Court File No.: CV-16-559339

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*

FACTUM OF THE APPLICANT, CANADA WITHOUT POVERTY
(returnable April 23, 2018)

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PART I - OVERVIEW

1. The Applicant, Canada Without Poverty ("CWP") is a registered charity. Its charitable purpose is the relief of poverty in Canada. CWP is challenging the constitutionality of s. 149.1(6.2) of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp) ("the Act"). This section was added to the Act in 1985 to establish that recommending and promoting changes to laws and policies to advance a charitable purpose should be permitted as charitable activity, but it restricts charities from **publicly** recommending or promoting such changes. This restriction on public communications to advance its charitable purpose violates CWP's right to freedom of expression under s. 2(b) of the *Charter* and is not justified in a free and democratic society.

2. The application raises a critical issue for people living in poverty in Canada and for Canadian democracy. The question is whether having recognized relief of poverty as a charitable purpose, and having established in s. 149.1(6.2) of the Act that recommending and promoting changes to laws and policies for that purpose will be considered charitable activity,

Parliament may impose on the Applicant restrictions on communicating these recommendations to the public. The Applicant submits that the restrictions imposed by s.149.1(6.2) undermine the core values protected by freedom of expression, which the Supreme Court of Canada has described as including participation in social and political decision-making and the communal exchange of ideas.[1]

3. In historical times, the types of activities considered "charitable" for the relief of poverty were largely limited to the voluntary provision of food, clothing or shelter. In contemporary times many charities such as CWP approach the relief of poverty differently. They seek to address the causes of poverty in a modern state, to identify and recommend changes to laws and policies to ensure that people have access to basic necessities and to enable people living in poverty to participate in the development of measures to address it. In enacting s.149.1(6.2) Parliament affirmed the value of these kinds of "political activities" in pursuit of charitable purposes.

4. Section 149.1(1) of the ITA states:

> Charitable organization, … means an organization, …
>
> *(a)* all the resources of which are devoted to charitable activities carried on by the organization itself…

5. Section 149.1(6.2) states:

> For the purposes of the definition *charitable organization* in sub-section 149.1(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,

[1] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 *per* McLachlin, C.J. and LeBel, J. at pp. 172-173, para. 32, [Applicant's Brief of Authorities ("Applicant's BOA"), Tab 1].

> *(b)* those political activities are ancillary and incidental to its charitable activities, and
>
> *(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.

6. In describing the intended effect of s. 149.1(6.2), the government identified two categories of activities or communications to promote changes to laws and policies, both of which would be considered charitable activities. Where charities communicate recommendations for changes to laws and policies directly to Parliamentary Committees or government officials by means of briefs or oral representations, these would be considered charitable and subject to no limitations imposed by s. 149.1(6.2). As long as recommended changes to laws and policies are reasonably connected to the organization's charitable purpose, a charity may commit any amount of its resources to this type of activity.

7. **Public** communication of recommendations for changes to laws and policies, on the other hand, are treated differently. S. 149.1(6.2) establishes that, like the first category, recommendations for changes to laws and policies shared with the public are also to be considered charitable activities if they advance a charity's purpose, **but they are subject to strict limitations**. If resources expended on this second category of activities exceed approximately 10% of a charity's resources, the charity's registration may be revoked.

8. CWP finds that the relief of poverty in Canada requires changes to laws and policies and finds that communicating with the public about these changes, particularly with those with lived experience of poverty, is necessary to properly identify and effectively promote necessary changes. Making direct submissions to government officials without engaging with the public

is not effective. The restrictions on CWP's ability to communicate with the public about ideas for changes to laws and policies for the relief of poverty, or to encourage the engagement of people living in poverty in non-partisan democratic processes, therefore undermines its effective pursuit of its charitable purpose.

9. It is important to note what the Applicant does not seek. It does not seek a finding that there is any constitutional obligation to confer charitable status on any particular purpose. It only challenges limits on communications to the public of recommendations for changes to laws and policies in pursuit of a recognized charitable purpose.

10. Parliament has established a statutory scheme under the Act which provides the benefit of charitable status for the relief of poverty and recognizes expressive activity to promote changes to laws and policies to advance the relief of poverty as charitable activity. A statutory scheme, including one which provides a benefit, must comply with the *Charter*.[2] While it is Parliament's role to determine qualifications for charitable status and other benefits under the Act, it is the Court's role to determine whether Parliament "has limited the rights of the claimants in a manner that does not comply with the *Charter*."[3]

11. The government has recognized problems with the Act's restrictions on the freedom of expression of charities. Recognizing "that charitable organizations are valuable contributors to public debate and public policy", the Minister of National Revenue announced the appointment of an expert panel on September 27, 2016 "to review the rules governing

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[2] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R 791 *per* McLachlin, C.J. and Major J. at pp. 843-844, paras. 104, 107, [Applicant's BOA, Tab 2]; *Symes v. Canada*, [1993] 4 S.C.R. 695 *per* Iacobucci, J. at p. 753, [Applicant's BOA, Tab 3].

[3] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 *per* McLachlin, C.J. at p. 178, para. 105, [Applicant's BOA, Tab 4].

political activities of charities."[4] On March 31, 2017 the panel submitted its report, recommending that the Act be amended to "explicitly 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."[5]

12. This is precisely the remedy sought by the Applicant. The Applicant seeks only the freedom to engage in, and to encourage, participatory non-partisan public policy dialogue to advance its charitable purpose. The suspended declaration of invalidity sought by the Applicant will allow Parliament to remedy the constitutional infirmities in section 149.1(6.2) as recommended by the panel.

PART II -THE FACTS

Legislative History

13. Section 149.1(1) of the Act states:

> Charitable organization, … means an organization, …
>
> *(a)* all the resources of which are devoted to charitable activities carried on by the organization itself…

14. In 1978 the CRA released a circular to clarify which types of activities were prohibited political activities under s. 149.1(1).[6] The CRA circular generated considerable debate and

[4] Affidavit of Zachary Euler sworn February 16, 2017 ["Euler Affidavit #1"] at para. 46, Exhibit 21, [Application Record, v. 4, Tab 4(21), p. 1041].
[5] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Report of the Consultation Panel on the Political Activities of Charities, March 31, 2017 ["Minister's Consultation Panel Report"] at p. 6, [Application Record, v. 3, Tab 3(A), p.770].
[6] Affidavit of Zachary Euler sworn February 16, 2017 ["Euler Affidavit #1"] at para. 6, Exhibit 1: Information Circular 78-3, Registered Charities; Political Objects and Activities, [Application Record, v. 4, Tab 4(1), p.815].

demands for amendments to the Act in the House of Commons. Hon. Flora Macdonald, for example, asked of the Minister of Finance on April 23, 1978:

> Will the Minister give the House the assurance that an amendment to the Income Tax Act will be brought in to do away with these outdated regulations? Further, will he explain why, at this time, it was felt necessary, in light of the work done by the churches and charitable organizations in this country in addressing themselves to matters of social significance, to remind them that the making of written or oral representations "to all or mostly all members of parliament or ministers of the Crown as part of a campaign to influence intended or specific legislation is a political activity and as such cannot be properly carried out by a charity that wishes to maintain registered status"? What kind of interference with freedom of speech is that, Mr. Speaker?[7]

15. In 1985 the Minister of Revenue announced the government's intentions to amend the Act, describing the intent as follows:

> The determination of what is or is not charitable is not a matter of departmental policy -- or ministerial discretion -- but is based on the common law.
>
> The common law meaning does allow an organization whose main objects are charitable to engage in political activities that are incidental or ancillary to its primary charitable objects. On the other hand, the *Income Tax Act* requires that, to be registered as a charitable organization, a charity must devote all of its resources to charitable activities. As statute law prevails over common law where political activities are concerned, the courts have generally interpreted statute law as prohibiting a charity from engaging in any political activities at all even if they are ancillary to its main charitable objectives.
>
> We now wish to seek a consensus from the voluntary sector on what further should be done. My discussions with those actively involved in the voluntary sector have convinced me that there is now widespread agreement that the meaning of "charitable activity" should be broadened to permit at least some measure of "political" activity.[8]

16. The resulting amendment, in Section 149.1(6.2), enacted February 13, 1986, was intended to prohibit any partisan political activity by charities, to allow unlimited direct

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[7] Euler Affidavit #1, Exhibit 2: Commons Debates, April 28, 1978 at p. 4970, [Application Record, v. 4, Tab 4(2), p. 820].

[8] Euler Affidavit #1 at para. 16, Exhibit 4: Revenue Canada Taxation Release and the Minister of National Revenue's Speech dated March 11, 1985 at pp. 5 and 6, [Application Record, v. 4, Tab 4(4), p. 859-860].

representations to government so long as the representations are made in furtherance of the charity's charitable purpose, and to permit limited communications to the public for such purposes.[9]

17. As summarized by the Minister of National Revenue:

> There are three elements of political activity by charities under the proposed amendment.
>
> The first of these is partisan support of candidates and political parties. As at present, this will not be allowed.
>
> The second element involves the direct presentation of information and views to government – through briefs to Parliament or to ministers, for example.
>
> The third element involves activities intended to influence public opinion generally – examples are advertising, mailings or rental of facilities for meetings on public policy issues.
>
> Both of these last two elements of political activity (direct and indirect) would be allowed to charities provided – and this is important – that the activities relate to the particular charitable purposes for which the individual charity is registered.
>
> The difference between the two elements, as the law would be administered, is that in the case of direct representations there would be no limit on how much of a charity's resources could be devoted to the preparation and presentation of, for example, briefs to the government, so long as this effort is ancillary and incidental to the charitable purposes of the organization.
>
> In the case of indirect activities – such as advertising – there would be expenditure limits on the proportion of a charity's resources that can be devoted to this form of political activity.[10]

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[9] 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. 2, [Application Record, v. 4, Tab 4(7), p. 882].

[10] 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. 2, [Application Record, v. 4, Tab 4(7), p. 882].

18. The Minister of National Revenue also stated:

> Up to 10% of the charity's resources may, therefore, be devoted to a combination of its administrative activities and those costs of political activities which are subject to expenditure limits.[11]

19. The distinction between restricted and unrestricted political activities was reiterated by the Parliamentary Secretary to the Secretary of State of Canada during the Commons Debates on the introduction of Section 149.1(6.2):

> The amendment recognizes that it is appropriate for a charity to use its resources, **within defined limits**, for incidental political activities in support of its charitable goals. These activities would include advertising, rental of facilities or mass mailings to influence public opinion towards the organization's views on matters of law or government policy related to its charitable purposes. I emphasize that it has to be related to the charitable purposes of that organization. **Furthermore, this measure does not affect the present unrestricted ability of a charity to provide information and express its views in briefs to Government to effect change in laws or policies**.[12] [emphasis added]

20. This distinction has been maintained in the CRA's most recent policy statement on political activities:

> When a registered charity makes a representation, whether by invitation or not, to an elected representative or public official, the activity is considered to be charitable. Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed or changed, the activity is considered to fall within the general scope of charitable activities. However, such activity should be subordinate to the charity's purposes….[13]

21. In contrast, the CRA Policy Statement describes political activities subject to the restriction that they may consume no more than 10% of the charities' resources as follows:

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[11] *Ibid* at p. 6, [Application Record, v. 4, Tab 4(7), p. 886].
[12] Euler Affidavit #1, Exhibit 8: Commons Debates, December 5, 1985 at p. 9193, [Application Record, v. 4, Tab 4(8), p. 889].
[13] Euler Affidavit #1, Exhibit 10: CRA Policy Statement CPS-022, Political Activities at s. 7.3, [Application Record, v. 4, Tab 4(10), p. 903-904].

> We presume an activity to be political if a charity:
>
> 1. explicitly communicates a call to political action (that is, encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country)
>
> 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 (if the retention of the law, policy or decision is being reconsidered by a government), opposed or changed
>
> 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 in Canada or a foreign country.[14]

22. The effect of Section 149.1(6.2) of the Act is that any of CWP's activities that include communications **to the public** about changes to laws or policies for the relief of poverty or which encourage democratic participation to promote such changes must be limited to less than 10% of the total expenditures of the charity.[15]

The Minister's Consultation Panel Report

23. In September 2016 the Minister of National Revenue appointed a panel to report and make recommendations on the treatment of charities in relation to their political activities under the Act and to make recommendations for administrative and legislative change.

24. In its report to the Minister dated March 31, 2017, the panel stated that a key principle that guided its work was that: "The participation of charities in public policy dialogue and

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[14] Euler Affidavit #1, Exhibit 10: CRA Policy Statement CPS-022, Political Activities at s. 6.2, [Application Record, v. 4, Tab 4(10), p. 902].

[15] Courts have accepted the CRA's position that s. 149.1(6.2) limits the amount of political activity that a charity can do to 10% of its expenditures. See, for example, *Action by Christians for the Abolition of Torture v. Canada* (2002), 225 D.L.R. (4th) 99 per Décary, J. A. at p. 109, para. 20, p. 120, para. 59, and p. 122, para. 68, (Fed. C.A.) [Applicant's BOA, Tab 5].

development should be recognized and valued, and seen as an essential part of the democratic process."[16]

25. The panel found that the restrictions on the freedom of expression in Section 149.1(6.2) of the Act were "unnecessary and counter-productive" 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.[17]

26. The panel recommended that the Act be amended by:

> …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.[18]

The Applicant

27. CWP's objects are:

1. To relieve poverty in Canada by:

- Advancing the knowledge of, and the study of, poverty in Canada by organizing conferences and workshops on topics related to poverty;
- Undertaking and supporting research into factors that contribute to poverty and the most appropriate ways to mitigate these;
- 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;

[16] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at p. 16, [Application Record, v. 3, Tab 3(A), p. 780].
[17] *Ibid* at p. 5, [Application Record, v. 3, Tab 3(A), p. 769].
[18] *Ibid* at p. 6, [Application Record, v. 3, Tab 3(A), p. 770].

- 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

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

2. 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;

3. 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

4. To do all things incidental and ancillary to the attainment of the above objects.[19]

28. CWP's approach to the relief of poverty has been informed by the emergence of a global framework for the relief of poverty.[20] The first world conference to consider the issue of poverty and social development was held in Copenhagen in 1995 and was attended by the Government of Canada.[21] The *Copenhagen Declaration on Social Development* (the "Copenhagen Declaration") and *Programme of Action of the World Summit for Social Development* (the "Programme of Action") was adopted and signed by all States, including Canada.[22]

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[19] Affidavit of Leilani Farha sworn August 24, 2016 ["Farha Affidavit"] at para. 6 and Exhibit B: Certificate of Continuance, [Application Record, v. 1, Tab 2(B), p. 65].
[20] *Ibid* at para 9(b), [Application Record, v. 1, Tab 2, p. 18-19].
[21] *Ibid*, [Application Record, v. 1, Tab 2, p. 18-19].
[22] Farha Affidavit, Exhibit D: United Nations World Summit for Social Development, *Copenhagen Declaration on Social Development*, 14 March 1995, A/CONF.166/9 (1995) ["Copenhagen Declaration"] at para. 2, [Application Record, v. 1, Tab 2(D), p. 75].

29. The Copenhagen Declaration affirmed that "empowerment" of people living in poverty is a fundamental principle of all effective initiatives to address poverty. It stated:

> Empowerment requires the full participation of people in the formulation, implementation and evaluation of decisions determining the functioning and well-being of our societies;[23]

30. The Programme of Action emphasized that poverty is manifested both as lack of income and productive resources sufficient to ensure sustainable livelihoods and as "social discrimination and exclusion."[24] It stated that poverty "is also characterized by a lack of participation in decision-making and in civil, social and cultural life."[25]

31. This approach to poverty has been accepted within Canada. In 2009 comprehensive reviews of poverty reduction strategies were conducted by House of Commons and Senate Committees.[26] Their reports, submitted to Parliament, recommended that in order to ameliorate poverty in Canada, governments must make significant changes to laws and policies, working in partnership with organizations working on poverty issues and engage directly with people living in poverty.[27]

32. *The Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*, noted that successful poverty reduction strategies in other countries have involved participation by people living in poverty and that it is important to adopt "a broad understanding of poverty and social exclusion to address the root causes of these problems."[28]

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[23] Farha Affidavit, Exhibit D: Copenhagen Declaration at para. 26(o), [Application Record, v. 1, Tab 2(D), p. 80].
[24] Farha Affidavit, Exhibit E: Programme of Action of the World Summit for Social Developmentat para. 19, [Application Record, v. 1, Tab 2(E), p. 111].
[25] *Ibid* at para. 19, [Application Record, v. 1, Tab 2(E), p. 111].
[26] Farha Affidavit at para. 9(c), [Application Record, v. 1, Tab 2, p. 19].
[27] *Ibid* at para 9(c), [Application Record, v. 1, Tab 2, p. 19].
[28] *Ibid* at para. 25, Exhibit F: 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

The Committee recommended a "shift in perspective" in Canada so that reducing poverty involved partnership and consultation with community organizations and people living in poverty and significant changes to laws and policies.[29]

33. In reliance on these and many other international and Canadian studies, CWP has emphasized civic engagement and public dialogue with people living in poverty regarding changes to laws and policies for the effective relief of poverty.

34. On January 9, 2015, the CRA issued its report on the Political Activities Audit of CWP for the period April 1, 2009 to March 31, 2012. Based on its review of all communications and activities of CWP, CRA concluded that most of CWP's activities and projects involved communications to the public, including recommended changes to laws and policies.[30] The Charities Directorate issued to CWP a Notice of Intention to Revoke its charitable registration. The Charities Directorate subsequently agreed to take no further action for revocation until the Court has ruled on this challenge to the constitutionality of s. 149.1(6.2) of the Act.

35. Citing the jurisprudence dealing with the definition of "political activities" in charities law, CRA stated in its audit report that an activity or purpose is considered "political" where, *inter alia*, 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

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in Partnership Towards Reducing Poverty in Canada, 40th Parl., 3rd sess. (November 2010) ["Federal Poverty Reduction Plan"] at p. 90, [Application Record, v. 2, Tab 2(F), p. 262].

[29] Farha Affidavit at para. 25, Exhibit F: Federal Poverty Reduction Plan at p. 2, [Application Record, v. 2, Tab 2(F), p. 175].

[30] Farha Affidavit, Exhibit W: Letter from Daniel Davies to Leilani Farha, January 9, 2015 at p. 10, [Application Record, v. 3, Tab 2(W), p. 737].

pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government".[31]

36. The common feature of all of the activities considered to be "political activity" in excess of that permitted by Section 149.1(6.2) of the Act was that they all involved communications by CWP to the public about law reform or other public policy issues related to the relief of poverty. CWP's efforts to engage people living in poverty in democratic processes to relieve poverty in the manner recognized by the Copenhagen Declaration and other authorities as essential to the effective relief of poverty were found by CRA to place CWP in breach of Section 149.1(6.2) of the Act.

37. The list of communicative activities found to be impermissible political activity as the result of the application of Section 149.1(6.2) of the Act included a program called "Dignity for All: the Campaign for a Poverty-Free Canada", which the CRA found was impermissible political activity because:

> 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.
>
> **Policy Summit:**
>
> ….

[31] Farha Affidavit, Exhibit W: Letter from Daniel Davies to Leilani Farha, January 9, 2015 at p. 8, [Application Record, v. 3, Tab 2(W), p. 735]. In addition to *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue*, [1999] 1 S.C.R. 10 [Applicant's BOA, Tab 6], the key cases on which CRA relied are: *Action by Christians for the Abolition of Torture v. Canada* (2002), 225 D.L.R. (4th) 99 (Fed. C.A.) [Applicant's BOA, Tab 5]; *Positive Action Against Pornography* v. *M.N.R*, [1988] 2 F.C. 340, 1988 CanLII 5754 (Fed. C.A.), [Applicant's BOA, Tab 7]; *McGovern* v. *Attorney General*, [1982] 1 Ch. 321 (Ch. Div), [Applicant's BOA, Tab 8]; *Human Life International in Canada Inc.* v. *M.N.R.*, [1998] 3 F.C. 202 (Fed. C.A.), leave to appeal to the S.C.C. dismissed (1999), 236 N.R. 187 (S.C.C.) [Applicant's BOA, Tab 9]; and *Alliance For Life* v. *Canada* (*Minister of National Revenue*), [1999] 3 F.C. 504 (Fed. C.A.), [Applicant's BOA, Tab 10]. See also *N.D.G. Neighbourhood Association* v. *Revenue Canada, Taxation Department*, [1988] 2 C.T.C. 14 (Fed. C.A.) [Applicant's BOA, Tab 11] and *Scarborough Community Legal Services v. Her Majesty the Queen*, [1985] 2 F.C. 555, 1985 CanLII 3055 (Fed. C.A.), [Applicant's BOA, Tab 12].

> Based on our review of these publications, the recommendations contained therein are not limited to upholding existing human rights. Rather, it appears they are focused on advocating for the establishment of new legal rights by explicitly communicating to the public the law, policy or decision of any level of government in Canada or a foreign country ought to be retained, opposed or changed. For example, recommendations resulting from the March 2011 Summit on "Housing and Homelessness" include the following:
>
> - "Secure passage into law of an act to ensure secure, adequate, accessible and affordable housing for Canadians (similar to the 2009 proposed legislation, Bill C-304), which mandates the federal government to have a federal strategy on housing and the elimination of homelessness….;" and
>
> - "Amend the *Canadian Human Rights Act* to recognize economic, social and cultural rights, including the right to adequate housing, and include social condition as a prohibitive ground of discrimination."
>
> Based on our review of these recommendations, it is our position they are political activities. These recommendations form an integral part of the Campaign's "model federal plan to reduce and eventually eliminate poverty….". As such, it appears that the summits have been undertaken for the political purpose of formulating and recommending changes to laws, policies and decisions of government.[32]

38. The report also described an event entitled Dish on Dignity which "brought together low-income citizens, politicians and social justice representatives for an evening of conversation."[33] The CRA noted that the discussions over dinner between people with experiences of poverty, policy experts and politicians resulted in a report which publicized recommendations for legislative and policy change: [34]

> The list of recommendations contained in this report is expansive, and includes a number of actions that would require the government to make policy or legislative changes, such as: reforms to the [employment] insurance system, the creation of a nationally-funded housing program, the introduction of a national childcare system, and a federal act to eliminate poverty. These recommendations are political activities…. The Dish on Dignity event itself cannot be considered

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[32] Farha Affidavit, Exhibit W: Letter from Daniel Davies to Leilani Farha, January 9, 2015 at pp. 10, 12, [Application Record, v. 3, Tab 2(W), p. 737, 739].
[33] *Ibid* at p. 13, [Application Record, v. 3, Tab 2(W), p. 740].
[34] Farha Affidavit, Exhibit W: Letter from Daniel Davies to Leilani Farha, January 9, 2015 at p. 13, [Application Record, v. 3, Tab 2(W), p. 740].

> charitable as it appears to have been undertaken for the political purpose of seeking changes to government policy.[35]

39. In addition to its efforts to change laws and policies to improve the lives of those living in poverty, CWP has engaged in activities in furtherance of its mandate to combat the social exclusion and stigmatization of people living in poverty, which the CRA has deemed to be restricted "political" activities, including organizing and hosting policy summits with social policy experts;[36] offering an online course on international human rights;[37] issuing a questionnaire and survey to members of ethno-cultural communities which included guidance on how to advocate for the elimination of poverty;[38] and formulating a national strategy to alleviate poverty.[39]

40. A review of the audit findings of the CRA in the letter of January 9, 2015 demonstrates that the application of Section 149.1(6.2) by the CRA imposes restrictions on all expressive activity by CWP which explicitly communicates to the public that a law, policy or decision of any level of government should be changed or retained, or that encourages participation in democratic political processes to promote measures for the relief of poverty.[40] CWP finds that limiting this communicative activity to 10% of its activities as required by s. 149.1(6.2) is fundamentally at odds with achieving its charitable purpose.[41]

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[35] *Ibid* at p. 13, [Application Record, v. 3, Tab 2(W), p. 740].
[36] Farha Affidavit at para. 9(h), [Application Record, v. 1,Tab 2, p. 20-21].
[37] *Ibid* at para. 9(h), [Application Record, v. 1, Tab 2, p. 20-21].
[38] Farha Affidavit at para. 57, [Application Record, v. 1, Tab 2, p. 42].
[39] *Ibid* at para. 49, [Application Record, v. 1, Tab 2, p. 39-40].
[40] Farha Affidavit, Exhibit W: Letter from Daniel Davies to Leilani Farha, January 9, 2015 at p 8, [Application Record, v. 3, Tab 2(W), p. 735].
[41] Farha Affidavit at para. 70, [Application Record, v. 1, Tab 2, p. 47].

PART III - ISSUES AND THE LAW

Charter **guarantee of freedom of expression in Section 2(b)**

41. Section 2(b) of the *Charter* provides that "everyone" has the "freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication."[42]

42. The right to free expression is one of the four *Charter* freedoms designated as "fundamental". The free public expression of ideas is inherent in our democratic system. As the Supreme Court of Canada has stated:

> It [freedom of expression] is the foundation of a democratic society (see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.[43]

43. The Supreme Court of Canada has interpreted the right to free expression broadly. As long as the activity that is restricted "conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."[44] Accordingly, virtually any government restriction on the content of speech has been found to violate the

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[42] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. 2(b), [Applicant's BOA, Tab 13]. "Everyone" in section 2(b) includes individuals and organizations. See, for instance, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 *per* Cory, J. at p. 1339 [Applicant's BOA, Tab 14] and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 *per* La Forest, J. at p. 267, [Applicant's BOA, Tab 15].

[43] *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., [2002] 1 S.C.R. 156, *per* McLachlin, C.J. and LeBel, J. at pp. 172-173, para. 32, [Applicant's BOA, Tab 1].

[44] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 *per* Dickson, C.J. at p. 969, [Applicant's BOA, Tab 16].

right. Restrictions on hate speech,[45] pornography,[46] cigarette advertising,[47] and soliciting prostitution[48] have all been found to violate s. 2(b).

44. While section 2(b) protects all manner of expression, the Supreme Court has repeatedly held that political speech is "the single most important and protected type of expression."[49] It "lies at the core of the [*Charter*'s] guarantee of free expression."[50]

45. In *R. v. Keegstra*, Chief Justice Dickson identified the core importance of freedom of expression in the political process, in enhancing the dignity and equality of all Canadians and ensuring that each person has access to the democratic process. Chief Justice Dickson stated:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity.[51]

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[45] *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 *per* Rothstein, J. at p. 503, para. 62, [Applicant's BOA, Tab 17]; *R. v. Keegstra*, [1990] 3 S.C.R. 69 *per* Dickson, C.J. at p. 734, [Applicant's BOA, Tab 18]; *R. v. Zundel*, [1992] 2 S.C.R. 731 *per* McLachlin, C.J. at p. 753, [Applicant's BOA, Tab 19].
[46] *R. v. Butler*, [1992] 1 S.C.R. 452 *per* Sopinka, J. at pp. 488-489, [Applicant's BOA, Tab 20].
[47] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 *per* LaForest, J. at p. 267, [Applicant's BOA, Tab 15].
[48] *Reference re: ss. 193 and 195.1(1)(c) of The Criminal Code*, [1990] 1 S.C.R. 1123, *per* Dickson, C.J. at p. 1134, [Applicant's BOA, Tab 21].
[49] *Harper v. Canada* , [2004] 1 S.C.R. 827 *per* McLachlin C.J. and Major J. (dissenting in part) at p. 839, paras. 10-11, [Applicant's BOA, Tab 22].
[50] *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 p. 103, para. 16, [Applicant's BOA, Tab 23] citing *Harper v. Canada*, [2004] 1 S.C.R. 827 at para. 1 (see also *Harper v. Canada*, [2004] 1 S.C.R. 827 at paras. 10-11 and 21, [Applicant's BOA, Tab 22]*; R. v. Keegstra*, [1990] 3 S.C.R. 697 *per* Dickson C.J. at pp. 763-64, [Applicant's BOA, Tab 18]; *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877 *per* Bastarache, J. at p. 944, para. 92, [Applicant's BOA, Tab 24].
[51] *R. v. Keegstra*, [1990] 3 S.C.R. 697 *per* Dickson C.J. at pp. 763-764, [Applicant's BOA, Tab 18].

46. As noted by McLachlin C.J. and Major J. in *Harper v. Canada*:

> 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." [emphasis in original]
>
> [. . .]
>
> 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.[52]

Section 149.1(6.2) of the Act Violates Section 2(b) of the *Charter*

47. The Supreme Court of Canada's approach to assessing whether 2(b) has been violated was established in *Irwin Toy*: "With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee."[53]

48. The Court must ask, first, whether the form of expression at issue is protected by s. 2(*b*) and, second, whether the purpose or effect of the impugned legislation is to restrict that form of expression.[54] In the present case, the form of communication subject to restrictions under s.149.1(6.2) is the public dissemination, through emails, workshops, lectures, website postings, speeches, publications or public events, of any recommendations for changes to laws and

[52] *Harper v. Canada*, [2004] 1 S.C.R. 827 *per* McLachlin C.J. and Major J. (dissenting in part) at p. 841, paras. 15-16, [Applicant's BOA, Tab 22].
[53] *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927, *per* Dickson, C.J. at p. 976, [Applicant's BOA, Tab 16].
[54] *Irwin Toy Ltd.*, *supra*, *per* Dickson, C.J. at pp. 967-969, 971-974

policies to advance the purpose of the relief of poverty. Such communications certainly fall within the Supreme Court's broad definition of protected expression.

49. The second step is to determine whether the purpose or effect of the impugned provision is to control attempts to convey meaning through that activity, either based on its content or the form of expression tied to content. Both the purpose and effect of s. 149.1 (6.2) of the Act are to restrict the public dissemination of any materials whose content includes recommendations for changes to laws and policies. S. 149.1 (6.2) therefore controls a form of expression conveying a particular content or meaning. The provision imposes severe limits on CWP's ability to engage in the communal exchange of ideas and participation in social and political decision-making. Such restrictions violate section 2(b).

50. It is important to emphasize that CWP does not challenge any restrictions on the types of purposes accorded the benefit of charitable status. It challenges statutory restraints on activities recognized as charitable and ancillary to an accepted charitable purpose based on their form (publicly disseminated) and their content (recommending changes to laws and policies).

51. The present case is distinguishable from the Federal Court of Appeal's 1998 decision in *Human Life International In Canada Inc. v. MNR* [55] and the Federal Court's 1999 decision in *Alliance for Life v. MNR* which applied it.[56] In *Human Life International* charitable status was denied for an anti-abortion group because the Court held that "whether the propagation of such views is beneficial to the community and thus worthy of temporal support through tax

[55] [1998] 3 F.C. 202 at p. 220-221 (F.C.A.), leave to appeal to the S.C.C. dismissed (1999), 236 N.R. 187 (S.C.C.), [Applicant's BOA, Tab 9].
[56] [1999] 3 F.C. 504 at para. 73, [Applicant's BOA, Tab 10].

exemption would be essentially a political determination and is not appropriate for a court to make."[57] In that context the Court held that s. 149.1(6.2) did not violate s. 2(b) because s. 2(b) could not be used as a "guarantee of public funding through tax exemptions" for particular political opinions.[58] CWP makes no claim to a guarantee of tax exemptions for a political view or purpose and does not ask the Court to assess whether changes to laws and policies for the relief of poverty are beneficial to the public. The benefit of recognizing the relief of poverty as a charitable purpose is well accepted and uncontroversial and Parliament has accepted that advocacy for changes to laws and policies for this purpose may be considered charitable activity. In the present case, CWP is challenging restrictions on expressions within an existing statutory scheme or platform.

52. The Supreme Court in *Greater Vancouver Transportation Authority v. Canadian Federation of Students* emphasized the distinction between a claim to government support for an expressive activity and a challenge to a restriction of freedom of expression within an existing platform.[59] The government cannot restrict the *content* of expression within an existing statutory platform without violating s. 2(b):

> The advertisements were rejected on the basis of their political content, not on the basis that the advertising service was not available to the respondents.
>
> […]
>
> The [claimants] seek the freedom to express themselves – by means of an existing platform they are entitled to use – without undue state interference with the content of their expression. They are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded.

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[57] *Human Life International in Canada v. M.N.R., supra* at p. 218, para. 13, [Applicant's BOA, Tab 9].
[58] *Ibid* at para. 18, pp. 220-221, [Applicant's BOA, Tab 10].
[59] [2009] 2 S.C.R. 295 [*Greater Vancouver Transportation Authority*], [Applicant's BOA, Tab 25].

> […]
>
> I therefore conclude that since the transit authorities policies limit the respondents' right to freedom of expression under s.2(b), the government must justify that limit under s. 1 of the *Charter*.[60]

53. In the present case, the statutory benefit of charitable status is provided to organizations (like CWP) with a recognized charitable purpose and not to other organizations with political purposes that are not recognized as charitable. Section 149.1(6.2) permits expressive activity that advances CWP's charitable purpose but restricts certain forms of public expressions of recommendations for the relief of poverty based on their content. Campaigns to encourage private employers to voluntarily agree to pay a living wage, for example, are not subject to any restriction because they do not seek to change laws or policies of any level of government. A public campaign to encourage a government to change minimum wage laws to ensure a minimum wage, on the other hand, is subject to restrictions. Restrictions on the content of political speech within an existing statutory platform is a clear violation of s. 2(b).

54. As noted in the report of the Minister's Consultation Panel Report, the restrictions on public communications of charities based on content are not imposed on other types of corporate entities, regardless of any tax benefits or subsidies they may receive. The Panel heard during its consultations from organizations such as the Pemsel Case Foundation that "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."[61] The Panel concluded that enabling

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[60] *Greater Vancouver Transportation Authority per* Deschamps, J. at pp. 315-316, para. 31,pp. 317-318, para. 35, and p. 322, para. 47, [Applicant's BOA, Tab 25].

[61] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at p. 15, [Application Record, v. 3, Tab 3(A), p. 779]

charities to fully participate in public policy dialogue and development to advance accepted charitable purposes "would remove the current disadvantage faced by the charitable sector vis-à-vis for-profit companies which can advocate in the public policy arena without restriction."[62]

55. The fact that CWP could theoretically enjoy freedom of expression by relinquishing the benefit of charitable status does not mean its 2(b) rights have not been violated. CWP places substantial reliance on its charitable status to survive as an organization so the option of relinquishing its status would not, in fact, allow it to promote its charitable purpose of relief of poverty in Canada free of restrictions on public communications.[63]

56. The situation in this case is akin to *Osborne v. Canada (Treasury Board)*, in which the Supreme Court of Canada considered the constitutionality of section 33 of the *Public Service Employment Act*, which prohibited public servants from engaging in partisan political activity. Even though public servants could engage in partisan political activities if they simply decided to work outside the federal public service, the Supreme Court nonetheless held that "there was little doubt" that the legislation violated the right to freedom of expression in s. 2(b) of the *Charter*.[64]

57. Moreover, governments are not relieved of their obligations to comply with the *Charter* simply by providing the option of relinquishing a statutory benefit. If that reasoning were

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[62] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at p. 18-19, [Application Record, v. 3, Tab 3(A), p. 782-783]

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

[64] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 *per* Sopinka, J. at pp. 88-89, [Applicant's BOA, Tab 26].

accepted, governments would be immune from *Charter* scrutiny in a wide range of benefit programs and legislation.

Section 1 of the *Charter*

58. If it is determined that a *Charter* right has been infringed, it must be determined, pursuant to section 1, whether the infringement is a justified limit in a free and democratic society. The onus of demonstration shifts to the government to show that on a balance of probabilities the limits it has imposed on a *Charter* right are reasonable. Prior to receiving the Respondent's submissions on section 1, the Applicant will address only general principles to be applied in this case.

59. The section 1 inquiry is premised on an understanding that the impugned limit violates constitutional rights and freedoms which are part of the supreme law of Canada.[65] In conducting the section 1 inquiry:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[66]

As noted by Justice Cory for the plurality in *Edmonton Journal v. Alberta*: "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of

[65] *R. v. Oakes*, [1986] 1 S.C.R. 103 *per* Dickson, C.J. at p. 135, [Applicant's BOA, Tab 27].
[66] *R. v. Oakes*, [1986] 1 S.C.R. 103 *per* Dickson, C.J. at p. 136, [Applicant's BOA, Tab 27].

expression….It seems that the rights enshrined in section 2(b) should therefore only be restricted in the clearest of circumstances."[67]

60. For limitations on political speech to be justified under Section 1 of the *Charter* 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**.[68]

(a) Pressing and Substantial Objective

61. Identifying the objective of a provision for the purposes of section 1 "requires a consideration of what the provision actually does, as well as documentary evidence as to what the legislator thought it was doing. Moreover, the relevant purpose is the purpose specific to the provision which limits the *Charter* right. But the purpose must, nevertheless, be articulated abstractly because a purpose is a goal or outcome which, by definition, may be achieved in different ways."[69]

62. Based on the statements of the Minister and other government representatives when the amendment was introduced in 1985, the wording of the statute, and the broader context of the evolving recognition of the importance of charities' engagement in public policy and law reform activities, the objective of s. 149.1(6.2) is to enable charities to participate in public policy dialogue and development where these activities advance their charitable purposes, while ensuring that charitable status is not extended to groups to advocate for non-charitable political purposes.

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[67] *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 at p. 1336, [Applicant's BOA, Tab 14].
[68] *B.C. Freedom of Information and Privacy Association v. Attorney General of British Columbia*, [2017] 1 S.C.R. 93 *per* McLachlin, C.J. pp. 103-104, at para. 16 (emphasis added), [Applicant's BOA, Tab 23].
[69] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 *per* Bastarache, J. at pp. 968-969, para. 125,[Applicant's BOA, Tab 24].

63. Assuming, without conceding, that this objective is sufficiently important to satisfy the first stage of the *Oakes* test, the Applicant submits that the means by which the objective has been pursued does not satisfy the second stage, the three-step proportionality test.

(b) Rational Connection

64. The rational connection requirement is satisfied only if the restriction of a *Charter* right is "carefully designed to achieve the objective in question . . . [and] not … arbitrary, unfair or based on irrational considerations."[70] Section 149.1(6.2) of the Act does not meet that standard.

65. That s. 149.1(6.2) allows unlimited political speech in the government's preferred forum makes plain the arbitrary nature of the restrictions it imposes on free expression. It allows a group to devote most of its resources to advocating legislative changes directly to Parliament or government officials (so long as those activities were in service of a charitable purpose). However, an organization that devoted a mere 15% of its resources to expressing precisely the same recommendations to the public, in service of the same charitable purpose, would be subject to deregistration.

66. Rational connection should also be assessed in light of the recognized importance of participation by those living in poverty in any effective measures to relieve poverty. Restrictions on CWP's ability to encourage civic engagement and public policy dialogue involving people living in poverty interfere with (and do not support) the advancement of CWP's charitable purpose. The provision as currently written is therefore not rationally connected to its objective of ensuring that charitable status is restricted to groups with a charitable rather than political purpose.

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[70] *R. v. Oakes*, [1986] 1 S.C.R. 103 *per* Dickson, C.J. at p. 139, [Applicant's BOA, Tab 27].

(c) Minimal Impairment

67. To satisfy the minimal impairment requirement, the restriction of *Charter* rights "must be 'reasonably tailored to its objectives' or 'impair the right no more than reasonably necessary.'"[71] The test at the minimum impairment stage is "whether there is an alternative, less drastic means of achieving the [government's] objective in a real and substantial manner."[72]

68. Contextual factors affect the degree of deference owed to Parliament's choice of a particular means to achieve its objective, and "little deference should be shown … where . . . the government has not established that the harm which it is seeking to prevent is widespread or significant."[73]

69. The record in this case fails entirely to establish that unlimited public communications by charities of recommendation for the reform of laws or policies, as a means of pursuing their charitable purpose, would lead to widespread harm which must be curtailed by appropriate legislation. Rather than protecting the interests of marginalized and vulnerable groups, the impugned provision exacerbates social and political exclusion and stigmatization linked to poverty. It creates an unlevel playing field in public policy debate by imposing restrictions on charities seeking to facilitate political participation by those living in poverty that are not imposed on for-profit organizations advancing the interests of those who are more affluent. Accordingly, little deference is owed to Parliament's choice to restrict public communications

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[71] *Vann Media Group Inc. v. Oakville (Town)*, 2008 ONCA 752 *per* Rouleau, J.A. at para. 42, [Applicant's BOA, Tab 28].
[72] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 *per* McLachlin C.J. at p. 597, para. 55, [Applicant's BOA, Tab 35].
[73] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 *per* Bastarache, J. at p. 963, para. 118, [Applicant's BOA, Tab 24].

of registered charities suggesting changes to laws and policies to advance their charitable purpose.

70. As noted by the Minister's Consultation Panel Report, other common law countries seeking to achieve a similar objective have not found it necessary to restrict public communications of recommendations for laws and policies in the manner of s. 149.1(6.2) :

> … the United Kingdom, Australia and New Zealand all have similar common law jurisdictions, and have adopted more permissible rules around public policy dialogue and development, focusing their restrictions, if any, on political purposes rather than activities.[74]

71. Even if some measure of deference were owed, it is clear that s. 149.1(6.2) is not reasonably tailored and that it impairs rights more than is reasonably necessary. Indeed, the Minister's Consultation Panel Report has proposed a minimally impairing amendment to s. 149.1(6.2):

> Amend the ITA by deleting any reference to non-partisan "political activities" to explicitly 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. [75]

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[74] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at p. 11 [Application Record, v. 3, Tab 3(A), p. 775]. See *Charities Act 2011* (U.K.) c. 25, ss. 1-4 [Applicant's BOA, Tab 29] and the *Charity Commission for England and Wales Guidance: Campaigning and political activity guidance for charities* (CC9) at pp. 2, 4, 8-14 [Applicant's BOA, Tab 30]; *Australian Charities and Not-for-profits Commission Act 2012* No. 168, 2012, at s. 45-10 (6) [Applicant's BOA, Tab 31] and *Charities Act 2013* (Australia) No. 100, 2013 ss. 5, 7(c), 11-12 [Applicant's BOA, Tab 32]; *Charities Act 2005* (New Zealand) No. 93 s. 5(3) [Applicant's BOA, Tab 33]. See also *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42, pp. 17-19 at paras. 44-49 (High Court of Australia), [Applicant's BOA, Tab 34].

[75] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at p. 6 [Application Record, v. 3, Tab 3(A), p. 770].

(d) Proportionality Between Effects and Objective

72. At the final step of the *Oakes* test, the salutary effects of the restriction must be shown to outweigh its deleterious effects. It is at this stage of the proportionality analysis that the severity of the effects on protected rights must be fully taken into account.[76]

73. As outlined in the discussion of section 2(b), *supra*, political speech is the single most important and protected type of expression. Moreover, the effect of the restriction on organizations like CWP is significant.[77]

74. Additionally, this limitation does not "enhance rather than harm the democratic process."[78] In fact it harms the free political expression which is central to the democratic process in Canada, deprives the democratic process of the valuable contributions of charities such as CWP, and creates an unlevel playing field by imposing restrictions on charities that are not imposed on other types of organizations.

75. Furthermore, in determining whether the limits on a *Charter* right imposed by Section 1 are justified, a court must consider that the Court is "conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."[79]

76. As noted further by Chief Justice Dickson in *R.* v. *Keegstra:*

> As noted in *Big M Drug Mart*, promoting equality is an undertaking essential to any free and democratic society, and I believe that the words of McIntyre, J.

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[76] *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 *per* McLachlin, J. at p. 605, para 76, [Applicant's BOA, Tab 35].
[77] *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10 *per* Iacobucci, J. at pp. 92-93, para. 128, [Applicant's BOA, Tab 6].
[78] *B.C. Freedom of Information and Privacy Association vs. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93 *per* McLachlin, J. at p. 103, para. 16, [Applicant's BOA, Tab 23].
[79] *R v. Oakes, supra, per* Dickson, C.J. at pp. 134-135 [Applicant's BOA, Tab 27].

> support this position. The principles underlying Section 15 of the *Charter* are thus integral to the s.1 analysis.[80]

77. CWP seeks to involve persons living with poverty in the development of solutions to poverty in Canada, and to counter the stigmatization and exclusion characteristic of persons in poverty. Restrictions on activities that serve that purpose contribute to the perpetuation of poverty and social exclusion which Canada has committed to combat in its endorsement of the Program of Action.

78. Indeed, the Minister's own Consultation Panel Report has concluded that the current legislative restrictions on the political activities of charities under Section 149.1(6.2):

> are confusing, costly to quantify and track, and do not address the substantive issue of ensuring charities are operating for recognized charitable purposes [….] It is the view of the Panel that the characterization of what constitutes 'political activities', and the limitations imposed on charities in this regard, impede the sector's participation in public policy dialogue and development, and do a disservice to Canadians, while offering no offsetting regulatory benefit.[81]

79. Accordingly it is clear, based on the conclusions of the Consultation Panel Report, that the deleterious effect of s. 149.1(6.2) on freedom of expression and the democratic process is substantial. That harm exceeds any benefit achieved by the limitation imposed on CWP's communication with the public concerning the reform of laws and policies to further its charitable purpose.

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[80] *R. v. Keegstra*, [1990] 3 S.C.R. 697 *per* Dickson, C.J. at p. 756, [Applicant's BOA, Tab 18].
[81] Affidavit of Katherine Stubits sworn May 26, 2017, Exhibit A: Minister's Consultation Panel Report at pp. 23 and 26, [Application Record, v. 3, Tab 3(A), p. 787, 790].

PART IV - ORDER REQUESTED

80. For the reasons set out above, s. 149.1(6.2) violates s. 2(b) of the *Charter* and is not saved by s. 1. In the circumstances, the appropriate remedy is a declaration that s. 149.1(6.2) is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.[82]

81. This declaration of invalidity should be suspended for twelve months to allow Parliament to re-enact s. 149.1(6.2) in a manner that does not violate s. 2(b) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2018.

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[82] *Canada v. Bedford* [2013] 3 S.C.R. 1101, per McLachlin, C.J. at p. 1165, para. 169, [Applicant's BOA, Tab 36].

SCHEDULE "A"
LIST OF AUTHORITIES

1. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156

2. *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R 791

3. *Symes v. Canada* [1993] 4 S.C.R. 695

4. *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134

5. *Action by Christians for the Abolition of Torture v. Canada*, (2002) 225 D.L.R. (4th) 99 (Fed. C.A.)

6. *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue*, [1999] 1 S.C.R. 10

7. *Positive Action Against Pornography* v. *M.N.R*, 1988 CanLII 5754 (Fed. C.A.)

8. *McGovern* v. *Attorney General*, [1982] 1 Ch. 321 (Ch. Div)

9. *Human Life International in Canada Inc.* v. *M.N.R.*, [1998] 3 F.C. 202 (Fed. C.A.), leave to appeal to the S.C.C. dismissed (1999), 236 N.R. 187 (S.C.C.)

10. *Alliance For Life* v. *Canada* (Minister of National Revenue), [1999] F.C. 504 (Fed. C.A.)

11. *N.D.G. Neighbourhood Association* v. *Revenue Canada, Taxation Department*, [1988] 2 C.T.C. 14 (Fed. C.A.)

12. *Scarborough Community Legal Services* v. *Her Majesty the Queen*, 1985 CanLII 3055 (Fed. C.A.)

13. *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

14. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326

15. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199

16. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

17. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11

18. *R. v. Keegstra*, [1990] 3 S.C.R. 697

19. *R. v. Zundel*, [1992] 2 S.C.R. 731

20. *R. v. Butler*, [1992] 1 S.C.R. 452

21. *Reference re: ss. 193 and 195.1(1)(c) of The Criminal Code*, [1990] 1 S.C.R. 1123

22. *Harper v. Canada* , [2004] 1 S.C.R. 827

23. *B.C. Freedom of Information and Privacy Association v. Attorney General of British Columbia*, [2017] 1 S.C.R. 93

24. *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877

25. *Greater Vancouver Transportation Authority*, [2009] 2 S.C.R. 295

26. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69

27. *R. v. Oakes*, [1986] 1 S.C.R. 103

28. *Vann Media Group Inc. v. Oakville (Town)*, 2008 ONCA 752

29. *Charities Act 2011* (U.K.) c. 25

30. *Charity Commission for England and Wales Guidance: Campaigning and political activity guidance for charities* (CC9)

31. *Australian Charities and Not-for-profits Commission Act 2012* No. 168, 2012

32. *Charities Act 2013* (Australia) No. 100, 2013

33. *Charities Act 2005* (New Zealand) No. 93

34. *Aid/Watch Incorporated v. Commissioner of Taxation*, [2010] HCA 42 (High Court of Australia)

35. *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567

36. *Canada v. Bedford* [2013] 3 S.C.R. 1101

SCHEDULE "B"
RELEVANT STATUTES

***Income Tax Act*, RSC 1985, c 1 (5th Supp), ss. 149.1(1) and (6.2)**

Section 149.1(1) of the Act states:

Charitable organization, … means an organization, …

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

Charitable activities

(6.2) For the purposes of the definition charitable organization in subsection 149.1(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

(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.

***The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, ss. 1, 2(b), and 52(1)**

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:
    (a) freedom of conscience and religion;
    (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
    (c) freedom of peaceful assembly; and
    (d) freedom of association.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

CANADA WITHOUT POVERTY Applicant	and	ATTORNEY GENERAL OF CANADA Respondent	Court File No.: CV-16-559339

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

FACTUM OF THE APPLICANT, CANADA WITHOUT POVERTY
(returnable APRIL 23, 2018)

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