

SUPPLEMENTARY RESEARCH MEMORANDUM

Date: December 4, 2004

Re: Registration of “Charity Bank” under Section 149 of the *Income Tax Act* :
Meaning of “Personal Benefit” in section 149.1 of the Income Tax Act (Canada)

Introduction

This research memorandum identifies further information and sources of information on the meaning of the term “personal benefit” as it is used in subsection 149.1(1) of the *Income Tax Act* (Canada) in the definitions of “charitable organization” and “charitable foundation”. It supplements our memorandum of July 19, 2004 which addresses the general question whether a bank for the charitable sector, as defined therein, is charitable at common law. The specific context of this further research work is the narrow issue whether one registered charity can own all of the shares of another registered charity and receive dividends on those shares from time to time out of the surplus of the other registered charity.

In summary, we have been unable to find any clear, direct or explicit information relating to the proper interpretation of the term “personal benefit”. There is helpful indirect and implicit information, including CRA’s own practice in regard to related questions or similar issues. The available information suggests that the prohibition against “personal benefit” is designed to ensure that the assets of a charity remain devoted to its charitable purpose. There is no evidence or information to suggest that the provision should be read as a prohibition against transfers to other registered charities and there is no identifiable policy reason to support such a prohibition.

The memorandum is divided into six parts : I Submissions on The Proper Interpretation of “Personal Benefit”; II History of the Relevant Legislative Provisions; III CRA Materials of Relevance; IV Statutory Interpretation and Tax Legislation; V The Non-Distribution Constraint; and, VI The Common Law Doctrine of Private Benefit.

I SUBMISSIONS ON THE PROPER INTERPRETATION OF “PERSONAL BENEFIT”

The definitions of “charitable foundation” and “charitable organization,” in part, are as follows:

149.1. (1) In this section, ...

“charitable foundation” means a corporation or trust that is constituted and operated exclusively for charitable purposes, **no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof, and that is not a charitable organization;**

...

“charitable organization” means an organization, whether or not incorporated,

(a) all the resources of which are devoted to charitable activities carried on by the organization itself,

(b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof...

The French language formulation of the same rule is as follows: “dont aucune partie du revenu n’est payable à l’un de ses propriétaires, membres, actionnaires, fiduciaires ou auteurs ni ne peut servir, de quelque façon, à **leur profit personnel.**”

The concept “personal benefit” is also used in the definition of “non profit organizations” in paragraph 149(1)(l).

In our memorandum of July 19, 2004 we concluded that the law on the proper interpretation of “personal benefit” is as follows:

The issue is whether the payment of dividends and/or other distributions on the shares issued by Charity Bank and owned by persons who are qualified donees is subject to the prohibition against personal benefits in the definition of “charitable organization”.

Our answer is that it clearly is not.

First, it is clear that no such dividend could be paid or distribution made to any person or entity other than a qualified donee and therefore, there could not be any “personal” benefit in the requisite sense.

Second, such a dividend distribution would not be contrary to the personal benefit prohibition because the statutory prohibition is clearly intended to sanction distributions to entities other than qualified donees. It is not intended to prohibit distributions to other qualified donees. This is clear from a reading of the provisions of the Act as a whole governing qualified donees. The Act’s regulation of qualified donees is broadly based on the “exclusively charitable” standard and this prohibition is but one instance of that standard.

Third, if CRA or a court were to take the view that such dividends or distributions were in violation of the Act’s prohibition, contrary to our opinion, then it would be a simple matter for Charity Bank,

as a registered Charity, to effect direct gifts of an equivalent amount to its qualified donee shareholders.

To these three arguments, we would add two more.

First, conceptually, it appears almost certain that the statutory formulation originates in one or both of two related ideas running through the whole of the law of charity. The first is the common law rule that a charitable purpose trust must be for the benefit of the public and cannot be for the “private benefit” of certain individuals. This rule is discussed in more detail in Part VI below. The second is what is referred to in the literature on non-share capital corporations as the “non-distribution constraint”. The non-distribution constraint, which is formulated in different ways in different corporate statutes, generally prohibits the distribution of the surplus of the non-share capital corporation to its members.

It is clear from the discussion below that neither of these rules is breached by a distribution of a charity’s surplus to another registered charity. With respect to the first we have already made the point in our July 19, 2004 memorandum that there is no private or personal benefit by virtue of such a distribution in the requisite sense. With respect to the second, corporate law not only permits, it requires, that the corporate surplus of a non-share capital corporation be distributed on dissolution. CRA similarly requires that a charity’s constating documents provide that the charity’s property be distributed to another registered charity on dissolution. There is no suggestion by CRA that the other registered charity in this circumstance cannot be a related charity or a charity that controls the dissolving charity. However, if the *Income Tax Act* prohibition under discussion were to be read as applying to distributions of the surplus to another registered charity, distributions on dissolution to other related or controlling registered charities would be included within it. Clearly, this would be incorrect.

Second, the main difficulty in interpreting the prohibition against personal benefits in a situation where one charity owns all the shares of another charity is, of course, the fact that such ownership structures are extremely rare. It is almost unheard of for a charity to be organized as a share-capital corporation owned by another charity. The need for a share capital corporation in the case of Charity Bank is derived, in part, from the fact that it will require substantial capital and that this capital, in significant measure, will be provided by other registered charities. The *Income Tax Act* requires, through various rules, that these other charities invest their funds prudently. If the personal benefit provision of the *Income Tax Act* is read as prohibiting a dividend return on these shares, it would, in effect, be prohibiting a structure which in all conceivable respects is exclusively charitable. We submit that this would be an absurd interpretation.

II HISTORY OF THE RELEVANT LEGISLATIVE PROVISIONS

We have traced the history of the legislative text back to the late 1940’s. We can continue this research if others think it worthwhile. What we have found thus far does not provide a strong indication as to the purpose or origin of the legislative text. It is highly likely that the draftsman merely selected language from the non-share capital corporation legislation in existence at that time, although we do not have any text which actually demonstrates this. Note that the formulation under consideration was adopted at a time when the *Income Tax Act* did not use a

MEMORANDU

functional or regulatory classification for charities (*i.e.*, active versus passive charities, or organizations versus foundations). Rather, the organizational concepts underlying the legislation were based on the forms of organization available from private law – associations, corporations and trusts. Hence it is likely that definitions simply drifted over to the Income Tax Act and that no exception for the case of a charity proprietor was stated due to the unusualness of that structure.

The results of this research are summarized in this section.

The following text is from the Ontario Law Reform Commission's *Report on the Law of Charity* (1996). It discusses the origin of the statutory language under consideration in legislation enacted in 1950:

The only significant legislative change during this period (1945-1967) occurred in 1950. For the purposes of the tax-exempt status of charitable organizations, a tripartite classification of charities was enacted. Charities were divided into charitable organizations, charitable trusts, and charitable corporations. Each of these was subjected to a distinct set of conditions which had to be satisfied in order to qualify for the tax-exempt status.

A “charitable organization” – the active or operational charity as per the intention of the legislator – was eligible for the tax-exempt status if “all” its resources “were devoted to charitable activities carried on by the organization itself” and “no part” of its income was available for the “personal benefit” of its members.

A much more stringent regime was made applicable to trusts and corporations. Trusts were coextensive, in the legislator's intention if not in reality, with institutions interested exclusively in funding the operations of the active charities. These were the “foundations” in the American parlance of the day. Corporations were conceived by the legislator to be hybrids of the active and the granting charities, inexplicably and, as it turned out, unworkably identified by their corporate form or organization. The statute provided for the tax-exempt status of these latter two types of charities if they were either,

“(eb) a corporation no part of the income of which was payable to, or was otherwise available for the personal benefit, of, any proprietor, member or shareholder thereof, that has not, since June 1, 1950, acquired control of any other corporation and that, during the period,

(i) did not carry on any business,

MEMORANDU

(ii) had no debts incurred since June 1, 1950, other than obligations arising in respect of salaries, rents and other current operating expenses, and

(iii) expended amounts each of which is

(A) an expenditure in respect of charitable activities carried on by the corporation itself,

(B) a gift to an organization in Canada the income of which for the period is exempt from tax under this Part by virtue of paragraph (ea), or

(C) a gift to a corporation resident in Canada the income of which for the period is exempt from tax under this Part by virtue of this paragraph, and

the aggregate of which is not less than 90 per cent of the corporation's income for the period, or

(ec) a trust all the property of which is held absolutely in trust exclusively for charitable purposes, that has not, since June 1st, 1950, acquired control of any corporation and that, during the period,

(i) did not carry on any business,

(ii) had no debts incurred since June 1st, 1950, other than obligations arising in respect of salaries, rents and other current operating expenses, and

(iii) made gifts, the aggregate of which are not less than 90 per cent of its income for the period, to organizations in Canada or corporations resident in Canada the incomes of which for the period is exempt from tax under this Part by virtue of paragraph (ea) or (eb).”

In these two provisions we see the origins of some of the restrictions applicable under the current rules to charitable organizations and charitable foundations: there were general prohibitions against carrying on a business and against financing programs with debt, and there was a rudimentary disbursement regime.

The inclusion of these two provisions in the income tax law of 1950 was justified by the government in Parliament on the basis of two reasons. First, the restrictions and disbursement requirement

MEMORANDU

were needed to prevent certain abuses that had come to the attention of the government. In his speech explaining the provisions, the Minister alluded to the fact that a number of “foundations” had been created in Canada in recent years, and gave as an example the Massey foundation. The abuses cited by the Minister were that some of these foundations - not the ones mentioned - had been operating businesses and accumulating their business and investment incomes with the intention of distributing the income to their “proprietors” on dissolution. This was an obvious misuse of the tax exemption which the mandatory restrictions and the disbursement requirement would certainly remedy. It is worth noting that precisely the same concerns were motivating the enactment of the *The Charitable Gifts Act, 1949* in Ontario at the same time.

Section 21(eb) and (ec) were enacted also because, under the existing legislation, it was not clear whether granting institutions actually qualified for the exemption. A number of Privy Council decisions had indicated that they did not. It was thought best to correct this oversight by making explicit the eligibility of granting institutions for the exemption.

Attached as Appendix 1 are excerpts from previous income tax legislation in which the same prohibition is expressed in slightly different language.

Appendix 2 contains the decision of the Tax Court in *LIUNA Local 527 Members Training Trust Fund v MNR* (1992) TCC Bowman J, one of the few decisions that discusses the legislative provision, but not, unfortunately, in a way that advances the present inquiry.

III CRA MATERIALS OF RELEVANCE

Attached as Appendix 3 are number of CRA documents which have some relevance to the proper interpretation of the prohibition. We have not excerpted the recently published draft guideline on the application of the public benefit test which is also relevant in the same since we presume you have it.

There is one CRA interpretation letter which specifically authorizes the proposed structure: CIL – 1996 – 003.

The relevance of the other CRA documents is two-fold. First, there is no statement in any of the CRA materials that we located which suggests that the “personal benefit” prohibition should be applied to the capital structure proposed for Charity Bank. Secondly, it is reasonably clear that CRA, in practice, regards the “personal benefit” prohibition as connected to the trust law prohibition against fiduciary conflicts and/or to the charity law prohibition against private benefits. CRA, as a consequence, has never applied it as an absolute prohibition against members of a charity benefiting from the charity’s charitable activities, such as in the case of self-help organizations, congregational religions, and umbrella groups.

IV STATUTORY INTERPRETATION AND TAX LEGISLATION

There are two recent articles in the tax literature addressing the proper approach to the interpretation of tax legislation: Brian J. Arnold, “Statutory Interpretation: Some Thoughts on Plain Meaning,” in *Report of Proceedings of the Fiftieth Tax Conference, 1998 Conference Report* (Toronto: Canadian Tax Foundation, 1999), 6:1-36 and J. Nitikman and D. Alty, “Some Thoughts on Statutory Interpretation in Canadian Tax Law: A Reply to Brian Arnold”, *Report of Proceedings of Fifty-Second Tax Conference, 2000 Tax Conference* (Toronto: Canadian Tax Foundation, 2001) at 9. These articles provide a fulsome and balanced view of the proper approach to statutory interpretation in the context of tax legislation. They are attached as Appendix 4.

These articles provide insight into the special problems associated with the interpretation of tax legislation and are offered as supplementary to the generally available literature on interpretation in general. They represent two considered views. Each concludes with a list of the relevant principles.

V THE NON-DISTRIBUTION CONSTRAINT

Appendix 5 contains an excerpt from the OLRC *Report on the Law of Charity* (1996) discussing the conceptual foundation of the non-distribution constraint.

The purpose of the constraint, as the OLRC Report suggests, is to establish one of the two key conceptual distinctions between non-share capital and share capital corporations, namely, that the surplus of the non-share capital corporation must be used exclusively for the non-profit purposes of the corporation. Hence, non-profit. The prohibition against distributions ensures that the surplus is available for that purpose only. It is clear from that discussion the constraint should not apply where the recipient of the distribution is another registered charity pursuing the same non-profit purpose.

VI THE COMMON LAW DOCTRINE OF PRIVATE BENEFIT

The common-law test for the definition of charity requires that there be a public, as opposed to a private, benefit. This part of the common law test is often put: Is the project of “public benefit” or of “benefit to the public” or of benefit to “a sufficient segment of the community”? In general terms, the issue is, first, whether the number of people who benefit is sufficient, and, second, whether the people who benefit are members of the public, as opposed to, for example, the friends and family of the donor. This test is often referred to as the “public benefit” test .

It should be noted that the fourth head of the *Pemsel* test - “other purposes beneficial to the community” - is also identified as a “public benefit” test.

In the following passage in *Vancouver Society* (para 147-8) Iacobucci J. notes that these two connotations of “public benefit” can be a source of confusion. He then goes on to state his formulation of the “public benefit” test under consideration in this part of the memorandum, as follows:

MEMORANDU

However, in *Guarantee Trust* this Court also noted, citing with approval *Verge v. Somerville*, [1924] A.C. 496 (New South Wales P.C.) at p. 499, that the *Special Commissioners of Income Tax* scheme is subject to the consideration that the purpose must also be “[f]or the benefit of the community or of an appreciably important class of the community” (p. 141). **This language of “benefit of the community” is unfortunate because it creates confusion with the fourth head of charity under the *Special Commissioners of Income Tax* 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” [emphasis added]:** Waters, *supra*, at p. 550. This public character is a requirement that attaches to all the heads of charity, although sometimes the requirement is attenuated under the head of poverty. It is this public quality that I also take Rand J. to be referring to in *Dames du Bon Pasteur*, *supra*, at p. 88, when, after outlining the four classifications of charitable purposes, he stated that “the attributes attaching to all are their voluntariness and, directly or indirectly, their reflex on public welfare”.

The difference between the *Special Commissioners of Income Tax* 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 *Special Commissioners of Income Tax*. **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 centers on who is the recipient.** [emphasis added]

In these passages, Iacobucci J.’s formulation uses the expression “for the benefit of the community or an appreciably important class of the community” to identify the “public benefit” test under discussion in this part of the memorandum. As can be seen from the passages describing this test quoted to this point in this memorandum, the emphasis in the second public benefit test is on excluding trusts which seek to confer only private advantages.

There are three leading formulations of the public benefit test in the English case law.

MEMORANDU

*Verge v. Somerville*¹ dealt with a trust for the “benefit of New South Wales returned soldiers”. In that case, the Privy Council (Australia) held in favour of validity saying:

[a trust must be] 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 object of such a gift, but private individuals or a fluctuating body of private individuals, cannot.** [emphasis added]

*Re Compton*² dealt with a bequest “for the education of Compton and Powell and Montague children to be used to fit the children...to be servants of God serving the nation”. In that case, Lord Greene held against the validity of the trust, saying:

[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.** [emphasis added] 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.

*Oppenheim v. Tobacco Securities Trust Co.*³ dealt with a trust for the education of the children of the employees of a group of associated companies having in combination over 100,000 employees. The court in *Oppenheim* held against the validity of the trust on the basis that it did not meet the “public benefit” test. In that case Lord Simonds said:

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 propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.** [emphasis added]

In drawing the required distinction between a public and a private benefit, the courts in *Compton* and *Oppenheim* focused on the existence of a personal relationship, by blood or by employment, *and* on the size of the section of the community identified. This test is generally referred to as the *Compton* or *Compton/Oppenheim* test.

¹ *Verge v. Somerville* [1924] A.C. 496

² [1945] CH 123, [1945] 1 All ER 198

³ [1951] AC 297, [1951] 1 A ER 31 (HL)

MEMORANDU

The emphasis in all of these tests, as in the passage quoted from *Vancouver Society* at the outset, is that the charitable purpose cannot be for private advantage. The relevant trust cannot, in other words be a private trust in disguise.

There are a number of acknowledged difficulties with the public benefit test.

First, courts and commentators have suggested that it is vague and indeterminate.

For example, in *Dingle v. Turner*⁴, Lord Cross spoke critically of the test as follows:

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 its 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.

Similarly, Hubert Picarda has observed that, if the *Compton/Oppenheim* test is literally construed, it excludes gifts in favour of any class identified by a relationship with *any* named person, not just those classes identified by their relationship with the donor. Thus, a gift for the advancement of education for the benefit of "employees of the Crown", for example, would be excluded.⁵

Further, it is unclear whether the *Compton/Oppenheim* test requires consideration of the size of the class of *possible* (meaning eligible) or of *ultimate* beneficiaries. Lord Simonds' statement in *Oppenheim* emphasizes the size of the *possible* beneficiary class of those eligible. But his words have been interpreted by some to require an ultimate beneficiary class of a certain size. A clear statement of the view that the size of the ultimate beneficiary class is relevant is contained in the *Restatement (Second) of Trusts*:

A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust.⁶

There are many cases, however, where a charitable trust was held valid even though the possible or the ultimate class of beneficiaries was small. An endowed professorship, for example, or a scholarship for only one student, or an endowment for a minister's stipend or retirement allowance, are all valid charitable trusts, even though the number of possible or ultimate beneficiaries in each case is small.

Secondly, courts and commentators have disagreed whether the nature of the test varies from head to head, although the dominant view appears to be that it does. For example, some courts

⁴ *Dingle v. Turner* [1972] AC 601

⁵ Picarda, *The Law and Practice Relating to Charities* (3d) (Butterworths: London, 1999) p. 23

⁶ *The American Law Institute, Restatement (Second) of Trusts* (Washington, D.C. 1975) 375

MEMORANDU

have said that the “public benefit” standard has developed “empirically”, not logically, that it is a question of degree, and “[m]uch must depend on the purpose of the trust” in issue.⁷ In *Gilmour vs. Coats*, decided a few years before *Oppenheim*, Lord Simonds explained the different treatment in the application of the public benefit standard for different types of charity:

It would not, therefore, be surprising to find that, while in every category of legal charity some element of public benefit must be present, the court had not adopted the same measure in regard to different categories, but had accepted one standard in regard to those gifts which are alleged to be for the advancement of education and another for those which are alleged to be for the advancement of religion, and it may be yet another in regard to the relief of poverty.

Similarly, Lord Somervell stated in *Inland Revenue Commissioners v. Baddeley*⁸:

There might well be a valid trust for the promotion of religion benefiting a very 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, though it is clear...that a recreation ground for the public is a charitable purpose.

The case law support for the position that the nature of the test varies from category to category is not unanimous, however. Lord Reid, in a passage quoted further below doubted its general validity.

Certainly, there is some variation since the public benefit test does not apply to charities for the relief of poverty. A trust for the benefit of poor relations⁹ and poor employees¹⁰ is, thus legally valid. There is also a so-called “founder’s kin” exception in the English case-law. This exception permits educational trusts in favour of a sufficiently large section of the community that express favouritism within the group for the grantor’s relatives.¹¹

⁷ *Dingle v. Turner* [1972] AC 601 at 624

⁸ [1955] AC 752, [1955] All ER 525 (1955) HL

⁹ *Dingle v. Turner* [1972] AC 601, [1972] 1 All ER 985 (CA)

¹⁰ *Re Scarisbrick; Cockshott v. Public Trustee*, [1951] 1 Ch. 622, [1951] All ER 822 (C.A.), and *Dingle v. Turner* [1972] AC 601, [1972] 1 All ER 985 (CA)

¹¹ The founder’s kin exception was considered in a 1954 English case, *Re Koettgen Westminster Bank Ltd. v. Family Welfare Association Trustees Ltd.*¹¹, and in a 1961 Privy Council decision, *Caffoor v. Commissioner of Income Tax (Colombo)*¹¹. In the former case the gift was “for the promotion and furtherance of commercial education” with a preference that up to 75% of the income was to be given “to any employees of John Batt & Co. (London) Ltd. or any members of the families of such employees”. Lord Upjohn in that decision held that the trust was valid as a charitable trust. In the latter case, there was a gift for the education of the grantor’s relatives with a gift – over to others if the relatives were unable to accept the gift. The Privy Council held, at 604, in that case that the trust was invalid as a charitable trust because of the “absolute priority to the benefit of the trust income...conferred on the grantor’s own family. No Canadian case has upheld a gift under which the “founder’s kin” are to preferred, and the exception in favour of such charitable trusts has been criticized both in England and in Canada.

MEMORANDU

There is also a suggestion in the English case law that a charity for the relief of poverty or the advancement of religion or education, is presumed to be a public benefit¹² unless the contrary is shown.

Despite these acknowledged difficulties with the test, it is reasonably clear that the test is only meant to exclude trusts for, in the words of Iacobucci J. in *Vancouver Society*, “private advantage”.

The case law examples of the application of the rule demonstrate the exclusion of private advantage is the rule’s general purpose. Thus, the rule has been applied to invalidate:

- a trust for the protection of private investors;¹³
- a trust for the children of members of a masonic order;¹⁴
- a trust to establish a home for the members of a trade union and their wives;¹⁵
- a trust to relieve air raid distress among employees where the contributions were made by the employees;¹⁶ and
- trusts for self-help, mutual benefit, a friendly society or trade union.¹⁷

All of these instances of the rule’s application dealt with situations where the true intention was to create a private trust for specific individuals having a close relationship with the settlor.

There is, however, limited support in the English case law for the view that any restriction on the distribution of a charitable benefit under the fourth head must have a “rational connection or relevance” to the specific charitable purpose. The leading, if not only, case on this point is *Inland Revenue Commissioner v. Baddeley*¹⁸. That case dealt with a trust deed which conveyed land in trust to be used as a playing field for the “moral well-being” of the residents of a particular area who were or who were likely to become members of the Methodist Church. The House of Lords held that the trust was not charitable on the basis that the purpose was not charitable under the fourth head. The decisions of Lord Simonds and Lord Somervell of Harrow and Lord Reid also addressed the question whether a charitable purpose under the fourth head was required, in addition, to meet a “rational connection” test. Lord Simonds and Lord Somervell argued in favour of a “rational connection” doctrine. Lord Reid argued strenuously against it. Lords Porter and Tucker expressly declined to comment on the doctrine on the basis

¹² *National Anti-Vivisection Society v. IRC* [1948] AC 31

¹³ *Foreign Bondholders Corporation v. IRC* [1944] 1 KB 403 CA

¹⁴ *Thomson v. Federal Taxation Commissioner* [1959] 102 CLR 315

¹⁵ *R. v. Mead’s Trust Deed* [1961] 2 All ER 836, 1 WLR 1244

¹⁶ *R. v. Hobourn Aero Components Ltd’s Air Raid Distress Fund* [1946] Ch 194, CA

¹⁷ *Braithwaite v. A-G* [1909], Ch 510 and *R. v. Mead’s Trust Deed* [1961] 2 ER 836

¹⁸ *Supra*, note in *Davies v. Perpetual Trustee Co.* [1959] AC 439, [1959] 2 All ER 128 P.C. a gift to establish a religious college in favor of descendants of Presbyterians in New South Wales from the North of Ireland was held invalid on account of the limited number and close relationship of the people that would benefit.

M E M O R A N D U

that it is difficult to affirm that the doctrine forms part of English Law. Based on the finding of the majority decision in *Re Baddeley* that the purpose under consideration in that case was not charitable in the first place, the statement of Lord Simonds and Lord Somervell regarding the “rational connection” test are probably *obiter*.

Conclusion

The information available on the proper interpretation of the “personal benefit” prohibition indicates reasonably clearly that it should not be applied to a distribution by one charity to another. There is no information that it should be applied in this way, and considerable information which indicates, implicitly for the most part, that it should not be.

G:\V\Vartana\REGIST~1\Memos\DS_Meaning of 'personal benefit'v02.doc