CITATION: Canada Without Poverty v. AG Canada, 2018 ONSC 4147
COURT FILE NO.: CV-16-559339
DATE: 20180716

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CANADA WITHOUT POVERTY Applicant	*David Porter, Geoff Hall, and Anu Koshal*, for the Applicant
– and –	
ATTORNEY GENERAL OF CANADA Respondent	*Joanna Hill*, for the Respondent
	HEARD: April 23, 2018

E.M. MORGAN J.

[1] What is political?

I. The constitutional challenge

[2] Section 149.1(6.2) of the *Income Tax Act*, RSC 1985, c. I (5th Supp) ("*ITA*") defines the extent to which a registered charity may devote its resources to "political activities". The section provides limited room for such activities:

> (6.2) For the purposes of the definition "charitable organization" in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and
>
> (a) it devotes part of its resources to political activities,
>
> (b) those political activities are ancillary and incidental to its charitable activities, and

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(c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

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[3] The Applicant challenges the interpretation given by Canada Revenue Agency ("CRA") to the "substantially all" requirement in the opening lines of s. 149.1(6.2). In doing so, it also challenges the overall distinction between "charitable activities" and "political activities" that is embodied in ss. 149.1(6.2)(a) and (b). As drafted, the section requires that "substantially all" of the charity's resources be devoted to "charitable activities", and to the extent that some of those resources are devoted to "political activities" – which are conceived in the section as being separate and apart from "charitable activities" – that is permitted under s. 149.1(6.2)(a). As long as the "political activities" are done under the conditions set out in ss. 149.1(6.2)(b) and (c) – i.e. are ancillary to the charitable activities and are non-partisan – the political activities are considered to be charitable.

[4] The CRA has formulated an interpretive mechanism for determining when it is that a charitable organization that engages in some political activities meets the requirement in s. 149.1(6.2) that it devote "substantially all" of its resources to charitable activities. As a matter of interpretation and enforcement, CRA restricts the ancillary, non-partisan political activities of a registered charity to 10% of the charity's resources. As stated in CRA Policy Statement CPS-022, *Political Activities* ("CRA Policy Statement"), at s. 9, "We usually consider *substantially all* to mean 90% or more." [emphasis in the original]

[5] Registered charities receive favourable treatment under the *ITA*. In the first place, under s. 149.1(f) all income earned by a registered charity is exempt from income tax. Secondly, under s. 118.1 registered charities my issue donation tax receipts to their individual contributors and under s. 110.1 to their corporate contributors. In order to maintain these fiscal advantages, a charity must remain within the definitional guidelines set out in s. 149.1(6.2). Failure to adhere to the 10% limit on resources devoted to "political activities" can result in the revocation of the organization's registration as a charity: *Action by Christians for the Abolition of Torture v Canada* (2002), 225 DLR (4th) 99, at paras 20, 59, and 68 (Fed CA).

[6] Again as a matter of interpretation and enforcement, CRA has divided "political activities" into two general types: submissions directly to government, and public advocacy. Oral and written submissions made to Parliamentary committees and other legislative bodies, or written briefs and in-person representations made to government agencies or officials, are deemed entirely charitable and subject to no enforcement under s. 149.1(6.2) provided that they are connected to the organization's charitable purpose. CRA thereby acknowledges as a matter of administration that there is, or at least can be, a policy and advocacy component to charitable activities: see CRA Policy Statement, at s. 7.3. In this respect, political activities and charitable activities are not always treated as distinct.

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[7] By contrast, communication of similar policy messages to the public at large, whether in written or spoken form and regardless of the media utilized as the vehicle for this public advocacy, is subject to the 10% rule (or 90% rule, depending on how one choses to view it) for the "substantially all" requirement. That is, to the extent that a charity uses more than 10% of its resources on policy advocacy not communicated directly to government officials, CRA considers it in violation of s. 149.1(6.2) and subject to revocation of its charitable registration. It also requires the 10% or less of political activities to be ancillary to the organization's charitable activities and that they be non-partisan in nature, pursuant to ss. 149.1(6.2)(b) and (c) of the *ITA*. This applies regardless of whether the subject matter of the charity's advocacy or policy reform efforts fit squarely within pursuit of its charitable purpose.

[8] The Applicant submits that CRA's 10% rule of interpretation and enforcement for the "substantially all" requirement in s. 149.1(6.2) of the *ITA*, as applied to public policy advocacy by registered charities, infringes freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). It likewise says that there is no valid distinction political expression (with the exception of partisan political involvement) and charitable activities, and so ss. 149.1(6.2)(a) and (b) of the *ITA* are redundant and violate the *Charter*'s guarantee of freedom of expression as well. The Applicant further submits that the infringement of s. 2(b) of the *Charter* cannot be justified under s. 1.

[9] In a nutshell, the Applicant, a registered charity under the *ITA*, argues that public advocacy for policy change is fundamental to its charitable purpose of poverty relief. It contends that without this component its charitable activities cannot accomplish their purpose. It further submits that the impugned section of the *ITA* is overly broad, confusing, complicated to define and track, and is premised on an incoherent distinction between permitted "charitable activities" and prohibited "political activities" that burdens political expression. While the Applicant understands and does not challenge the prohibition on strictly partisan politics contained in s. 149.1(6.2)(c) of the *ITA*, it challenges the requirement that substantially all of its resources be devoted to charitable as opposed to political activities.

[10] It is an understatement to say that, "There is no widely agreed upon definition of what is political": Amitai Etzioni, "What Is Political?", CSA Worldwide Political Science Abstracts (2006), at1. Accordingly, "it is difficult to say what, if anything, 'political' signifies in its various applications and how it signifies what it does": Eugene F. Miller, "What Does 'Political' Mean?", 42 *Review of Politics* 56 (1980). Contemporary debate in political philosophy reflects this difficulty insofar as it has focused more on deconstructing the "political" than defining it: Nancy Fraser, "The French Derrideans: Politicizing Deconstruction or Deconstructing the Politcal?" (1984), 33 Modernity and Postmodernity 127.

[11] There is no definition of "political activities" in s. 149.1(1) of the *ITA*, the definition section specifically applicable to charities and their activities. Virtually all of the Applicant's activities are communicative or expressive and, seen in that light, they are all in some sense of the word "political". This raises both a practical and a philosophical question. In an era when the personal has long been considered political, see Carol Hanisch, "The Personal is Political",

in: Shulamith Firestone and Anne Koedt, eds, *Notes from the Second Year: Women's Liberation* (New York: Radical Feminism, 1970), can one coherently distinguish between political activities and charitable activities, or, for that matter, any other kind of activities?

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II. The Applicant and its activities

[12] As indicated, the Applicant is a registered charity with the stated charitable purpose of relieving poverty in Canada. In pursuing this purpose, it has embraced an internationally endorsed program of action which strives for the full civic engagement of people living in poverty as a fundamental principle of initiatives aimed at poverty relief. This approach "requires the full participation of people in the formulation, implementation and evaluation of decisions determining the functioning and well-being of our societies": *Copenhagen Declaration on Social Development*, UN World Summit for Social Development, 14 March 1995, A/CONF.166/9 (1995) ("*Copenhagen Declaration*"). In other words, the Applicant engages in public advocacy for policy and attitudinal change as its primary means of achieving an end to poverty.

[13] Historically, charities devoted to poor relief took the form of almshouses, church-run housing and food distribution schemes, and hospitals and hospices for the indigent, and the relief of lost travelers and other homeless people in distress: Eleanor Chance, Christina Colvin, Janet Cooper, C J Day, T G Hassall, Mary Jessup and Nesta Selwyn, "Charities for the Poor", in: Alan Crossley and CR Elrington, eds., *A History of the County of Oxford*, vol. 4 (London, 1979), pp. 462-475. The Applicant, however, takes a different approach. Its purpose is to relieve poverty, but to do so by sharing with its constituency ideas rather than nutrition.

[14] According to its corporate charter, the Applicant's purpose and objects are:

a. To relieve poverty in Canada by:

   i. Advancing the knowledge of, and the study of, poverty in Canada by organizing conferences and workshops on topics related to poverty;

   ii. Undertaking and supporting research into factors that contribute to poverty and the most appropriate ways to mitigate these;

   iii. Producing and disseminating articles, commentary and reports on topics related to relieving poverty;

   iv. Providing information to government officials, and the public to increase knowledge of poverty related issues and how to more effectively relieve poverty;

v. Working with food banks, soup kitchens, homeless shelters, social housing providers and other social agencies to relieve poverty while promoting respect for the human rights of people living in poverty; and

vi. Directing people to the government programs and offices by which people may access benefits to which they may be entitled;

b. To uphold and ensure compliance with international human rights law as it relates to the relief of poverty, including, among others, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities;

c. To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to charitable organizations that are also registered charities under the *Income Tax Act* (Canada); and

d. To do all things incidental and ancillary to the attainment of the above objects.

[15] As already indicated, the Applicant's approach to its tasks is very much informed by the global framework for relief of poverty pronounced in Copenhagen in 1995. This framework's guiding principle is embodied in para 26(o) of the *Copenhagen Declaration*, to the effect that:

> Empowerment requires the full participation of people in the formulation, implementation and evaluation of decisions determining the functioning and well-being of our societies.

[16] The *Copenhagen Declaration*, para 19, goes on to pronounce that poverty "is also characterized by a lack of participation in decision-making and in civil, social and cultural life." This approach has been followed by a Parliamentary committee report recommending "a broad understanding of poverty and social exclusion to address the root causes of these problems": House of Commons Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*, 40th Parl., 3rd sess. (November 2010), p. 90 ("Standing Committee Report").

[17] The Standing Committee Report also spoke of instilling a "shift in perspective" in Canada so that poverty reduction is pursued by means of co-engagement and consultations with community organizations and poverty constituencies. This type of community activism is pursued by the Applicant with a view to instigating significant changes to government policy and the legislative frameworks that implement those policies: *Ibid*., p. 175.

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[18] Counsel for the Applicant states that in reliance on these and other studies, it has placed its resources and efforts behind civic engagement and public dialogue, with the ambition of bringing about legislative and policy change for the effective relief of poverty. While this approach may be in keeping with contemporary activism in the poverty relief field, it is out of step with s. 149.1(6.2) of the *ITA* and with the CRA Policy Statement on interpretation and enforcement of that section. The Applicant therefore submits that the CRA's 10% rule should no longer be applied. It also states that there is no cogent distinction between non-partisan "political activities" and charitable activities as indicated by s. 149.1(6.2(a) and no reason for political activities to be ancillary or incidental to charitable activities as indicated in s 149.1(6.2)(b) as political activities aimed at fulfilling the organization's charitable purpose are charitable activities.

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[19] On January 9, 2015, the CRA issued a report that summarized the results of a 'Political Activities Audit' of the Applicant for the period April 1, 2009 to March 31, 2012. In its audit report, the CRA concluded that virtually all of the Applicant's activities involved political engagement in the nature of communications to the public advocating policy changes. The CRA stated that in its view an activity is considered "political" where it: 1) "explicitly communicates a call to political action"; 2) "explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained… opposed, or changed"; or 3) "explicitly indicates in its materials (whether internal or external) that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government".

[20] What these activities have in common that characterized them as non-partisan "political activities" is that they all involve communications about law reform or other issues related to the relief of poverty. Most of these activities are public forms of expression that represent the Applicant's efforts to engage its constituency in democratic processes to relieve poverty in the manner recognized by the *Copenhagen Declaration* and the Standing Committee Report as essential to the effective relief of poverty.

[21] The Applicant has also engaged in a substantial amount of activities aimed at combatting the social exclusion and stigmatization that comes from living in poverty. The CRA in its Political Activities Audit has likewise deemed these to be restricted "political activities". As described by the Applicant, these activities include organizing and hosting policy summits with social policy experts, offering an online course on international human rights, issuing a survey to members of ethno-cultural communities which contained general advice on how to advocate for the elimination of poverty; and formulating a national strategy to alleviate poverty.

[22] Finally, to the extent that the CRA's Political Activities Audit also impugns the Applicant's internal communications, it suggests that even the organization's contemplation of "political activities" consumes resources in a way that places the Applicant offside the s. 149.1(6.2) limit. This poses perhaps the most profound dilemma of all. In order not to overrun the 10% rule imposed by the CRA Policy Statement, the Applicant is compelled to contemplate

what is and what is not a "political activity". But, of course, there is an inherent circularity in that exercise. One need not be an expert in political theory to understand that "[t]he definition of politics is in itself a political act": Clare Bambra, Debbie Fox, Alex Scott-Samuel, *Toward a New Politics of Health* (University of Liverpool, 2003), citing Adrian Leftwich, *What Is Politics? The activity and its study* (Oxford: Blackwell Press, 1984). The Applicant may be consuming part of the allotted 10% of its resources by determining whether it is permissible to consume those resources.

[23] The Political Activities Audit findings indicate that the CRA's interpretation and enforcement of s. 149.1(6.2) of the *ITA* restricts virtually all aspects of the Applicant's communications to the public regarding law reform or policy change. It also greatly limits the extent to which the Applicant can encourage the public to participate in various governmental forums and democratic processes to promote awareness of the challenges of living with poverty and to support measures for the relief of poverty. The Applicant views the limitation on its public communicative activity to 10% of its resource use as imposed by the CRA Policy Statement regarding s. 149.1(6.2) to run counter to its charitable purposes and its overall goal of ending poverty through advocacy.

III. Minister of National Revenue Consultation Report

[24] The Applicant is not alone in finding the current state of the law to be unduly restrictive of its charitable activities. In September 2016, the Minister of National Revenue appointed a Consultation Panel to make recommendations on the entire question of political activities and the treatment of registered charities under the *ITA*. The panel's report ultimately agreed with many of the positions taken by the Applicant herein.

[25] Specifically, in the *Report of the Consultation Panel on the Political Activities of Charities*, March 31, 2017 ("Consultation Report"), the Consultation Panel recognized that a key principle with respect to charitable activities is that public advocacy and charitable works go hand-in-hand in a modern democracy: "The participation of charities in public policy dialogue and development should be recognized and valued, and seen as an essential part of the democratic process": Consultation Report, p. 6.

[26] More to the point, the Consultation Panel specifically found that the restrictions on political participation in Section 149.1(6.2) of the *ITA* were outmoded and required legislative change: "Legislative change is required to broaden and simplify the requirements for charities and to remove other obstacles to their contribution to society that are unnecessary and counter-productive": Consultation Report, at p. 5.

[27] The Consultation Report then recommended, at p. 6, that the *ITA* be amended in much the same way as the Applicant seeks here:

> …deleting any reference to non-partisan "political activities" to expressly allow charities to fully engage, without limitation, in non-partisan public policy,

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dialogue and development, provided that it is subordinate to and furthers their charitable purposes.

IV. Freedom of Expression

[28] The Applicant's challenge to s. 149.1(6.2) of the *ITA* "engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(b) of the *Charter*": *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*., [2002] 1 SCR 156, at para 30. It would be difficult to express the importance of this Charter right any higher than the Supreme Court of Canada has put it; freedom of expression "is . . . 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual": *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 968.

[29] Early in the *Charter* era, the Supreme Court observed that, ""It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society": *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 583. Indeed, the Court has gone on to quote Justice Cardozo that, "free expression is 'the matrix, the indispensable condition, of nearly every other form of freedom'": *RWDSU, Local 558*, at para 23, quoting *Palko v Connecticut*, 302 US 319, 327 (1937).

a) Does the measure infringe section 2(b)?

[30] There is no doubt that the activity in which the Applicant wishes to engage – public advocacy of policy change – is within the guarantee of freedom of expression. McLachlin J. (as she then was) stated in *R v Keegstra*, [1990] 3 SCR 397 that, "if the activity being regulated has expressive content, and does not convey a meaning through a violent form, then it is *prima facie* protected by s. 2(b) of the *Charter*." Indeed, the Attorney General here does not doubt that the Applicant engages in political expression – that is the very reason it seeks to revoke the Applicant's status as a registered charity. The Applicant explicitly engages in "expression to the end of promoting…political or social engagement", the very definition of s. 2(b) activity: *The Queen v Native Women's Association of Canada,* [1994] 3 SCR 627, at para 47.

[31] It is the government's position that nothing about s. 149.1(6.2) of the *ITA* infringes the Applicant's freedom of expression. As counsel for the Attorney General sees it, charitable status under the *ITA* is a tax benefit, which is economically the same as a government subsidy. The Attorney General rejects the notion that, "a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression," *Human Life International Inc. v MNR,* [1998] FCJ No 365, at para 18 (FCA), arguing that the Applicant has a right to free speech, not to subsidized speech.

[32] In essence, the government contends that the Applicant is raising a positive rights claim that does not fit within the structure of *Charter* rights. Counsel for the Attorney General

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analogizes this to 'platform' cases such as *Haig v The Queen,* (1993] 2 SCR 995, where the challenger sought to vote in a referendum in order to express his views on constitutional reform, and *Baier v Alberta,* [2007] 2 SCR 673, where the challenger sought to run for school trustee in order to express his views on education policy. In doing so, the Attorney General relies on the testimony of the Applicant's executive director to the effect that the Applicant depends on its charitable status for financial viability, without which it would not be able to pursue its charitable purposes.

[33] This position was perhaps most forcefully described in *Haig*, at 1035: "the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones." For the Attorney General in the present case, registered charitable status is a megaphone and its deprivation does not amount to a gag.

[34] The Applicant submits that the government's argument is a mischaracterization of its claim. It views the restrictions contained in s. 149.1(6.2) of the *ITA* to be embedded within an existing legislative policy, with the censorship of its activities prompted by the CRA's potential stripping of its registered charity status as raising a negative rights claim. As counsel for the Applicant describes it, non-partisan political advocacy is an accepted charitable activity under the *ITA*, with an arbitrary ceiling of 10% of the organization's resources tacked onto the legislation that restricts the Applicant's expressive conduct. It is the restriction that is the target of the complaint, not the status itself.

[35] The Applicant's position reflects another of the Supreme Court of Canada's observations in *Haig*, at 1041, that "While s. 2(b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply." L'Heureux-Dubé J. followed up on this idea in *Native Women's Association*, *supra*, at para 85, where she commented on the need under certain circumstances for government to continue to provide a mechanism or funding for expression where to eliminate it effectively silences voices in a way that is contrary to government's constitutional obligations:

> …in certain ones, funding or consultation may be mandated by the Constitution by virtue of the fact that when the government does decide to facilitate the expression of views, it must do so in a manner that is mindful of the *Charter*. In this respect, one must note that the circumstances in which the government may be held to a positive obligation in terms of providing a specific platform of expression invariably depend on the nature of the evidence presented by the parties.

[36] This reasoning has been embraced by successive panels of the Supreme Court of Canada. In *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, paras 24-25, 31-33, agriculture workers sought to form and maintain an employee association in furtherance of their s. 2(d) *Charter* right of freedom of association. Bastarache J. found in the claimants' favour, holding that government must provide, or continue to provide, inclusion in a benefit where the claimant demonstrates that exclusion from a statutory regime permits a substantial interference

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with activity protected under s. 2 of the *Charter*, or that the purpose of the exclusion was to burden such activity. The Court went on to reason that the exercise of the *Charter* right need not be made impossible by the state action, but the claimant must seek to generally exercise the right in question and not merely seek a particular channel for exercising his or her constitutional right.

[37] Rothstein J. further elaborated on this approach in *Baier*, at para 28, where he compared the Charter challenge in *Dunmore* to that in *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989. In *Delisle*, an RCMP member sought the right on behalf of all RCMP officers to collectively organize their workplace under the *Public Service Staff Relations Act*; the Supreme Court held that the *Charter* does not confer a right to establish a particular type of association defined in a particular statute. As Rothstein J. explained it in *Baier*, the agricultural workers seeking to organize in *Dunmore* were exercising their only means of employment association, while the police officers in *Delisle* were seeking to supplement their existing exercise of association rights.

[38] The CRA in its Political Activities Audit indicates that activities considered "political" for the purposes of the 10% ceiling under s. 149.1(6.2) are as defined in general tax law – i.e. where the organization issues a call to political action, or publicly advocates for changing or maintaining any law, policy, or decision at any level of government in Canada or a foreign country, or "states in its internal or external materials that its goal is to convince an elected representative or public official to change, oppose, or support any law, policy, or decision at any level of government": see *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*, [1999] 1 SCR 10.

[39] According to the uncontroverted affidavit evidence adduced by the Applicant, this encompasses far more than 10% of the Applicant's efforts and resources. This application of s. 149.1(6.2) imposes restrictions on all expressive activity by the Applicant, whose goal is entirely wrapped up with communicating to the public that a law, policy or decision at any level of government should be changed or retained for the purpose of relieving poverty. The Applicant's executive director has deposed that restricting this communicative activity to 10% of its resources is fundamentally at odds with achieving its charitable purpose. Indeed, virtually everything that the Applicant does is "political", although those political activities are conceptually ancillary to –i.e. a mechanism to achieve – its charitable activities and purpose.

[40] To provide just one example, the Political Activities Audit identified as impermissible political activity a campaign run by the Applicant entitled "Dignity for All: the Campaign for a Poverty-Free Canada". CRA's reasons for this finding were set out with clarity in its Audit:

> The campaign website indicates that the campaign is a multi-year, multi-partner, non-partisan campaign with a vision of a poverty-free and more socially secure and cohesive Canada by 2020. It also features a call for vigorous and sustained action by the federal government to combat the structural causes of poverty in Canada.

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[41] This activity is, of course, squarely within the charitable purpose of relief of poverty. It also represents a means of achieving that purpose that is recognized by the federal legislature itself. In the Standing Committee Report, p. 90, Parliament signaled that it is important for organizations engaged in poverty relief to adopt “a broad understanding of poverty and social exclusion to address the root causes of these problems.” The Standing Committee recommended that in achieving this broad understanding, there needs to be a “shift in perspective” that generally reflects the approach taken in the *Copenhagen Declaration*. That is, it acknowledged that reducing poverty needs to be accomplished by engaging with community organizations and people living in poverty in support of those constituencies organizing and advocating for changes to laws and policies.

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[42] Simply put, there is no way to pursue the Applicant’s charitable purpose – using methodology that is recognized as necessary by Parliament itself – while restricting its politically expressive activity to 10% of its resources as required by CRA under s. 149.1(6.2). As counsel for the Applicant points out, the Applicant does not claim a right to engage in political objectives or purposes; rather, it seeks to pursue its existing charitable purpose through means which are self-evidently expressive and protected by s. 2(b) of the *Charter*. In effect, the language of s. 149.1(6.2), and CRA’s 10% rule in application of that statutory provision, makes the Applicant’s charitable purpose untenable.

[43] Moreover, the evidence is that the Applicant cannot function – or will have difficulty in functioning – in the absence of registered charitable status. The Attorney General presents no evidence that counters the Applicant’s description of its needs. The charity registration platform created by the *IT*A exists to support charitable works, and enforcement of s. 149.1(6.2), in burdening free expression, seriously impairs those works.

[44] As with state-imposed burdens on religious practice, a state-imposed burden on political expression need not amount to an outright prohibition. Any burden, including a cost burden, imposed by government on the exercise of a fundamental freedom such as religion or expression can qualify as an infringement of that right or freedom if it is not “trivial or insubstantial”: *R v Jones*, [1986] 2 SCR 284, 314 (*per* Wilson J., dissenting).

[45] As if anticipating the very type of burden on s. 2(b) alleged by the Applicant, in *Harper v Canada*, [2004] 1 SCR 827, 841, McLachlin CJ and Major J (dissenting in part) put the matter in terms of effective political expression:

> The right to participate in political discourse is a right to effective participation – for each citizen to play a ‘meaningful’ role in the democratic process…s. 2(b) aspires to protect ‘the interest of the individual in effectively communicating his or her message to members of the public…’
>
> The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one’s fellow citizen through

debate and discussion. This is the kernel from which reasoned political discourse emerges.

[46] In *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, at para 97, the Supreme Court reasoned that, "For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice." The evidence of the Applicant is uncontroverted that this test is met with respect to the analogous state-imposed cost or burden on its rights under s. 2(b).

[47] The Applicant, a registered charity, has a right to effective freedom of expression – i.e. the ability to engage in unimpaired public policy advocacy toward its charitable purpose. The burden imposed by the impugned section of the *ITA* and by the policy measure adopted by CRA in administering that section runs counter to that right.

[48] The Applicant is therefore in a position that is akin to that of the agricultural workers in *Dunmore*. The shortcomings of a legislative regime undermine or burden the exercise of a *Charter* right. This burden prevents or impairs the right holder from taking advantage of a state-supplied platform that it could otherwise freely access were it not for its insistence on exercising that right. The Applicant's right to freedom of expression under s. 2(b) of the *Charter* is thereby infringed.

b) Is the measure justified under section 1?

[49] When it comes to fundamental *Charter* guarantees such as political advocacy and freedom of expression, "[t]he Court must be guided by the values and principles essential to a free and democratic society": *R v Oakes*, [1986] 1 SCR 103, 109. Having found that s. 149.1(6.2)(c) of the *ITA* violates s. 2(b) of the *Charte*r in that it burdens the Applicant's pursuit of public policy advocacy, it is necessary to turn to s. 1 of the *Charter*. The burden at this point shifts to the Attorney General to establish that the infringement is reasonable and justified in a free and democratic society.

[50] In considering whether the *ITA*'s limits on the Applicant's freedom of expression are so justified, the analysis follows the *Oakes* test. In full, the test considers whether the legislative objective is pressing and substantial, whether the means chosen by the legislature is rationally connected to the objective, whether the legislation minimally impairs the right of free expression, and whether it is proportional considering the deleterious and salutary effects on the right. These must be addressed in sequence. The failure of the government to pass any one of the hurdles results in the conclusion that the infringement of the *Charter* is unjustified.

[51] The first question to arise under *Oakes* is whether, as one scholar has put it, the state's action under challenge has "good ends". That is, "[t]o be justified, the state's action [has] to be motivated by acceptable ends": Charles-Maxime Panaccio, "The Justification of Rights Infringements: Section 1 of the Charter", in: P. Oliver, P. Macklem and N. Des Rosiers, eds, *Handbook of the Canadian Constitution* (Oxford University Press, 2017). In the more familiar

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language of *Oakes*, the question is whether s. 149.1(6.2) embodies a "pressing and substantial objective".

[52] McLachlin CJ has opined that for limitations on political speech to be justified under s. 1, they "must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process": *BC Freedom of Information and Privacy Association v Attorney General of British Columbia*, [2017] 1 SCR 93, at para 16. Justice Cory, writing for the plurality of the Supreme Court in *Edmonton Journal v Alberta*, [1989] 2 SCR 1326, 1336, put the matter even higher and observed that, "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression….It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances."

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[53] Counsel for the Attorney General identifies the objective of s. 149.1(6.2) with reference to the Department of Finance Technical Notes. Those Notes identify the objective of the section as being to…

> recognize that it is appropriate for a registered charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals, and
>
> prohibit partisan political activities 'such as supporting or opposing a political party or candidate'.

[54] The Technical Notes and statements made by the Ministers of National Revenue and Finance prior to the enactment of s. 149.1(6.2) describe the government's concern as a desire to reconcile common law view of charitable activities with the definitions under the *ITA*. To this end, the Minister of National Revenue announced that the government sought to permit registered charities to 'use political means to further their views on matters pertaining to the wholly charitable ends, within reasonable limitations designed to ensure that those activities do not predominate": Background Statement by the Hon. Perrin Beatty, Minister of National Revenue, Regarding Political Activities of Charitable Organizations, May 29, 1985, 883.

[55] Government officials and counsel for the Attorney General in its factum prefer to articulate this objective as a permissive one – s. 149.1(6.2) "permits a 'charitable organization' to devote 'substantially all', rather than 'all' of its resources, to charitable activities if the organization conducts non-partisan political activities that are 'ancillary and incidental' to its charitable activities." As it is put in the CRA Policy Statement, at s. 2, "we consider a charity that devotes no more than 10% of its total resources a year to political activities to be operating within the *substantially all* provision [of s. 146.1(6.2)].

[56] It is obvious, however, that what the Attorney General sees as permissive the Applicant sees as prohibitive. That is, to "permit" 10% of an organization's resources to be devoted to public policy advocacy is to prohibit 90% of that organization's resources from being devoted to

public policy advocacy. Thus, while counsel for the Attorney General contends in its written submissions that the impugned measure "ensures that organizations with 'registered charity' status *can* engage in *some* political activities" [emphasis added], a different reading of the identical measure is that it ensures that registered charities *cannot* engage in *most* political activities.

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[57] Seen this way, the objective of s. 146.1(6.2) is to limit political expression – i.e. to keep it to a small percentage of the organization's time, effort, and resources. What's more, the limitation on political expression is apparently pursued for its own sake. The Attorney General offers no further rationale for the 10% ceiling, or the 90% "substantially all" floor contained in this section of the *ITA*. As already stated in these reasons, the Applicant does not question why Parliament has not opened registered charity status to organizations pursuing non-charitable, political purposes; rather, the question is why Parliament has limited political speech acts done in furtherance of accepted charitable purposes. The Attorney General provides no answer to that question.

[58] I pause to note that it is important in the section 1 analysis to "identify with precision the measure which is the object of scrutiny and to focus on that measure to determine if it is justified 'in a free and democratic society'": *R v Penno*, [1990] 2 SCR 865, 882. Here, the analysis is not focused on the general need for charitable organizations to adhere to charitable purposes or to refrain from turning themselves into political organizations. Rather, the focus is on CRA's 10% rule of interpretation for the "substantially all" requirement in s. 146.1(6.2), and the artificial distinction made in ss. 149.1(6.2)(a) and (b) between charitable activity and non-partisan political activity in support of the charitable purpose. For the first stage of the *Oakes* test, "[i]n determining the importance of the legislative objective it is necessary to focus on exactly what needs to be justified in each particular case": *R v Logan*, [1990] 2 SCR 731, 745.

[59] Taking seriously the statements of the Minister when the section was introduced in 1985, the wording of the section of the statute, the administrative interpretation given to the section by CRA, and the evolving recognition of the importance of charities' engagement in public policy and law reform advocacy, the objective of s. 149.1(6.2) is a confusing one. The legislative purpose appears to be to minimize the very activity that the government supposedly wants to foster – a registered charity's ability to participate in public policy dialogue where these activities advance its charitable purpose.

[60] In 1985, the Minister of National Revenue explained the government's legislative reform initiative that brought in s. 149.1(6.2) by indicating that "there is now widespread agreement that the meaning of 'charitable activity' should be broadened to permit at least some measure of political activity." There is no further explanation for why "some measure" of political activity turned out to mean an amount as small as 10% of the organization's resources. The government generally, and the Attorney General in this case, approach the issue as though the need to limit the political expression of charitable organizations in this way is self-evident. It is not; indeed, it is self-evidently not.

[61] The flaw in this approach has been brought to the surface by the Consultation Report, at p. 6, which highlighted the now recognized imperative that charities fully engage, not minimally engage, in various forms of public advocacy. The Consultation Report explicitly articulated a need for "deleting any reference to non-partisan 'political activities' to expressly allow charities to fully engage, without limitation, in non-partisan public policy, dialogue and development, provided that it is subordinate to and furthers their charitable purposes."

[62] Restricting free expression for its own sake, in the absence of any further goal or policy purpose, is difficult to characterize as a pressing and substantive objective for the purposes of the *Oakes* test. The point of this first stage of analysis is to identify a social, economic, or other policy objective that is important enough in comparison with the *Charter* right that it can potentially justify limiting that right. Government cannot justify limiting the right of free expression for charities for the very purpose of ensuring that charities use no more than 10% of their resources on the exercise of free expression.

[63] As the Supreme Court indicated with respect to language education rights under the *Charter*, "The provisions of [the challenged Quebec language law] collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter*...": *Attorney General of Quebec v Quebec Association of Protestant School Boards*, [1984] 2 SCR 66, 88. Or, to put it as Wilson J. did in her concurrence in *R v Big M Drug Mart Ltd*. [1985], 1 SCR 295, at para 107, "[l]egislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the *Charter* right is aimed."

[64] The Attorney General has not established a pressing and substantial objective, and the government's case has not passed the first hurdle of *Oakes*. Once the objective is determined to be unjustified, the means chosen to accomplish the objective are equally unjustifiable and the impairment cannot be minimal. As for whether the effects of the measure are proportional to the objective, the question makes no sense since the objective and its effect on the Applicant's rights are identical.

[65] In other words, the first stage of *Oakes* is the lynchpin to the entire s. 1 test. "The finding that the objective of the legislation warrants overriding a protected right is only a minimum requirement", Norman Siebrasse, "The Oakes Test: An Old Ghost Impeding Bold New Initiatives" (1991) 23 Ottawa Law Rev 99, 107, but without a pressing and substantial objective that counts as a justification for the limitation of a *Charter* right, the entire analysis collapses.

[66] Accordingly, there is no justification for the infringement of the Applicant's right to freedom of expression under s. 2(b) of the *Charter*.

V. CRA's misapprehension

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[67] The Tax Court of Canada has observed that "taxing statutes are notorious for the use of elusive, puzzling, and at times incomprehensible language": *454538 Ontario Ltd. v MNR* (1993), 93 DTC 427, 436. Section 149.1(6.2) of the *ITA* is no exception to that observation. The distinction between "charitable activities" to which the opening lines of the s. 149.1(6.2) require a charity to devote "substantially all" of its resources, and "political activities" to which subsection 149.1(6.2)(a) permits a charity to devote part of its resources (under conditions set out in subsections (b) and (c)), is one that either reflects or has prompted a fundamental misunderstanding.

[68] The Applicant has demonstrated, and the Minister, the Standing Committee, and the Consultation Panel all confirm that there is no contradiction, and no justification for an interpretation of s. 149.1(6.2), that draws a distinction between charitable activities and non-partisan "political activities" in the nature of public policy advocacy. This applies whether the charity's communications are made directly to government, to the public at large, or internally within its own organization. As long as the advocacy is done in pursuit of the overall charitable purpose – for the Applicant, the relief of poverty – such "political activities" are charitable activities.

[69] Accordingly, an organization such as the Applicant can spend "substantially all" of its resources on non-partisan public policy advocacy or communications aimed at changing hearts and minds with respect to poverty and its causes and remedies – "political activities", in CRA's view – and still be spending "substantially all" of its time on charitable activities as required by s. 149.1(6.2).

VI. Disposition

[70] The interpretation and enforcement by CRA of the "substantially all" requirement in s. 149.1(6.2) of the *ITA* by limiting to 10% a charitable organization's use of its resources for political activities, as set out in the CRA Policy Statement, violates s. 2(b) of the *Charter* and is not saved by s. 1. There shall be a Declaration to that effect and an Order that CRA cease interpreting and enforcing s. 149.1(6.2) in that way.

[71] There shall be a further Order that the phrase "charitable activities" used in s. 149.1(6.2) be read to include political activities, without quantum limitation, in furtherance of the organization's charitable purposes.

[72] The Declaration and Orders described above render meaningless ss. 149.1(6.2)(a) and (b) of the *ITA*. As part of the protection of freedom of expression encompassed by the above Declaration and Orders, there shall therefore be a further Declaration that ss. 149.1(6.2)(a) and (b) are of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[73] The exclusion from "charitable activities" of partisan political activities contained in subsection 149.1(6.2)(c) of the *ITA* remains in force.

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[74] The Declarations and Orders described above shall take effect immediately upon issuance of these reasons for judgment.

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Morgan J.

Released: July 16, 2018

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COURT FILE NO.: CV-16-559339
DATE: 20180716

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADA WITHOUT POVERTY

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

E.M. Morgan J.

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