges on the meaning and effect of these two sections. Has

\textsuperscript{5} Charities Act 2006 s 2.
\textsuperscript{6} Charities Act 2006 s 3(3).
\textsuperscript{7} Charities Act 2006 s 3(4).
\textsuperscript{8} Charities Act 2006 s 3(2).
the Charities Act 2006 changed the public benefit test historically applied by the courts?

The widespread disagreement over the effect of the public benefit provisions predates the passage of the Act. In 2004, while appearing before the Joint Committee of the House of Lords and House of Commons that was scrutinizing the Charities Bill, the Charity Commission declared its view that the removal of the presumption of public benefit would ‘probably not change the law.’ The Home Office, on the other hand, took the position that the legislation would affect fee-charging charities, and force them to provide increased access to the poor. In light of this lack of consensus, many participants in the charitable sector called for Parliament to clarify the public benefit provisions, either by enumerating relevant factors, or by defining the concept as the Scottish Parliament had proposed. What happened instead, however, was that the two public authorities reached a ‘Concordat’ setting out certain agreed-upon principles of the public benefit concept, and stating that the Commission would look at public benefit on a case-by-case basis. For its part, Parliament chose not to clarify the public benefit test, leave its elucidation instead in the hands of the Charity Commission.

b. The Charity Commission’s guidance

The Charities Act 2006 specifically confers on the Charity Commission the objective of promoting awareness and understanding of the operation of the statutory public benefit requirement. In pursuance of this objective, the Act required the Commission to carry out public and other consultations on the meaning of the

---

9 Lloyd at 25.
12 Charities Act 2006 s 7.
public benefit requirement, and to publish guidance thereafter. Charity trustees are obliged to have regard to the Commission’s public benefit guidance when exercising any powers or duties to which the guidance is relevant. In their annual report, they must confirm that they have complied with this duty, and identify the activities undertaken by their charity during the year to further its charitable purposes for the public benefit.

The Charity Commission published its primary statutory guidance on public benefit in January 2008, following a four-month consultation that produced nearly 1000 responses. The forty-page document, which is available online on the Charity Commission website, summarizes the Commission’s views on the principles of public benefit, and what charity trustees must do to meet their public benefit duties under the Act. The starting point of the Public Benefit Guidance is that all organizations established for charitable purposes must demonstrate that their aims are for the public benefit if they are to be registered as a charity in England and Wales. This alone, as we will see, has proved a controversial interpretation of the effect of subsection 3(2) of the Act.

The Commission’s further summary of public benefit principles is structured around the two accepted pillars of the common law rule: first, that a charity must confer an identifiable benefit; and second, that the benefit must be to the public, or a sufficient section of it. With regard to the first principle, the Guidance identifies the following as ‘important factors’ to be taken into account:

---

13 Charities Act 2006 s 4(1)-(5).
14 Charities Act 2006 s 4(6).
15 Charity Commission, Charities and Public Benefit (January 2008) at 6.
a. **It must be clear what the benefits are.** Where the public benefit of a particular aim, such as the preservation of a historic building or art collection, is debatable, evidence of the purported benefit may be required.\(^{17}\)

b. **The benefits must be related to the aims of the organization.**

c. **The benefits must be balanced against any detriment or harm.** If the detrimental or harmful consequences of an organisation’s aims (such as damage to the environment, or the promotion of hatred towards others) are greater than the benefits, the organisation will not be charitable.\(^{18}\)

With regard to the ‘sufficiently public’ principle, the Guidance identifies four important factors:

a. **The beneficiaries must be appropriate to the aims.** The class of people who can benefit must be a ‘public class’, and must be sufficiently large or open in nature given the charitable aim that is to be carried out.\(^{19}\)

b. **Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted.** Restrictions based on the personal characteristics of beneficiaries, membership eligibility, or trustee discretion must be proportionate, rational and justifiable given the nature of the organisation’s charitable aims. Where the charging of fees restricts the benefits of a charity to only those who can afford to pay the fees charged, the charity may not meet the ‘sufficiently public’ test.\(^{20}\)

c. **People in poverty must not be excluded from the opportunity to benefit.**

---

\(^{17}\) Commission, at 14.

\(^{18}\) ibid at 16.

\(^{19}\) ibid at 17.

\(^{20}\) ibid at 18-26.
d. **Any private benefits (i.e. benefits that people receive other than as a beneficiary) must be incidental.**

Despite the extensive consultations carried out by the Charity Commission before publishing its Public Benefit Guidance, the document has provoked a great deal of criticism. Most fundamentally, several commentators dispute the Charity Commission’s starting position that all institutions must now positively show that their purposes are for the public benefit in the ‘first pillar’ sense of conferring an identifiable and recognisable benefit. Peter Luxton, author of a leading English charity law text and an expert witness at the Parliamentary hearings regarding the Charities Bill, has been the most virulent critic, describing the hundreds of pages that the Commission has produced on public benefit as ‘largely waste paper’. In his view, and that of other influential commentators, purposes that have been recognized as charitable by the courts or the Act are necessarily beneficial in the ‘first pillar’ sense, not as a matter of presumption but as a matter of law. If subsection 3(2) reverses any common law rule, therefore, it is simply the *prima facie* assumption that organizations carrying out a purpose under one of the first three heads benefit a sufficient section of the community. It follows, in his view, that only organizations seeking to establish that a new purpose should be recognized as charitable are required to prove public benefit in the ‘first pillar’ sense, either under the common law or under the new statute.

Even critics of the Commission guidance, it is important to note, acknowledge that Parliament did *intend* to establish a positive, ‘strengthened’ public benefit requirement through the enactment of the Charities Act. The Parliamentary record contains several assertions of the government’s view that *all* charities would be

---

21 Luxton, at 37.
22 *ibid* at 17. See also Jeffrey Hackney, "Charities and Public Benefit" (2008) 124 LQR 347 at 348; Picarda at 37-39F.
23 Luxton, at 8-10
required to demonstrate public benefit under the new statutory regime. The contention of the critics, however, is that the statute as drafted did not achieve this effect. As a result, they charge, the conclusion that must be drawn from the Public Benefit Guidance is that the Charity Commission has ceased to be an independent body, and is now an instrument for the promotion of government policy.

In addition to these general criticisms, the Charity Commission's interpretation of the public benefit provisions has raised a number of specific issues that are of concern to particular subsections of the English charitable sector. It is to these controversial issues that we turn in part III.

III. Controversial Issues in the Public Benefit Debate

a. The Public Benefit of independent schools

The powerful independent schools of England and Wales were always a major political target of the nation's charity law reforms. During the years that the Charities Bill was being debated, prominent charities such as the British Red Cross campaigned for a definition of public benefit that would force fee-charging charities to be far more inclusive, and several Labour MP's expressed the view that the nation's 'public schools' should not be charities at all. In the introduction of the Bill's Second Reading, the Government emphasized that independent schools, like all other charities, would have to show that they provided a public benefit. Far less clear was precisely what this 'public benefit' test would require: this difficult issue was left for the Charity Commission to figure out.

Approximately one year after the publication of its general Public Benefit Guidance, the Charity Commission released a supplementary guidance detailing its views on

24 Hackney, at 350
25 Luxton, at 34.
26 See, for example, http://www.timesonline.co.uk/tol/news/uk/article712050.ece.
how principles 2b (where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted) and 2c (people in poverty must not be excluded from the opportunity to benefit) of that guidance affected the public benefit of fee-charging charities. According to Public benefit and Fee-Charging, where a charity charges fees that many people could not afford, the charity trustees must demonstrate that there is sufficient opportunity for people who cannot afford those fees to benefit in a material way that is related to the charity’s aims.\textsuperscript{28} The guidance makes clear that the Commission does not consider the wider benefits arguably received by the public through the creation of an educated elite or a corps of potential volunteers to constitute such material benefits. Nor, despite \textit{Re Resch}, does the Commission consider that the relief of public expenditure flowing from a charity doing something that the state would otherwise have to provide benefit the poor in a material way.\textsuperscript{29}

\textit{Public benefit and Fee-charging} clearly suggests that the easiest way for a fee-charging charity to meet the public benefit requirement is to offer free or subsidised access to the charity’s core services, but maintains that other alternatives, such as making facilities and staff available to other charities that provide similar services, will also be considered.\textsuperscript{30} The Guidance indicates that the Commission is very willing to work with charities who are struggling to find feasible ways of providing opportunities to benefit to those who cannot afford their fees. Doing nothing to meet the public benefit requirement is ‘not an option’, however, and trustees who fail to meet the legal standard will find themselves in breach of trust.\textsuperscript{31}

In 2009, the Charity Commission also began investigating and producing ‘public benefit assessments’ of a number of individual charities, in order to illustrate to the

\begin{flushleft}
\footnotesize
\textsuperscript{28} \textsuperscript{28}Charity Commission, \textit{Public Benefit and Fee-Charging} (December 2008) at 9.
\textsuperscript{29} \textsuperscript{29}ibid at 10.
\textsuperscript{30} \textsuperscript{30}ibid at 14.
\textsuperscript{31} \textsuperscript{31}ibid at 19, 23.
\end{flushleft}
broader charitable sector how the Commission would apply its guidance in practice.\textsuperscript{32}

During the next two years, the Commission carried out assessments of twenty different charities, including fee-charging charities in the residential care sector, arts charities, sport and recreation charities and independent schools. In determining whether these charities met the public benefit test, the Commission relied on information provided by the charities and reports by other regulators, as well as independent reviews and ‘other relevant and reliable publicly available information’.\textsuperscript{33} Two independent schools, as well as one care home and one tennis club, failed the assessment. In the case of the two schools, a central criticism was that the schools did not make sufficient provision for the poor to participate by way of means-tested bursaries.\textsuperscript{34} The fact that the schools offered non-means-tested scholarships and shared their facilities with state schools was apparently not regarded as sufficient to meet the statutory public benefit requirement.

The Commission’s guidance on public benefit and fee-charging, as developed and applied in its public benefit assessment reports, has been seen by many in England as a direct challenge to the autonomy of the nation’s independent schools. As such, it is not surprising that the document has produced the most extensive charity law proceedings that England has seen in many years. In February 2010, the Independent Schools Council, which represents some 1000 charitable independent schools, applied for judicial review of both the general public benefit guidance, and the supplementary guidance on fee-charging. The ISC’s judicial review application identifies two ‘critical’ legal issues on which its position diverges dramatically from that of the Charity Commission. First, it contends that according to the principles of charity law preserved by section 3(3) of the Act, the public benefit requirement is


\textsuperscript{33} Ibid at 10-11

\textsuperscript{34} Statement of Facts and Grounds Relied Upon by the Independent Schools Council, available online at http://www.charity.tribunals.gov.uk/references.htm.
satisfied where a charity’s purpose is to offer its services to an appreciably important class of the community upon payment of its fees. By insisting that the benefits of a fee-charging charitable school must be made available to those who are unable to pay, the ISC claims, the Commission has ‘introduce[d] a mandatory element of poverty relief into an educational trust’. Second, the ISC argues that indirect benefits are just as important to an assessment of public benefit as direct benefits, so that ensuring a reasonable level of direct access for poor persons to the charity’s core services is not a prerequisite to any wider or more indirect benefits being taken into account.

In October 2010, the High Court granted the ISC its requested permission to apply for judicial review.

The meaning of the public benefit requirement and its application to the independent school sector are, in England and Wales, matters of substantial public concern. As such, the Attorney General has also entered the fray, employing for the first time its statutory power to refer any question regarding the operation or application of charity law to a particular state of affairs to the Charity Tribunal. The Attorney General’s reference focuses largely on a series of fact-specific questions that are intended to determine what types and levels of benefits provided by independent schools to persons who cannot afford the fees would be in accordance with the law of charity. The reference and the judicial review claim have been transferred to the Upper Tribunal (Tax and Chancery) chamber and will be heard alongside each other by a panel of three judges in May 2011. At least two

36 Statement of Facts and Grounds Relied Upon by the Independent Schools Council, at paras 3, 82.
37 Charities Act 1993 sch 1D, s 2(1). On 27 January 2011, the Attorney General lodged a separate reference to the Charity Tribunal to determine whether trusts with a restricted pool of beneficiaries defined by a relationship to an individual or a company and established for the purpose of relieving poverty, satisfy the public benefit test following the implementation of the Charities Act 2006: see http://www.attorneygeneral.gov.uk/NewsCentre/Pages/GuidnacearoundrecentcharitylawReference.aspx.
other organisations, the National Council on Voluntary Organisations and the Education Review Group, have intervened, and the hearing is set for a full eight days.

b. The Public Benefit of religion and the impact of human rights

During the legislative development of the Charities Bill, the government went to great lengths to reassure religious constituents that the removal of the presumption of public benefit was not intended to narrow the range of religious activities accepted as charitable, and that ‘religions had nothing to fear’ from the statutory public benefit test. Nevertheless, religious organisations in England and Wales have from the beginning been concerned that the removal of the presumption of public benefit could negatively impact the religious sector by requiring religious organisations to positively demonstrate that they confer an ‘identifiable’ benefit on the public. Given the legacy of Gilmour v. Coats, that the spiritual benefit flowing to mankind from religious organizations does not fulfill the public benefit requirement because it is not “capable of legal proof”, this would appear to be a very valid concern.

However, the Charity Commission has taken a broad and flexible approach to the issue of the public benefit of religious charities, which appears for the time being to have put these issues to rest. According to its supplementary guidance, The Advancement of Religion for the Public benefit, ‘it is the existence of an identifiable, positive, beneficial moral or ethical framework that is promoted by a religion which demonstrates that [a] religion is capable of impacting on society in a beneficial way.’ The public benefit of a religious charity should be capable of being ‘recognised, identified, defined or described’, but that does not mean that it must

38 Lloyd) at 27.
39 Gilmour v. Coats [1949] 1 All ER 848 (HL).
40 Charity Commission, The Advancement of Religion for the Public Benefit (December 2008)
also be quantifiable....‘the benefits may or may not be physically experienced.’ The guidance recognizes that in addition to providing a moral or ethical framework, religious charities may meet the public benefit requirement in diverse ways that include contributing to the spiritual education of children, fostering social cohesion, or contributing to the mental and physical health of their adherents. It also clarifies that charities whose aims include advancing religion do not have to undertake secular activities in addition to their religious activities in order to meet the public benefit requirement. Until someone decides to challenge the Commission guidance, therefore, it appears that the intangible quality of the religious experience will not provide a barrier to the continued registration of religious organizations.

In fact, there has been a major challenge to the public benefit of religious charities in England and Wales since the enactment of the Charities Act 2006, but it has come from quite another direction. Since the UK Human Rights Act came into effect in October 2000, it has been the case that all domestic legislation in the UK must be read and given effect, so far as possible, in a way that is compatible with the rights set out in the European Convention on Human Rights and Fundamental Freedoms (ECHR). This provision was brought to bear on the Charities Act in 2008, when a Catholic adoption agency sought to amend its objects clause to clarify that it would only provide adoption services to heterosexuals in accordance with the tenets of the Catholic Church. The Charity Commission refused to consent to the amendment, a decision that the charity appealed to the Charity Tribunal and then the High Court.

In the course of his ruling, Justice Briggs made several holdings that will affect the manner in which the public benefit of religious charities is assessed. First, he confirmed that the ECHR compatibility rule applies to the definition of public benefit.

---

41 ibid at 14.
42 Ibid at 14, 26.
43 Human Rights Act 1998 s 3
44 Under the Charities Act 1993, any alteration of the objects clause of a charitable corporation requires the prior written consent of the Commission, and is ineffective if such consent is not obtained: see Charities Act 1993, s 64.
set out in the Charities Act 2006. Second, he affirmed the previously untested assertion of the Public Benefit Guidance that the question of whether a particular purpose is charitable ‘may require a weighing of the public benefits and dis-benefits associated with its implementation.’ If the detrimental consequences of a purpose outweigh a charity’s benefits, Briggs J held, the organisation will not be charitable. Third, Justice Briggs held that a charity that discriminated otherwise than as a proportionate means of achieving a legitimate aim would not likely meet the public benefit test. The matter was sent back to the Charity Commission to be decided in accordance with the principles articulated by the High Court. In July 2010, following a further hearing, the Commission determined that the reasons proposed by Catholic Care for its discrimination against same-sex adopters were not sufficiently weighty to constitute a proportionate means of achieving a legitimate aim.

While the Catholic Care decision has not consistently been addressed in the literature on the statutory public benefit requirement, it has the potential to profoundly impact the manner in which the public benefit of religious charities is assessed. Religious charities, whose public benefit is no longer presumed, will now have to positively demonstrate that they do not discriminate against homosexuals, women or other protected groups unless such discrimination constitutes a proportionate means of achieving a legitimate aim within the meaning of human rights law. Where the differential treatment refers to the sexual orientation of potential beneficiaries, ‘particularly convincing and weighty reasons’ will have to be shown. And, at least in circumstances where religious organizations carry out ‘public activities’ that are partly funded by government authorities, respect for the

45 Catholic Care v the Charity Commission for England and Wales [2010] EWHC 520 (Ch)
46 ibid at paras 67-68.
47 ibid at paras 97-99.
48 Charity Commission for England and Wales, Catholic Care (Diocese of Leeds) - Decision Made on 21 July 2010: Application for Consent to a Change of Objects under s 64 of the Charities Act 1993
49 See, for example, Picarda) at 136-144.
50 EB v France (2008) 47 EHRR 21, cited in Catholic Care (Ch) at para 58.
religious beliefs motivating the organization is not likely to constitute an acceptable justification.\textsuperscript{51} The stakes of this dispute are high, which explains why the revised decision of the Charity Commission is also under appeal.

IV. The relevance of the Public Benefit Debate to Canada

To some extent, the relevance of the United Kingdom’s public benefit debate to Canada depends on the answer to the controversial question of whether the removal of the presumption of public benefit by the Charities Act 2006 actually changed the existing law. If it did, it would seem that the emerging guidance and case law should not be strictly applicable in Canada, as it constitutes the interpretation of a foreign domestic statute. If subsection 3(2) did not change the law, it is likely more fitting to characterize the current flurry of administrative and judicial activity as a clarification or elaboration of a difficult area of the common law, which is equally relevant here. The Upper Tribunal (Tax and Chancery) will undoubtedly have to address subsection 3(2) at the upcoming independent schools hearing, and so the ongoing debate about the provision’s effect may soon be resolved.

In assessing the ongoing relevance of the UK’s public benefit debate to Canada, it will also be important to consider the very different contexts in which each country’s charity regulation takes place. Only a few of the most evident differences need be mentioned here. First, the Charity Commission is a non-ministerial government department with no tax-related functions. It has interpreted and applied the public benefit requirement pursuant to a direct statutory mandate, not only to promote understanding of the public benefit requirement, but to do so in a way which encourages charitable giving and innovation in the sector.\textsuperscript{52} Therefore, charges that it is less than independent from the government, while damaging, do

\textsuperscript{51} Catholic Care (Ch) at para 84. In fact, counsel for Catholic Care did not even seek to advance this argument.

\textsuperscript{52} Charities Act 2006 s 1D(2).
not have the same force as those that could be leveled against the fiscally-driven, government-directed Charities Directorate during a public debate. Second, while the Catholic Care decision might prove influential in Canada, the public benefit of religious charities in this country would have to be assessed in relation to the particular balance set between individual and collective rights in Canada’s human rights statutes, a balance that may differ significantly from that established by the ECHR. Third, the huge debate over the public benefit of the UK’s independent schools, while arguably relevant in Canada, must be understood in the broader context of British class warfare, and the significant, historical power of the nation’s public schools.

Regardless of these important limitations, however, it seems very likely that the debate over what entails public benefit in the United Kingdom will have a significant impact on the Canadian charity law landscape. If the statutory removal of the presumption has illustrated anything, it is the extent to which the common law concept of public benefit and associated jurisprudence is confused and unclear. Even if the English courts decide that the Charities Act requires something different by way of public benefit than was required by the common law, therefore, the upcoming litigation is certain to clarify the meaning of some of the old cases that have contributed to this confused state of affairs.

One of the most significant of these cases, the 1969 decision of the Privy Council in Re Resch’s Will Trusts, is central to the independent schools dispute.\(^{53}\) Re Resch involved a bequest to a private, fee-charging hospital, which was established to meet an existing demand for more comfortable hospital accommodation and to relieve the pressing public demand for admission to the adjacent, public hospital.\(^{54}\) Several parties objected to the validity of the bequest on the ground that the hospital excluded the poor from participation in its benefits. At issue was one line of cases stating that a trust for the sick did not have to be limited to the poor sick, and

\(^{53}\) Re Resch’s Will Trusts [1969] 1 AC 514 (PC)
\(^{54}\) Ibid at 539.
another stating that a trust which excluded the poor from its benefits would not be charitable. Speaking for the court, Lord Wilberforce affirmed the correctness of both lines of cases, with the caveat that they did not mean that a trust for the provision of medical facilities would not be charitable simply because ‘by reason of expense [the facilities] could only be made use of by persons of some means.’ On the facts, the private hospital was found to be charitable, but it is not clear which if any of the factors relied on by the court to support that conclusion would have established its charitable nature on its own. As Lord of Phillips of Sudbury commented during the House of Lords debates when the decision in Re Resch was raised, ‘read and read and read ye may, but a certain conclusion you will not find...’ The Upper Tribunal may seek to dispel this uncertainty with the independent schools decision.

There are at least three further, broader senses in which the UK’s public benefit debate may be relevant to Canada. First, it is increasingly clear that the public benefit concept has become the lens through which difficult, modern issues affecting the charitable sector are evaluated and resolved in the UK. These issues include the tension between certain religious charities and protected minority groups, the tension between ‘elitist’ charities and those that primarily service the poor, and even the policing of charities that may have violent or other illegal aims. Even if Canada does not jump into a debate over the public benefit of its registered charities, therefore, it is likely that the academic, judicial and political discussions of public benefit in the UK will be considered instructive as these issues come to the fore here.

55 These factors included that some poor people were able to access the hospital’s services through fee reductions and medical benefit schemes, the availability of a ‘particular type’ of medical treatment, and the general benefit resulting from the relief to the beds and medical staff of the general hospital: ibid at 544
57 Public benefit guidance at 16
Second, the UK’s experience in passing the Charities Act and working through the ensuing public benefit controversies offers Canada a valuable illustration of what it might look like if the meaning of charity were to be brought in a meaningful way into our political sphere. The UK’s public benefit debate has been highly political, from the early debates about what should be specified in the Act, to the government’s decision to leave the most difficult decisions to the regulator (and then cut its funding!), to the media coverage of the Charity Commission’s public benefit assessments and the particular focus on England’s public schools. There are downsides to this political route: in particular, as we have seen, the public’s perception of the Charity Commission as a regulator that is independent of government has arguably suffered some damage. However, both the transparency of the debate over what types of organizations should be accorded charitable status, and the level of public and sectoral awareness of the major issues are admirable, and provide goals towards which Canada should aspire.

A final, broad sense in which the UK’s public benefit debate may be relevant to Canada relates to the manner in which the various challenges to the Charity Commission’s public benefit guidance have been brought. As we saw earlier, the pending claim of the Independent Schools Council is a claim for judicial review of several parts of the Commission guidance, based on the principle that public decision-makers must correctly state the law that regulates their decision-making power and give effect to it, if they are to act within their jurisdiction.\(^{58}\) Despite opposition from the Charity Commission\(^{59}\), the propriety of this approach has been approved by the High Court.

\(^{58}\) Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410F.

\(^{59}\) The Charity Commission took the position that judicial review proceedings were not the appropriate means of obtaining judicial guidance, and that any court action should be based on some individual regulatory decision: see Statement of Facts and Grounds Relied Upon by the Claimant, the Independent Schools Council, at para 33.
As far as I am aware, no one has ever challenged the Charities Directorate’s administrative policies on charitable registration or revocation through judicial review. Nevertheless, the approach does offer certain perceivable advantages. Most notably, perhaps, it allows legal proceedings to be brought by a charity that can actually afford counsel, without forcing that charity to run the risk of revocation that generally accompanies individual regulatory decisions. The bringing of statutory references by the Attorney General, a form of action that does not currently exist here, has the related advantage of allowing difficult charity law questions to be addressed in the abstract, independently of particular administrative policies or the circumstances of a particular appellant.

**V. Conclusion**

The question of what it means for a purpose to be ‘for the public benefit’ under the Charities Act 2006 has raised a debate that is certain to change the dimensions and character of the charitable sector in England and Wales. The extent of those changes, and particularly their effect on the religious and educational sectors, will become clear over the next few years, as England’s courts and tribunals resolve the various disputes that have arisen under the Act.

Canada will want to continue following the English developments, both because the impending court decisions are likely to elucidate the rather murky public benefit jurisprudence, and because ‘public benefit’ is now the rubric under which most modern issues affecting the charitable sector are evaluated and resolved in the UK. Before assuming that any particular aspect of the UK’s public benefit debate is relevant to the Canadian charitable sector, however, Canada will need to consider the very different statutory frameworks, constitutional backgrounds, and cultural contexts in which the question of public benefit may arise.