

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

CANADA WITHOUT POVERTY

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*,
R.R.O. 1990, O. Reg. 194, and under the *Canadian Charter of Rights and Freedoms*

APPLICANT'S REPLY FACTUM

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The Respondent Mischaracterizes Canada Without Poverty's ("CWP's") Claim

1. The Respondent's argument is premised on two fundamental mischaracterizations of CWP's claim. First, the Respondent mischaracterizes CWP's claim as a positive rights claim to access a statutory platform which is denied to it. In fact, CWP is making a negative rights claim. CWP challenges restrictions on certain types of political expression within an existing expressive platform which the statute, in combination with common law, provides to CWP.
2. Second, the Respondent mischaracterizes CWP's claim as a claim to advance a new political purpose that is not recognized as charitable. In fact, CWP challenges restrictions on expressive charitable activity to advance its accepted charitable purpose.

Negative Rights Claim: CWP Challenges Restrictions within an Existing Expressive Platform

3. The Respondent characterizes CWP's claim as a claim to receive charitable subsidy for political activities that are not subject to charitable tax exemption. It argues that charitable status

“is not a platform aimed at facilitating expression”¹ and that CWP’s claim is a positive rights claim to financial support for expressive activity that is not charitable. It argues that CWP’s claim is analogous to the claims considered by the Supreme Court of Canada in *Baier* and in *Haig*, in which applicants sought access to an expressive platform for which they were ineligible.

4. However, this is not a case in which the applicant has been barred from access to an expressive platform. CWP has been deemed to qualify for charitable registration and has been operating as a charity for more than 40 years. CWP is registered as a charity to relieve poverty through a variety of means, including public expressive activity such as “... organizing conferences and workshops on topics related to poverty;” “Producing and disseminating articles, commentary and reports on topics related to relieving poverty;” “Providing information to government officials, and the public to increase knowledge of poverty related issues and how to more effectively relieve poverty;” and “... promoting respect for the human rights of people living in poverty.”² All of these charitable activities are subject to the 10% restriction if they include recommendations for changes to laws and policies. CWP thus challenges restrictions that are applied to it as a registered charity operating within an expressive platform for which it has qualified.

5. The *Income Tax Act*, read in combination with common law, grants charities access to a beneficial tax status in order to engage in charitable activities to advance a charitable purpose. Accepted charitable activities include significant expressive activities. Prior to the adoption of section 149.1(6.2), expressive activity to recommend changes to laws and policies directly to government was accepted as charitable activity. Public dissemination of these recommendations

¹ Respondent’s Memorandum of Fact and Law, at para. 49.

² Farha Affidavit, Exhibit B, Certificate of Continuance of Canada Without Poverty dated October 14, 2014 [Application Record, v. 1, Tab 2b, at p. 65].

or broader political campaigns to engage the public, on the other hand, were not permitted. Section 149.1(6.2) was added in response to concerns that the restriction applied to the latter category of expressive activity was a violation of fundamental rights and deprived the public of the benefit of charities' recommendations and views. The Minister explained:

It has been argued that this limitation constitutes a denial of the basic rights and freedoms available to all Canadians to criticize governments and to lobby for changes which charitable organizations feel will contribute to the quality of life in our society.

Recently I have sought the views of the voluntary sector on what might be done to broaden the activities permitted to charities by the Income Tax Act to allow at least a measure of non-partisan "political" activity. (...) The result, I'm happy to say, is a proposed amendment to the Income Tax Act, as announced in the May 23 Budget.³

6. Contrary to the Respondent's submissions, CWP does not challenge the limits determined by Parliament with respect to what type of expressive activity is deemed charitable and is therefore subject to the benefit of charitable tax benefits. It does not argue that the legislation is under-inclusive of any type of expressive activity or purpose. Section 149.1 (6.2)(c) establishes that partisan political activity is not charitable, and CWP does not challenge that restriction. Expressive political activities which do not advance an accepted charitable purpose are not permitted. CWP also does not challenge that restriction.

7. The restriction that CWP challenges is the 10% restriction to a particular category of *accepted* charitable activities – publicly disseminated recommendations for changes to laws and policies that advance its charitable purpose. The challenged restriction operates *within* the expressive platform of accepted charitable activities in which CWP is permitted by the statute and its stated objects to engage, and for which it has been registered as a charity to pursue.

³ Euler Affidavit #1, Exhibit 7: Background Statement of the Honourable Perrin Beatty, Minister of National Revenue Regarding Political Activities of Charitable Organizations, May 29, 1985, at p.1 [Application Record, v.4, Tab 4(7), p. 881].

8. The Respondent's reliance on *Baier v. Alberta*⁴ is misplaced. In *Baier*, school employees were barred from running for election as trustees. *Baier* would be analogous to the case at bar if school employees had been eligible to become and were elected as trustees and, as such, were permitted to express views on education policy but were subject to restrictions on the public dissemination of their views. Unlike the applicant in *Baier*, CWP does not invoke section 2(b) to demand access to an expressive platform that has been denied to it. CWP is making a negative rights claim challenging a restriction applied to activities which the statute, and CWP's registration as a charity, specifically authorize it to pursue to advance a well-established charitable purpose. Such a restriction violates section 2(b) and must be justified under section 1.⁵

In any Event, CWP's Claim Satisfies the Criteria in *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016

9. In the alternative, if this Court rejects CWP's submission that its claim is a negative rights claim, the *Dunmore* criteria are satisfied in this case. CWP's claim is grounded in the fundamental *Charter* guarantee of the freedom of expression in section 2(b); the purpose and effect of section 149.1(6.2) is a substantial interference with CWP's freedom of expression guaranteed under section 2(b); and the State, operating through the Canada Revenue Agency, is accountable for enforcing this restriction on free speech, and did so in relation to CWP.⁶

⁴ *Baier v. Alberta*, 2007 SCC 31, 2007 CarswellAlta 853 [RBA, Tab 11].

⁵ *Greater Vancouver Transportation Authority v. Canadian Federation of Students* [2009] 2 S.C.R. 295 per Deschamps at p. 316–318, para 32–35 and p. 322, para 47 [Applicant's BOA, Tab 25].

⁶ *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016 at pp. 1047-1049, paras. 24-26, [Applicant's Supplementary Brief of Authorities ("Supp. BOA"), Tab 1]; *Baier v. Alberta* 2007 SCC 31, at paras. 27-30 [RBA, Tab 11].

CWP Does not Claim a Right to Have a Political Purpose

10. CWP does not claim that section 2(b) guarantees that registered charities can have a political purpose. CWP has a recognized charitable purpose of relief of poverty and does not seek to have that purpose altered or expanded.

11. In combination with common law, the *Income Tax Act* recognizes that expressive activity to promote changes to laws and policies – either through non-partisan submissions to government or through engagement with the public – should be considered charitable activity when undertaken to advance an accepted charitable purpose. Unlimited resources may be applied to direct submissions to government, while resources applied to public engagement are restricted to not more than 10% of over-all expenditures. Neither form of “political activity” – restricted or unrestricted – alters CWP’s charitable purpose. Indeed, engagement with people with lived experience of poverty and with the public is critical to advancing CWP’s charitable purpose. The issue in this case is not about recognizing a new political purpose but rather it is about restrictions on charitable activities in support of an existing charitable purpose.

12. The Respondent’s submission that the assertion of this fundamental freedom is properly characterized as “a demand for financial support from the state”⁷ is a mischaracterization of this claim. CWP challenges a sanction applied to charities if they exceed the restriction on public expression. Section 149.1(6.2) severely limits CWP’s expressive activity with the public in furtherance of its charitable purpose. The sanction of loss of charitable status impairs CWP’s pursuit of its charitable purpose through expressive activity with the public. The Respondent acknowledges that the risk of losing charitable registration because of political activities that

⁷ Respondent’s Memorandum of Fact and Law, at para. 1.

should be permitted is a serious harm and that relieving charities of this threat constitutes a pressing and substantial objective.⁸

CWP’s Claim to Charter Infringement is Distinguishable from Prior Section 2(b) Claims

13. Contrary to the Respondent’s submission, CWP’s claim in this case is distinguishable from the very different claim rejected by the Federal Court of Appeal in *Human Life International in Canada Inc. v. MNR*.⁹

14. In that case, an anti-abortion organization had lost its charitable status and appealed this decision. It did not press its claim to charitable status for the charitable purpose of the “advancement of education”. It was therefore limited to a possible claim to charitable status as serving “other purposes beneficial to the community not falling under any of the preceding heads”.¹⁰

15. As the Court of Appeal noted:

“It must always be kept in mind that the fourth category of charitable activities as stated in *Pemsel* is those “for other purposes beneficial to the community not falling under any of the preceding heads” (emphasis added). Thus the mere dissemination of opinions that are not found to be for the advancement of education or religion (the latter was not even invoked in support of the appellant here) must be justified under the fourth category if at all as having some beneficial value that can be ascertained by the Minister and by the Court of Appeal”.¹¹

16. It was in this context, where the views advanced were **not** in support of any other recognized charitable purpose such as the relief of poverty, that the Court stated that:

⁸ *Ibid.*, at para. 56.

⁹ [1998] 3 F.C. 202 [Applicant’s BOA, Tab 9].

¹⁰ *Human Life International Inc.*, *supra* note 9, at pp. 215-216, paras. 10-11 [Applicant’s BOA, Tab 9].

¹¹ *Human Life International Inc.*, *supra* note 9, at p. 218, para. 13 [Applicant’s BOA, Tab 9]. The fourth *Pemsel* category requirement is different than the requirement that attaches to all heads of charity that the charity “seeks the welfare of the public and is not concerned with the conferment of private advantage” *per* Iacobucci, J. in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, at p. 105, para. 147 [Applicant’s BOA, Tab 6].

“Any determination by this court as to whether the propagation of such views is beneficial to the community and thus worthy of temporal support through tax exemption would be essentially a political determination and is not appropriate for a court to make”.¹²

17. Contrary to the submission of the Respondent¹³, this has no application to this case where the expression at issue is to advance a recognized charitable purpose, so the issue confronted in *Human Life International* does not arise.

18. Furthermore, the section 2(b) claim advanced in *Human Life International* was fundamentally different than CWP’s claim, in that it was a claim to a *Charter* right to charitable registration *per se* to advance **any speech or expression**. CWP claims only *Charter* protection for speech that advances its charitable purpose. As the Court of Appeal noted in *Human Life International*:

“It [Human Life International] contends that, if the *Income Tax Act* and the jurisprudence interpreting it denies registration as a charitable organization to any organization which engages in the dissemination of information and opinions, then it is invalid as denying freedom of speech or expression as guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedom*”.¹⁴

19. This was the claim rejected by the Federal Court of Appeal.¹⁵ This rejection, in identical terms, is repeated in *Alliance for Life v. MNR*.¹⁶ This is not the claim made by CWP, so these decisions are of no assistance to the Court.

¹² *Human Life International Inc.*, *supra* note 9, at p. 218, para. 13 [Applicant’s BOA, Tab 9].

¹³ Respondent’s Memorandum of Fact and Law, at para. 32.

¹⁴ *Human Life International Inc.*, *supra* note 9, at p. 213, para. 6 [Applicant’s BOA, Tab 9].

¹⁵ *Ibid.*, at pp. 220-221, para 18.

¹⁶ *Alliance for Life v. M.N.R.*, [1999] 3 F.C. 504, at p. 558-559, para. 87 [Applicant’s BOA, Tab 10].

The Respondent's Claim that Charities Receive No Section 2(b) Charter Protection Should Be Rejected

20. The Respondent argues that CWP's *Charter* rights have not been infringed by restrictions imposed on charities because CWP is free to relinquish the benefit of charitable status in order to escape the restrictions.¹⁷ CWP submits that this argument must be rejected.

21. The cases on which the Respondent relies do not support its claim. *Haig* and *Baier* did not involve charities but rather individuals who the Court found were making a claim to be included in an expressive platform from which they were excluded. In *Human Life International*,¹⁸ the Court found that the anti-abortion group did not have a charitable purpose, and in the *Canadian Arab Federation v. Minister of Citizenship and Immigration* the group made no claims to charitable status at all.¹⁹

22. The evidence in this case, established by the Executive Director, is that "CWP would not be able to perform its national role of relieving poverty if it were to lose its charitable status".²⁰

23. The implication of the Respondent's argument, however, extends beyond the evidence in the present case. It suggests that *Charter* rights of recipients of any statutory or government benefit are not violated if the violation can be avoided by relinquishing the government benefit in question. The same logic would apply if a government made the receipt of employment insurance benefits or child tax credits conditional on limiting any public statements criticizing government policy. The restrictions on freedom of expression could be escaped by relinquishing

¹⁷ Respondent's Memorandum of Fact and Law, at para. 50.

¹⁸ *Human Life International*, *supra* note 9, at p. 219, para. 15 [Applicant's BOA, Tab 9].

¹⁹ *Canadian Arab Federation v. Minister of Citizenship and Immigration*, 2013 SCC 1283, at para. 35 [RBA, Tab 12].

²⁰ Farha Affidavit, at para 8 [Application Record, v. 1, Tab 2, p. 18]; Cross-examination of Leilani Farha, Jan 10, 2018, at p. 88 line 10 – p. 94 line 10 [Application Record, v. 6, Tab 6, pp. 1536-1542].

these benefits. Clearly restrictions on freedom of expression that are tied to receiving a tax or any other benefit must be subject to review under section 2(b) and justified under section 1.

24. The Supreme Court of Canada has been clear that the *Charter* should not be read in a way that immunizes particular spheres of legislation or action from *Charter* scrutiny.²¹ The Supreme Court's "primordial direction"²² is that *Charter* rights be defined generously, "avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to".²³ Mr. Justice Dickson, as he then was, explained in *R. v. Big M Drug Mart Ltd.*, that the meaning of a right or freedom guaranteed by the *Charter* should be interpreted "in light of the interests it was meant to protect."²⁴

25. Charities' engagement in public dialogue to propose changes to laws or policies is central to the interests section 2(b) is meant to protect. When section 149.1 (6.2) was introduced, the Minister acknowledged that it addressed concerns about infringements of fundamental rights of charities. The Prime Minister's 2015 mandate letter to the Minister of Finance referred to the need to "allow charities to do their work on behalf of Canadians free from political harassment ... with an understanding that charities make an important contribution to public debate and public policy."²⁵ The "Report of the Consultation Panel on the Political Activities of Charities" stated that participants viewed the restrictions on political activities as restrictions on freedom of expression:

²¹ *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391, at p. 414, para. 26 [Applicant's Supp. BOA, Tab 2].

²² *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at pp. 167-168, para. 19 [Applicant's Supp. BOA, Tab 3].

²³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, pp. 666-667, para. 53 citing *Lord Wilberforce in Minister of Home Affairs v. Fisher*, [1980] A.C. 319 (Privy Council, Bermuda), at p. 328 [Applicant's Supp. BOA, Tab 4].

²⁴ [1985] 1 S.C.R. 295, at p. 344 [Applicant's Supp. BOA, Tab 5].

²⁵ Euler Affidavit #1, Exhibit "19", Application Record, Tab 4(19), at p. 1026.

Many participants supported the recommendations of other organizations, such as Imagine Canada's call to ensure that the focus of the ITA is on charitable purposes rather than activities, and Réseau québécois de l'action communautaire autonome's call to ensure full freedom of expression for charities. In regard to the latter, it was argued the playing field needs to be levelled between charities, with their restrictions on political activities, and for-profit corporations, which can fully deduct lobbying and other related expenses without having to operate under the same type of restrictions. It was often noted that the current restrictions on political activities not only restrict charities' freedom of expression, but the freedom of expression of citizens themselves (whose views charities represent) and are therefore anti-democratic.²⁶

26. In CWP's submission, it is unreasonable to suggest that what is experienced by charities, and described by the Prime Minister of Canada, as interference with freedom of expression is beyond the reach of section 2(b) of the *Charter*. Such restrictions go to the heart of the interests that section 2(b) of the *Charter* are meant to protect. The rights in section 2(b) are no less applicable to charities than to any other individual or organization.

Section 1

27. The Respondent relies on the Supreme Court of Canada's decision in *Vancouver Society of Immigrant and Visible Minority Women* to argue that in light of the "tremendous tax advantages available to charities and the consequent loss of revenue to the public", the restrictions on CWP's expressive activities should simply be accepted as "preferred tax policy." However, the statement on which the Respondent relies was in response to a demand that the Court "adopt a new and more expansive definition of charity"²⁷ based on a "novel doctrine" proposing an entirely new definition of charitable activities.²⁸ CWP is not proposing any expansion of the definition of a charity or of charitable activity, but rather challenges a restriction on the amount of resources applied to accepted categories of charitable activity.

²⁶ Report of the Consultation Panel on the Political Activities of Charities, March 31, 2017, Affidavit of Katherine Stubits, Exhibit A, Application Record, Vol. 3, Tab 3(A) [Application Record, Vol. 3, Tab 3(A), at p. 779].

²⁷ *Vancouver Society*, *supra* note 11, *per* Iacobucci, J. at p. 134, para. 200 [Applicant's BOA, Tab 6].

²⁸ *Vancouver Society*, *supra* note 11, *per* Iacobucci, J. at pp. 132-134, paras. 196-200 [Applicant's BOA, Tab 6].

28. The Court’s statement must also be read in the context of its caution in the preceding paragraph not to “confuse the concept of charitable purposes with that of charitable activities.” The Court affirmed that “any definition of charity must be concerned primarily with the former, not the latter, as the true issue is whether activities are carried on in furtherance of a charitable purpose or purposes.”²⁹ This supports CWP’s claim that there is no justification for restricting the resources applied to non-partisan expressive activities which are in furtherance of its charitable purpose.

29. While section 149.1(6.2) may have been the “preferred tax policy” of the government, the fact that a government may have considered a statute limiting free political speech to be reasonable, does not amount to the “clear and convincing demonstration” that limitations on free political speech are “necessary, do not go too far and enhance more than harm the democratic process” so as to be justifiable limits under section 1 of the *Charter*.³⁰ Furthermore, the fact that legislation is “a preferred tax policy” falls woefully short of the demonstrable justification based on urgent financial circumstances required to justify a *Charter* breach under section 1.³¹

30. It is telling that the Respondent makes no effort to defend the arbitrariness that results from allowing unlimited political speech in Parliament and to government officials, but limiting political speech to the public to 10 percent of a charity’s activities. No matter how the objective of section 149.1(6.2) is defined, there is no rational connection between any public policy objective and such an arbitrary restriction. Such an arbitrary restriction is also not minimally impairing of freedom of expression, nor is it proportional to the government’s objective.

²⁹ *Vancouver Society*, *supra* note 11, *per* Iacobucci, J. at p. 134, para. 199 [Applicant’s BOA, Tab 6].

³⁰ *B.C. Freedom of Information and Privacy Association v. Attorney General of British Columbia*, [2017] 1 S.C.R. 93, *per* McLachlin, C.J. at pp. 103-104, para. 16 [Applicant’s BOA, Tab 23].

³¹ *Newfoundland (Treasury Board) v. N.A.P. E.*, [2004] 3 S.C.R. 381, *per* Binnie, J. at p. 407, para. 59; p. 412, para. 72; p. 422, para. 97, and pp. 424-425, paras. 102-103 [Applicant’s Supp. BOA, Tab 6.].

31. It is also telling that the Respondent's section 1 argument makes no effort to defend the arbitrariness and inequity of allowing corporations to deduct lobbying expenses but restricting the political activities of charities.

32. The suggestion in para. 59 of the government's factum that minimal impairment is met because charities "can engage in some political activities" [underlining in original]" is an astonishing statement. This is akin to saying that as long as *some* degree of political speech remains unrestricted, the minimal impairment test is met. Such a formulation does not insist on *minimal* impairment, as *Oakes* does, but rather would countenance *maximal* impairment as long as it is not complete impairment.

33. Given that political speech lies at the core of the guarantee of freedom of expression, the circumstances in which section 1 will save a violation of section 2(b) will be rare. The government has failed to make out a case that section 149.1(6.2) is one of those rare circumstances.

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LIST OF AUTHORITIES

1. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016
2. *Health Services & Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391
3. *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157
4. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
5. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
6. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381

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