

## **PROPOSED GUIDELINES FOR RESEARCH AS A CHARITABLE ACTIVITY**

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### **A. INTRODUCTION**

On January 9, 2008, the Canada Revenue Agency (“CRA”) published the draft policy *Consultation on Proposed Guidelines for Research as a Charitable Activity*<sup>1</sup> (“Proposed Guidelines”). Within the Proposed Guidelines, the CRA sets out its proposed policy pertaining to “the legal and administrative requirements a registered charity is expected to fulfil in order to conduct or fund research as a charitable activity.” The CRA generally defines research, in the charitable sense, as “the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge. Moreover, to be considered charitable, the research must be disseminated and made freely available to others who might want access to it.”<sup>2</sup> In an effort to assist charities in carrying out research as a way of furthering or achieving their own charitable purposes, the Proposed Guidelines additionally discusses the types of research which are not considered to be charitable.

The Proposed Guidelines apply not only to charitable organizations with a charitable purpose, as set out in their governing documents, to conduct or fund research in a particular field, but also to charitable

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<sup>1</sup> Canada Revenue Agency, Consultation Paper, “Consultation on Proposed Guidelines for Research as a Charitable Activity” (9 January 2008, available online at [http://www.cra-arc.gc.ca/tax/charities/consultations/research\\_guidelines-e.html](http://www.cra-arc.gc.ca/tax/charities/consultations/research_guidelines-e.html)).

<sup>2</sup> *Ibid.* at para 2.

organizations that have some other charitable purpose, such as organizations of a hospital or a school, and carry out research as a way of furthering or achieving that purpose.<sup>3</sup>

This *Charity Law Bulletin* summarizes the content of the Proposed Guidelines, as well as highlighting their significance for registered charities in Canada.

## **B. WHAT ARE THE GENERAL REQUIREMENTS FOR ATTAINING AND MAINTAINING CHARITABLE REGISTRATION?**

Research has been recognized as a charitable purpose under the second and fourth categories of charity as set out in *Commissioners for Special Purposes of Income Tax v. Pemsel*<sup>4</sup>. Specifically, research as a charitable activity falls under the charitable heads defined respectively as the advancement of education and other purposes beneficial to the community in a way the law regards as charitable. Charitable research must be undertaken in such a way that it is likely that knowledge will be discovered or improved.<sup>5</sup>

Where a charitable organization conducts or funds research to further a non-research charitable purpose, the CRA may still consider the research to be a charitable research activity in certain circumstances. However, in order for this type of research to be determined to be a charitable activity, the research must fulfil several requirements which have been prescribed by the CRA and are set out in detail below.

## **C. HOW DOES THE CRA DEFINE RESEARCH AS A CHARITABLE ACTIVITY?**

The Proposed Guidelines provide that, based upon charity law principles and case law pertaining to charitable research trusts, the CRA will generally view any research that an organization conducts or funds to be a charitable activity provided that:

- (a) it represents a reasonable way to achieve or further the organization's charitable purpose;
- (b) the subject matter is not frivolous; and the research is undertaken in a way that knowledge is likely to be discovered or improved;
- (c) it is carried out for the public benefit that could arise from it and not primarily for self interest or for mainly private commercial consumption; and
- (d) the results are disseminated and made freely available to others who might want to access them.<sup>6</sup>

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<sup>3</sup> *Ibid.* at para 3.

<sup>4</sup> [1891] A.C. 531 (H.L.).

<sup>5</sup> *Supra* note 1 at para 8.

<sup>6</sup> *Ibid.* at para. 11.

While a research activity not possessing one or more of the characteristics listed above is unlikely to be considered to be research in the charitable sense, the CRA recognizes that the organization's particular purpose and the specific facts of the situation may lead to a determination that the research is nevertheless a charitable activity. This could be so if the research activity represents a reasonable way to achieve or further their charitable purpose. Where there exists uncertainty or concern in relation to a charitable organization's particular research activities, the Proposed Guidelines indicate that the organization can contact the CRA to obtain an opinion on the matter.<sup>7</sup>

#### **D. WHAT KINDS OF ACTIVITIES ARE NOT REGARDED AS CHARITABLE RESEARCH?**

The Proposed Guidelines indicate that research that does not directly further a charitable purpose, or the delivery of a charitable program, is not considered to be research in the charitable sense. An example of such research, which has been provided within the Proposed Guidelines, is a situation where the proposed research concerns the internal deployment of an organization's administrative, management or fundraising. As this type of research is conducted to benefit the organization internally, rather than to directly bring about or further a charitable purpose, it does not meet CRA's criteria for research as a charitable activity. This is because indirectly advancing a charitable purpose is insufficient for the qualification of research as a charitable activity. While it is generally acceptable for a charity to devote a minor part of its resources to this type of research activity, the CRA states in the Proposed Guidelines that the charity cannot use the amount expended on these types of research activities to meet its annual disbursement quota.<sup>8</sup>

Where research has dual objectives, some of which are charitable and some of which relate to administrative issues and program delivery issues, the charity conducting the research is expected to make reasonable and consistent allocations as to the amount of resources devoted to the portion of the research pertaining to administrative issues and program delivery issues. These figures are required to be reported annually by the charity on its T3010A Information Return, a requirement for all registered charities.

A charity's mere accumulation and production of information on a given subject or about a specific event, or its gathering of market research about consumers' needs and preferences, will not, in and of itself, be considered to be a charitable research activity. However, as stated above, if the research activity represents a

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<sup>7</sup> *Ibid.* at para. 13.

<sup>8</sup> *Ibid.* at para 14.

reasonable way to achieve or further a charitable purpose, then it may nevertheless be considered to be a charitable activity.

The Proposed Guidelines caution that if an organization undertakes a particular research project in order to generate income, then it might be considered to be a related or unrelated business activity. As such a determination could have a significant impact on a charity's charitable registration, any charity considering engaging in this type of research should first consult the CRA's policy statement CPS-019, "What is a Related Business?"<sup>9</sup>

#### **E. DETERMINING WHETHER RESEARCH IS LIKELY TO ACHIEVE OR FURTHER A CHARITABLE PURPOSE?**

In order to determine whether a specific research activity has the capacity to attain a charitable objective, the CRA assesses the following:

- (a) whether the research activity relates to the charitable purpose; and
- (b) whether the research activity represents a reasonable way to further or achieve that purpose.

In relation to the first requirement, an organization that does not have an explicit charitable purpose to conduct research in a particular field must consider whether the research it funds or conducts is connected to its charitable purpose. The CRA provides the example of an organization created with the charitable purpose of relieving poverty by providing accommodation to the homeless. This organization may be able to further its charitable purpose by conducting research assessing what factors lead to a recent rise in the number of single parent families seeking this type of accommodation. The same organization would not be able to conduct research pertaining to global warming as a charitable activity since it is not related to its charitable purpose.

In relation to the second requirement, charitable organizations are not required to adduce evidence to the effect that undertaking the intended research is certain to produce results that will further or achieve its charitable purpose. Rather, the CRA's threshold requirement is that the proposed research presents a reasonable prospect of furthering or achieving its charitable purpose.

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<sup>9</sup> Available online at: <http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-019-e.html>.

**F. HOW DOES THE CRA ASSESS THE RESEARCH AN ORGANIZATION INTENDS TO CONDUCT OR FUND?**

If the CRA identifies any concern in relation to the substantive quality of the research proposed to be or being conducted, specifically whether it may be frivolous or incapable of achieve the desired results, the charitable organization proposing such research will be required to provide literature or the opinion of an expert to validate the contention that the research is capable of “*adding to the store of human knowledge*”<sup>10</sup>. The expert must not only be qualified to provide an opinion with respect to the quality of the research, but additionally, his or her qualifications, employment experience and/or record of published work may be sought to confirm that he or she has the requisite training and/or experience necessary to carry out the research in question.<sup>11</sup>

If the CRA remains concerned about the proposed research despite the provision of the information set out above, the charitable organization may be required to provide an expert opinion indicating that the proposed research “*is likely to lead to the discovery or improvement of knowledge.*”<sup>12</sup> This opinion would be required to canvass issues pertaining to the effectiveness of the chosen methodology and the analysis and evaluation techniques intended to be employed.

The charitable organization is also required to generate a plan which will assist in determining whether constructive results were obtained by conducting the research. The CRA proposes that an organization might evaluate its research results by assessing whether:

- (a) the methodology used to analyse the data was appropriate for the stated objectives of the project; and
- (b) the data and analysis substantiate all of the conclusions and recommendations.<sup>13</sup>

The Proposed Guidelines indicate that organizations can corroborate their assessment of the research results, whether constructive or not, by having an expert or an expert peer group in the specific field review the results. If the quality of the research is verified and subsequently published by a work that has subjected the research to peer review, the CRA will tend to see this as indicating the results are constructive.<sup>14</sup>

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<sup>10</sup> *Supra* note 1 at para 23.

<sup>11</sup> *Ibid.* at paras. 23 – 24.

<sup>12</sup> *Ibid.* at para 25.

<sup>13</sup> *Ibid.* at para. 26.

<sup>14</sup> *Ibid.* at para 227

## G. ETHICAL CONSIDERATIONS

Where a charitable organization undertakes or funds research which involves human subjects, it must begin by assessing any ethical questions that might arise. The Proposed Guidelines indicate that the organization must develop a plan to convey how any identified ethical questions will be addressed. The CRA points to the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*<sup>15</sup> as a best practices guideline with respect to the ethical code of conduct expected to be in place when an organization conducts or funds research involving humans as a charitable activity.<sup>16</sup>

The Proposed Guidelines stress the importance of assessing and mitigating the risk of harm that a research project may cause to humans and indicate that doing so will assist the charitable organization in demonstrating that the research is capable of satisfying the “public benefit” requirement. As indicated above, ensuring that there is a public benefit from the research is the second key requirement of evidencing a charitable purpose at law.

## H. WHAT DISSEMINATION AND ACCESSIBILITY REQUIREMENTS APPLY

As “there is no universal requirement under common law that a charity that conducts or funds research as a charitable activity must disseminate it to others”<sup>17</sup>, a charitable organization will not be required to disseminate the results of its charitable research to the public in all circumstances. Where the organization does not have a charitable educational research purpose, but instead has some other charitable purpose, there is no express requirement at law that dissemination of the results of its charitable research occur. However, this does not preclude the organization from publicizing research results where it so chooses.

Alternatively, the common law prescribes that where a charitable organization does have a charitable educational research purpose, which aims to advance learning or public knowledge through the discovery or improvement of knowledge, the results of any research which it has undertaken must be circulated to anyone who might wish to acquire access thereto. This requirement is as a result of the fact that a charitable organization would not be able to achieve the said charitable purpose unless the results of its research are made available in the public realm.

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<sup>15</sup> Produced by the Canadian Institutes of Health Research, the Natural Sciences and Engineering Research Council of Canada and the Social Sciences and Humanities Research Council of Canada (Ottawa: Public Works and Government Services Canada, 2005), available online at: [http://pre.ethics.gc.ca/english/pdf/TCPS%20October%202005\\_E.pdf](http://pre.ethics.gc.ca/english/pdf/TCPS%20October%202005_E.pdf).

<sup>16</sup> *Supra* note 1 at para 28.

<sup>17</sup> *Ibid.* at para. 30.

The means employed to make research results available is a determination which has been left up to the charitable organization itself. The results can be published in a journal, submitted to an online database of publications or posted on the organization's publicly accessible website. While the CRA has not set out specific guidelines in this regard, it has specified that where the organization is unable to reproduce the entire results of its research due to the time or space allocation requirements of the chosen media vehicle, some indication must be made to inform interested parties of the way in which they can access the remainder of the results. Where the research results are not entirely disseminated, the CRA indicates that charitable organizations must follow its policy on charitable communication activities.<sup>18</sup>

If the results do not assist in furthering or achieving the organization's charitable purpose, or if they are unhelpful in relation to the objectives of the research activity, the results are not required to be distributed. The CRA, however, appears to encourage organizations to make their research results available even in the cases where they have been found not to be constructive. The basis for this proposition is that these results might assist those who are contemplating conducting similar research activities in a related field of research.

The requirement to disseminate results also varies based upon the degree of specialization or technicality of the research conducted. With regard to highly specialized or technical research, fewer parties are likely to be interested in the results, and therefore, the dissemination requirement is somewhat relaxed. In this regard, the dissemination and accessibility requirement might be satisfied by simply providing public access to the research rather than actively disseminating it. At the very least, the organization would be required to record the existence of the research in a publicly available catalogue or on its publicly accessible website so that those who are interested in the results have the ability to access it.

## **I. DEVELOPMENT AND PROTECTION OF INTELLECTUAL PROPERTY RIGHTS**

The Proposed Guidelines suggest that organizations with a charitable educational research purpose that are looking to develop and exploit the intellectual property rights arising from its research should first consider whether acquiring such rights might place the organization in a position of being unable to satisfy the dissemination and accessibility requirement. The example cited by the CRA in the Proposed Guidelines relates to the acquisition of patents for its research, which can be a lengthy process to complete. Specifically, the CRA indicates that it will allow for delays in dissemination where an organization has applied for a patent for

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<sup>18</sup> Canada Revenue Agency, Policy Statement, "Political Activities" (2 September 2003, available online at <http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html>).

its research, as the results may be required to be held in secret until the patent is obtained. However, in order that the dissemination and accessibility requirement nevertheless generally be considered to have been satisfied in these circumstances, the CRA requires that the organization ensure that it:

- a) properly seek to secure the patent right; and
- b) publish or make accessible to the public, the research results that created the patent right as soon as reasonably possible after the patent right has been secured.<sup>19</sup>

Where a charitable educational research organization delays an application for a patent where the research has been conducted, it must show reasonable and legitimate reasons for the delay in order for the dissemination and accessibility requirement to be considered to have been met.

#### **J. PRIVATE BENEFIT ISSUES INVOLVING COLLABORATIONS**

Research, as a charitable activity, must be carried out for the public benefit that could arise from it. The research cannot be carried out primarily for self interest or private commercial consumption.

While corroboration with a private entity to fund or conduct research is permissible, a charitable organization must provide a clear indication of the basis for the decision to engage in such an affiliation. Additionally, a charitable organization choosing to collaborate with a commercial entity with respect to a charitable research project must ensure that any agreement it enters into with the commercial entity will not prevent it from satisfying the legal requirements of charitable research as set out above.<sup>20</sup>

In certain circumstances, it will be inevitable that the commercial entity will obtain a private benefit, such as the provision of an exclusive right to produce medicine that is the result of research conducted in relation to a particular disease or the appointment of an employee of the commercial entity to a committee of the charity making determinations as to the funding of research proposals. The provision of a private benefit to a commercial entity is not precluded by the CRA so long as the said benefit is directly the result of, or incidental to, the achievement of the charity's charitable purpose. The private benefit must be an "inevitable and indeed necessary step in the achievement of the public benefit that the organization was established to

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<sup>19</sup> *Supra* note 1 at para. 40.

<sup>20</sup> *Ibid.* at paras. 43 – 44.

realize. Additionally, the private benefit is only acceptable if it is reasonable in all the circumstances; it should not amount to a non-charitable collateral purpose, such as the promotion of a private enterprise.”<sup>21</sup>

In situations where the private entity is given an exclusive right, such as the right to produce medicine as described above, the Proposed Guidelines recommend the negotiation of a licensing fee at fair market value in order to assist in demonstrating that the private benefit obtained is incidental to the charitable purpose.

#### **K. WHAT RESTRICTIONS APPLY TO PUBLICISING THE RESULTS OF CHARITABLE RESEARCH?**

Where a charitable organization uses its research results to support its views on an issue which is connected with its charitable purpose, the organization must be aware of restrictions which apply concerning the way an organization can engage in, and debate on, issues of public or political interest as set out under the *Income Tax Act* and in the common law. Where the organization intends to engage in this type of publication of its research results, the CRA indicates that charitable organizations should look to its Political Activities Guidelines for an in-depth discussion of the limitations in regards thereto.<sup>22</sup>

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<sup>21</sup> *Ibid.* at para. 45.

<sup>22</sup> *Supra* note 17.

## L. COMMENTARY

The Proposed Guidelines provide charitable organizations with a significant degree of direction with respect to the legal and administrative requirements that a registered charity is expected to fulfil in order to conduct or fund research as a charitable activity. There are, however, several issues which should be addressed by the CRA prior to implementing this draft into policy. The first relates to the intellectual property issues associated with research by a charity. That is, while patents, as just one type of intellectual property that could arise from research, is addressed in the Proposed Guidelines, other type of intellectual property that could arise in the research field, specifically copyrights and, to a less degree, trade-marks, are not addressed in any way at all.

Secondly, there remains some uncertainty with respect to the issue of the ownership of the research, particularly the data produced by the research. At the very least, the charity requires access to the report or analysis prepared by the researcher in order for the research to further or benefit its charitable purpose. If the researcher was to use the data in another context, they must be required to acknowledge the contribution of the charity, and the charity should have the right to be consulted and review any report prepared using the data. It is unclear from the Proposed Guidelines whether research produced with monies from a charity is to be solely owned by the funding charity. If this is not the case, then can the said research be jointly owned by the charity and the researcher or, instead, can the charity enter into a licensing agreement with the researcher in relation to the said research? These issues are currently not addressed in the Proposed Guidelines and, therefore, should be carefully reviewed by the CRA before finalizing the Proposed Guidelines.