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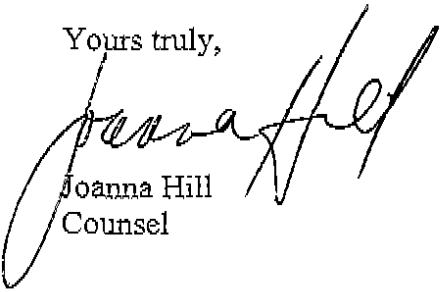
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Dear Sirs:

Re: Canada Without Poverty v. Attorney General of Canada
Court Number: CV - 16-559339 - Justice File: 8681807

Enclosed please find the Respondent's Memorandum of Fact and Law, served upon you pursuant to the *Rules of Civil Procedure*.

Yours truly,



Joanna Hill
Counsel

c.c. Canada Revenue Agency
Josée Tremblay, Department of Justice

Court File No.: CV-16-559339

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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*

**RESPONDENT'S MEMORANDUM OF FACT AND LAW
(returnable April 23, 2018)**

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Court File No.: CV-16559339

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CANADA WITHOUT POVERTY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

OVERVIEW

1. The applicant's activities are primarily designed to sway government policies and legislation relating to poverty, a social issue. Although Canada Without Poverty framed its application on the premise that subsection 149.1(6.2) of the *Income Tax Act* infringes its constitutional right to freely express itself, the true nature of its application is a demand for financial support from the state. The applicant seeks to maintain access to the tax benefits of "registered charity" status under the *Income Tax Act*, specifically the ability to issue tax receipts as an incentive to donors.
2. No legislation or government actions prevent or prohibit the applicant from expressing itself by advocating for changes in policy and legislation. The applicant is a not-for-profit corporation constituted under and regulated by the *Canada Not-for-profit Corporations Act*. As a corporate entity, Canada Without Poverty is permitted to conduct its expressive activities without restriction, regardless of its tax treatment under the *Income Tax Act*.

3. The applicant claims that its freedom of expression is violated by subsection 149.1(6.2), a provision that was enacted to permit a “registered charity” to conduct limited non-partisan political activities within a statutory tax scheme that otherwise does not consider political purposes or activities to be charitable. If Canada Without Poverty does not fall within that exception, the sole effect is that it may be excluded from this statutory tax scheme.
4. As the Federal Court of Appeal stated in *Human Life International*:¹

Essentially its argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. [...] The appellant is in no way restricted by the *Income Tax Act* from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held.
5. Freedom of expression does not require the government to subsidize Canada Without Poverty’s activities. The present claim is not an exceptional case which requires such positive government action.

¹ *Human Life International Inc. v MNR*, 1998 CarswellNat 366, [1998] FCJ No 365 (FCA), (“*Human Life International*”), para 18. Applicant’s Brief of Authorities (“Applicant’s BOA”), Tab 9.

PART I – STATEMENT OF FACTS

6. Canada Without Poverty is a not-for-profit corporation constituted under the *Canada Not-for-profit Corporations Act*.² It engages in political activities because it advocates for changes to government policies and legislation related to the elimination of poverty.³ This “public advocacy interest” is a critical component of the applicant’s work.⁴
7. Canada Without Poverty, a legal person, has the capacity and the ability to conduct its political activities as of right, irrespective of its tax treatment under the *Income Tax Act*. However, the organization asserts that it relies primarily on charitable donations to operate.⁵ The applicant’s Executive Director outlined the organization’s concerns relating to how its funding will be obtained. She stated that the applicant would not be able to operate without the ability to issue tax receipts to solicit donations, that is to say, if the applicant no longer qualifies as a “registered charity” under the *Income Tax Act*.⁶
- A. The tax benefits of charitable registration under the *Income Tax Act***
8. The Canadian charitable sector consists of approximately 170,000 organizations.⁷ These organizations are funded by various sources, including income from the sale of products and services, government funding and foundation grants, membership fees, and individual or corporate donations.⁸

² Affidavit of Leilani Farha, Amended Application Record of the Applicant (“AAR”), Volume 1, Tab 2, (“Farha Affidavit”), p 16, para 4, and Exhibit B: Certificate of Continuance of Canada Without Poverty under the *Canada Not-for-profit Corporations Act* and other materials.

³ *Ibid*, para 9(a), AAR, Vol 1, Tab 2, p 18. Cross-Examination of Leilani Farha, AAR, Vol 6, Tab 6, (“Farha Cross-Examination”), Questions 90-94, pp 1475-1477.

⁴ Farha Affidavit, *supra* note 2, paras 9(a) and para 13, AAR, Vol 1, Tab 2, pp 18 & 23.

⁵ *Ibid*, para 8, AAR, p 18. Factum of the Applicant, para 55.

⁶ Farha Cross-Examination, *supra* note 3, Questions 252-254, AAR, Vol 6, pp 1537-1538.

⁷ Affidavit of Daniel Davies-Ostrom, AAR, Vol 5, Tab 5 (“Davies-Ostrom Affidavit”), para 1 and Exhibit “1”: Imagine Canada Sector Impact.

⁸ *Ibid*.

9. From the total number of organizations composing the charitable sector, approximately 86,000 have applied for and obtained “registered charity” status under the *Income Tax Act*.⁹ The “registered charity” status provides two significant tax benefits.¹⁰ First, registered charities are exempt from paying tax on income. Second, registered charities are entitled to issue tax receipts to their donors, an incentive which also benefits registered charities through increased funding.
10. The costs to the Canadian taxpayers of granting these tax benefits are significant.¹¹ In 2011, the costs of the individual tax credits and corporate deductions were estimated at \$2.9 billion, and in 2014, the individual tax credit alone amounted to more than \$2.5 billion in foregone federal tax revenue.¹²
11. Parliament has restricted the availability of those tax benefits to organizations that have exclusively charitable purposes and activities. Since the *Income Tax Act* does not define charitable purposes or charitable activities, the Canada Revenue Agency relies on the four common law heads of charity to determine whether the purposes and activities of a taxpayer qualify for registration under the *Income Tax Act*.¹³ The common law requires that a charitable purpose fall in at least one of these categories: the relief of poverty, the advancement of education, the advancement of religion, or the residual category of other purposes beneficial to the community.

⁹ *Ibid*, para 3, Exhibit “2”: Government of Canada “Charities Program Facts and Figures”.

¹⁰ *Ibid*, para 4.

¹¹ *Ibid*, para 5.

¹² *Ibid*, Exhibit “3”: Chapter 1 of the House of Commons Standing Committee on Finance Report, “Tax Incentives for Charitable Giving in Canada”, dated February 11, 2013, and Exhibit “4”: excerpt of Part 2 of the Department of Finance Report, “Tax Expenditures and Evaluations 2014”.

¹³ *Ibid*, para 7.

B. Subsection 149.1(6.2) allows registered charities to conduct ancillary and incidental political activities

12. On February 13, 1986, Parliament amended the *Income Tax Act* to add subsection 149.1(6.2).¹⁴ The provision as originally enacted read as follows:

149.1(6.2). For the purposes of paragraph (1)(b), 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) such political activities are ancillary and incidental to its charitable activities, and
- (c) such 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.

13. As outlined in the Department of Finance Technical Notes, subsection 149.1(6.2) was enacted to permit registered charities to engage in non-partisan political activities that are ancillary and incidental to their charitable purposes or activities:¹⁵

At present, the Act requires a charitable foundation to be constituted and operated exclusively for charitable purposes and requires all the resources of a charitable organization to be devoted to charitable activities carried on by the organization itself. A registered charity which engages in political activities therefore risks losing its tax-exempt status. These amendments recognise that it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals. These activities would include advertising, rental of facilities or mass mailings to influence public opinion to support the charity's views on matters of law or government policy related to its charitable purposes. Under the present law a charity may, without restriction, provide information

¹⁴ Affidavit of Zachary Euler, AAR, Volume 4, Tab 4 ("Euler Affidavit"), para 22. Subsection 149.1(6.1) also was enacted to apply to charitable foundations. *An Act to amend the Income Tax Act and related statutes*, 33-34-35 Elizabeth II, SC 1986, c 6, section 85(2), RBA, Tab 3.

¹⁵ Department of Finance Technical Notes, November 1985, Euler Affidavit, *supra* note 14, para 23, Exhibit "9", AAR, Vol 4.

and express its views in briefs to government to change laws or policies. These amendments do not alter this position. However, purely partisan activities such as supporting or opposing a political party or candidate will not be permitted.

C. The federal government's current review of the rules on political activities

14. In 2015, one of the priorities identified in the Prime Minister's mandate letter addressed to the Minister of National Revenue was to clarify the rules governing political activities, with the understanding that registered charities make an important contribution to public policy.¹⁶
15. In 2016, the Minister of National Revenue launched public consultations on the rules regarding the involvement of registered charities in political activities.¹⁷ An online consultation was conducted inviting the participation of all registered charities and the public in general. In-person consultations were also conducted across Canada with representatives from various registered charities.
16. The Consultation Panel appointed by the Minister of National Revenue used the results of those consultations in preparing its "Report of the Consultation Panel on the Political Activities of Charities".¹⁸ In its Report, the Consultation Panel made recommendations aimed at changing the provisions of the *Income Tax Act* and the administrative policy of the CRA related to the conduct of political activities by registered charities. In addition, the Consultation Panel suggested that the registered charity statutory regime as a whole required changes.¹⁹

¹⁶ Euler Affidavit, *supra* note 14, AAR, Vol 4, Tab 4, para 44.

¹⁷ *Ibid.*, para 46, Exhibit "21": News Release dated September 27, 2016, and Exhibit "22": CRA web page "The Canada Revenue Agency's online consultation on charities' political activities".

¹⁸ Supplementary Affidavit of Zachary Euler, Respondent's Application Record ("RAR"), Volume 1, Tab 1, ("Euler Supplementary Affidavit"), paras 3-4.

¹⁹ *Ibid.*, Exhibit "B": Report of the Consultation Panel on the Political Activities of Charities, Executive Summary.

17. The federal government will be providing a response to the Consultation Panel Report in the coming months.²⁰
18. Contrary to allegations made by Canada Without Poverty,²¹ the scope of the consultations and the government's review has never been stated in terms of "recognizing problems with the Act's restrictions on the freedom of expression of charities".²² In addition, the Consultation Panel was not mandated to determine whether subsection 149.1(6.2) violates freedom of expression, and it did not make any findings in this regard.

D. Canada Without Poverty is an advocate for policy and legislative changes

19. Canada Without Poverty was incorporated as the National Anti-Poverty Organization (NAPO) on June 13, 1973, and was registered as a "charitable organization" under the *Income Tax Act* effective October 25, 1973.²³
20. In a recent audit, the CRA determined that Canada Without Poverty conducted political activities in seeking to retain, oppose, or change poverty-related laws, policies, or decisions of governments, and that the organization's goals could only be achieved through political intervention and legislative change.²⁴ The CRA concluded that the extent of Canada Without Poverty's political activities demonstrates that the organization is pursuing a political purpose.²⁵ On January 9, 2015, the CRA informed Canada Without Poverty of its findings.²⁶

²⁰ Second Supplementary Affidavit of Zachary Euler, RAR, Vol 9, Tab 2 ("Euler Second Supplementary Affidavit"), para 4, Exhibit "B".

²¹ Factum of the Applicant, paras 11, 12 and 25.

²² Euler Affidavit, *supra* note 14, para 46, AAR, Vol 4, Exhibit "21": News Release dated September 27, 2016; Euler Supplementary Affidavit, *supra* note 18, RAR, Exhibit "A": Consultation Panel on the Political Activities of Charities Terms of Reference, and Exhibit "B": Report of the Consultation Panel on the Political Activities of Charities.

²³ Davies-Ostrom Affidavit, *supra* note 7, para 22, AAR, Vol 5, Tab 5.

²⁴ *Ibid*, AAR, Vol 5, Exhibit "20": Letter to Canada Without Poverty from the Charities Directorate, pp 1266 & 1272.

²⁵ *Ibid*.

²⁶ *Ibid*, Exhibit "20".

21. On August 25, 2016, Canada Without Poverty filed the present application challenging the constitutionality of subsection 149.1(6.2) of the *Income Tax Act*.
22. On October 27, 2016, the Minister of National Revenue issued a Notice of Intention to Revoke informing Canada Without Poverty that its registration as a charitable organization will be revoked.²⁷ The organization exercised its right under the *Income Tax Act* to dispute this decision by serving a notice of objection on the Minister of National Revenue.²⁸ The objection is in abeyance pending a decision of this Court on this application.

PART II – STATEMENT OF ISSUES

23. The issues before the Court are whether Canada Without Poverty has established that subsection 149.1(6.2) of the *Income Tax Act* infringes freedom of expression under s. 2(b) of the *Charter* and, if a violation has been established, whether it is justified under s. 1 of the *Charter*.

PART III - SUBMISSIONS

A. The tax benefits of “registered charity” status under the *Income Tax Act*

24. In determining whether subsection 149.1(6.2) of the *Income Tax Act* infringes on the applicant’s freedom of expression under s. 2(b) of the *Charter*, it is necessary to properly interpret the provision and the registered charity statutory scheme as a whole.²⁹
25. Under the *Income Tax Act*, not-for-profit corporations are considered taxpayers and will be treated differently for tax purposes depending on their purposes and activities. Some not-for profit corporations will be taxable, and others will be tax-

²⁷ *Ibid*, AAR, Vol 6, Exhibit “27”. Contrary to the characterization contained in paragraph 34 of the Factum of the Applicant, it was not a “political activities audit”.

²⁸ *Ibid*, para 61, AAR, Vol 5, Tab 5.

²⁹ *Haig et al. v The Queen et al.*, [1993] 2 SCR 995, 1993 CarswellNat 2353, (“*Haig*”) para 31. RBA, Tab 5. See also *Siemens v Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 SCR 6, paras 12-18.

exempt under the *Income Tax Act* as “non-profit corporations”.³⁰ Others will qualify as “registered charities” and will not only be exempted from tax but will also be entitled to issue tax receipts to donors.

26. While the definition of “charity” rests with the common law, registered charities are a creature of statute. In determining whether an organization qualifies as a “registered charity” under the *Income Tax Act*, the Supreme Court of Canada outlined a test which takes into account both the common law meaning of “charity” and the statutory definition of “charitable organization”.³¹ An organization needs to meet two requirements to qualify as a “charitable organization”:³²

- (1) The purposes of the organization must be charitable, and must define the scope of the activities engaged in by the organization; and
- (2) All of the organization’s resources must be devoted to these activities, unless the organization falls within specific statutory exceptions, such as subsection 149.1(6.2).

Political purposes are not charitable at common law

27. To meet the requirement that the organization must be charitable, the organization’s purpose must fall under at least one of the four common law heads of charity: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; and (4) other purposes beneficial to the community, not falling under any of the other heads.³³

³⁰ *Income Tax Act*, RSC, c. 1 (5th supp.) as amended, RBA, Tab 1. Under subsection 149(1)(1), a “non-profit organization” is not a charity, but is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except for profit. See also IT-496R, Non-Profit Organizations, dated August 2, 2001, RBA, Tab 15.

³¹ *Income Tax Act*, s. 149.1(1) defines “charitable organization”, RBA, Tab 1. *Vancouver Society of Immigrant and Visible Minority Women v Canada (Minister of National Revenue – MNR)*, [1999] 1 SCR 10, [1999] SCJ No 5, (“*Vancouver Society*”), paras 142-158, Applicant’s BOA, Tab 6.

³² *Ibid*, para 159.

³³ *Ibid*, paras 144-148.

28. Absent specific enactments from Parliament, courts have declined to expand those common law categories.³⁴ The Supreme Court of Canada has recognized that the statutory reliance on the common law indicates a preferred tax policy, Parliament's desire to limit the class of charitable organizations to those relatively few restrictive categories.³⁵

This can be seen as reflecting the preferred tax policy: given the tremendous tax advantages available to charitable organizations, and the consequent loss of revenue to the public treasury, it is not unreasonable to limit the number of taxpayers who are entitled to this status. For this Court to suddenly adopt a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system.

29. Under the common law, political purposes are not considered charitable.³⁶ In 1917, the House of Lords outlined that the prohibition on political purposes is based on a court's inability to judge whether a proposed change to a law would be for the public benefit, notwithstanding the liberty to advocate for a change in the law:³⁷

... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

30. The purpose of an organization will be considered to be political when an organization's direct and principal purpose is to:³⁸

a) further the interests of a particular political party;

³⁴ *Ibid*, paras 179, 200 and 203. See also *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, [2007] SCJ No. 42, paras 28, 31 and 44, RBA, Tab 6; and *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue*, 2016 FCA 193, para 18, RBA, Tab 7.

³⁵ *Vancouver Society*, *supra* note 31, para 200.

³⁶ *Ibid*, para 190. See also Donovan W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012) pp 789-795, RBA, Tab 14.

³⁷ *Bowman v Secular Society Ltd.*, [1917] AC 406, 1917 WL 18005, p 442, RBA, Tab 8.

³⁸ *McGovern v Attorney General*, [1982] 2 WLR 222, ("McGovern") p 340, Applicant's BOA, Tab 8.

- b) procure changes in the laws of this country or a foreign country;
 - c) procure a reversal of government policy or of particular decisions of governmental authorities in this country, or a foreign country; or
 - d) sway public opinion on social issues.³⁹
31. Political purposes or political activities cover more than initiatives leading to legislative changes.⁴⁰ Political purposes and activities cover undertakings aimed specifically and directly at influencing the policy-making process, the exercise of moral pressure on governments, and any attempt to sway a government.⁴¹
32. In applying these principles, the Federal Court of Appeal concluded that courts should not be called upon to make decisions granting or denying legitimacy to what are essentially political views because:⁴²
- 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.⁴³
33. Organizations with political purposes, even if they otherwise appear to fall within the spirit and intent of the four heads of charity at common law, can never be considered as acting for the public benefit as this concept is defined and applied at common law.⁴⁴

³⁹ *Human Life International*, *supra* note 1, para 12; *Action by Christians for the Abolition of Torture v Her Majesty the Queen*, 2002 FCA 499 (“ACAT”), para 38, Applicant’s BOA, Tab 5.

⁴⁰ *ACAT*, *supra* note 39, para 66.

⁴¹ *Scarborough Community Legal Services v Her Majesty the Queen*, [1985] FC 555, 1985 CarswellNat 174, (“*Scarborough Community Legal Services*”), para 13, Applicant’s BOA, Tab 12; *ACAT*, *supra* note 39, paras 53 and 66.

⁴² *Human Life International*, *supra* note 1, para 12.

⁴³ *Human Life International*, *supra* note 1, para 13.

⁴⁴ *McGovern*, *supra* note 38, p 340.

Subsection 149.1(6.2) was enacted to allow a “registered charity” to conduct ancillary and incidental political activities

34. The common law prohibition on political purposes necessarily limits the amount of political activities a charity can carry out.⁴⁵ Only subsidiary or incidental political means used to achieve an otherwise charitable purpose are considered charitable at common law.⁴⁶
35. However, the definition of “charitable organization” under s. 149.1(1) of the *Income Tax Act* requires an organization to devote all of its resources to “charitable activities”, and “charitable activities” has been interpreted to exclude political activities.⁴⁷
36. In determining whether Scarborough Legal Services was devoting all of its resources to “charitable activities”, the Federal Court of Appeal, *in obiter*, considered incidental, sporadic political activities that are subservient to an otherwise charitable purpose.⁴⁸ In *Scarborough Legal Services*, Justice Marceau outlined that a charitable organization should not lose its charitable status because of exceptional or sporadic activity, and that an activity is still charitable even if one of its components or an incidental or subservient portion, when considered in isolation, is not charitable.⁴⁹
37. Following the *Scarborough Legal Services* decision, Parliament enacted subsection 149.1(6.2) to permit registered charities to engage in non-partisan political activities

⁴⁵ *Ibid.*, p 340-341. See also *Re Public Trustee and Toronto Humane Society et al.*, 60 OR (2d) 236, [1987] OJ No 534, p 126, RBA, Tab 9;

⁴⁶ *McGovern*, *supra* note 38, p 341.

⁴⁷ *Scarborough Legal Services*, *supra* note 41 paras 13-15; *Positive Action Against Pornography v Minister of National Revenue*, [1988] 2 FC 340, 1988 CarswellNat 689, para 15, Applicant’s BOA, Tab 7.

⁴⁸ *Scarborough Community Legal Services*, *supra* note 41, para 16.

⁴⁹ *Ibid.*

that are ancillary and incidental to their charitable purposes or activities.⁵⁰ The purpose of the provision was to permit political activities as an exception to the requirement that charitable organizations devote all their resources to charitable activities.

38. Subsection 149.1(6.2) currently reads as follows:

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.

39. In *Vancouver Society*, the Supreme Court recognized that subsection 149.1(6.2) is an exception to the statutory requirement for exclusive charity.⁵¹ By virtue of the provision, an organization that devotes “substantially all” of its resources, rather than “all” of its resources, to charitable activities will be considered charitable.

B. Subsection 149.1(6.2) does not violate the freedom of expression

40. Freedom of expression does not require the government to subsidize Canada Without Poverty’s activities, and this application should therefore be dismissed.

41. The essential nature of the freedom of expression protected under s. 2(b) of the *Charter* is to permit “free expression to the end of promoting truth, political or

⁵⁰ Department of Finance Technical Notes, November 1985, Euler Affidavit, *supra* note 14, para 23, AAR, Vol 4, Tab 4, Exhibit “9”. Exhibit “7”: Background Statement by the Honourable Perrin Beatty, Minister of National Revenue, Regarding Political Activities of Charitable Organizations, May 29, 1985, p 884.

⁵¹ *Vancouver Society*, *supra* note 31, para 155.

- social participation, and self-fulfillment”.⁵² In *Human Life International*, the Federal Court of Appeal held that revoking the “registered charity” status of an organization under the *Income Tax Act* because of its political purposes and activities does not violate that freedom.⁵³
42. In that case, Human Life International asserted that freedom of expression under the *Charter* would be violated if the provisions of the *Income Tax Act* and the applicable jurisprudence denied “registered charity” status to organizations with political purposes and activities.⁵⁴ In dismissing this argument, the Federal Court of Appeal held that the appellant was in no way restricted by the *Income Tax Act* from disseminating any views or opinions, and that freedom of expression is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or sincerely held.⁵⁵
43. The Federal Court of Appeal adopted the same reasoning in *Alliance for Life*, an appeal involving both the definition of a “charitable organization” under subsection 149.1(1) and the application of subsection 149.1(6.2).⁵⁶ In that case, the Court pointed out that the loss of “registered charity” status under the *Income Tax Act* would not bar Alliance for Life from engaging in its activities.⁵⁷
44. The same rationale applies to Canada Without Poverty’s challenge to subsection 149.1(6.2). The organization is not asserting a right to freedom of expression, it claims a right to access the tax benefits of the registered charity regime under the *Income Tax Act*.

⁵² *Her Majesty the Queen v Native Women’s Association of Canada et al.*, [1994] 3 SCR 627, para 47, RBA Tab 10.

⁵³ *Human Life International*, *supra* note 1, para 18.

⁵⁴ *Ibid*, para 6.

⁵⁵ *Ibid*, para 18.

⁵⁶ *Alliance for Life v The Minister of National Revenue*, [1999] 3 FC 504, [1999] FCJ No 658 (FCA), Applicant’s BOA, Tab 10, para 87.

⁵⁷ *Ibid*, para 76.

Canada Without Poverty is asserting a positive right to subsidized funding under the registered charity statutory regime

45. At its core, Canada Without Poverty's application is directed at maintaining its status as a "registered charity" under the *Income Tax Act*. It seeks to maintain access to government financial assistance in the form of tax exemptions and the ability to issue tax receipts as an incentive to donors. However, as a not-for-profit corporation, the applicant is free to conduct its political activities without "registered charity" status. The applicant's freedom of expression is not engaged by the determination of its tax status under the *Income Tax Act*.
46. Freedom of expression is the right to be free from government interference, and does not impose a positive obligation on the government to provide protection or assistance, absent exceptional circumstances.⁵⁸ No such exceptional circumstances exist in this case.
47. Canada Without Poverty is asserting a positive right to government financial support through subsidized funding resulting from being granted the status of a "registered charity" under the *Income Tax Act*. The applicant does not seek a declaration of its right to be free from government interference in disseminating its message or conducting its activities. As stated in paragraph 55 of its factum, Canada Without Poverty "places substantial reliance on its charitable status [under the *Income Tax Act*] to survive as an organization", but the organization also effectively acknowledges that registration as a charity is an "option".⁵⁹
48. An under inclusive statutory regime does not constitute government interference.⁶⁰ Canada Without Poverty's position is that subsection 149.1(6.2) is too restrictive because it excludes organizations that conduct unlimited political activities. However, the fact that Canada Without Poverty faces losing access to its status as a "registered charity" under the *Income Tax Act* does not constitute government

⁵⁸ *Baier v Alberta*, 2007 SCC 31, 2007 CarswellAlta 853 ("*Baier*"), RAR, Tab 11, paras 20-30; *Haig*, *supra* note 29, para 70.

⁵⁹ Factum of the Applicant, para 55.

⁶⁰ *Baier*, *supra* note 58, paras 34-37.

interference.⁶¹

49. Canada Without Poverty is free to express itself without restriction as a not-for-profit corporation. “Registered charity” status is not a platform aimed at facilitating expression.⁶² The legislative scheme provides the designation of “registered charity”, and associated tax benefits, to existing organizations that meet specific requirements.
50. Furthermore, Canada Without Poverty has failed to meet its evidentiary burden.⁶³ There is no evidence of any infringement of its freedom of expression. To the contrary, its Executive Director acknowledged that the organization has the ability to conduct its activities without the status of a “registered charity” under the *Income Tax Act*.⁶⁴ Canada Without Poverty has done so in the past when it founded and launched a major initiative, the Dignity for All Campaign, with two other organizations, while it was not a “registered charity”.⁶⁵

C. In the alternative, the provision is saved by section 1 of the *Charter*

51. In the alternative, if the Court finds that there is a violation of the freedom of expression, subsection 149.1(6.2) is justified under section 1 of the *Charter*. The restriction on the extent and nature of the political activities of a “registered charity” under the *Income Tax Act* is a reasonable limit on the freedom of expression as provided under the *Oakes* test.⁶⁶

⁶¹ See, for example, similar findings regarding a loss of entitlement in *Canadian Arab Federation v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1283, para 88, RBA, Tab 12, and *Baier*, *supra* note 58, para 36.

⁶² See, for example, similar findings regarding other statutory schemes in *Haig*, *supra* note 29, para 81; and *Baier*, *supra* note 58, paras 38-42, 45-48, and 54-55.

⁶³ Under the *Dunmore* test applied in *Baier*, *supra* note 58, paras 27 and 30.

⁶⁴ Farha Cross-Examination, *supra* note 3, Question 46 and Questions 242-243, AAR, Vol 6, Tab 6, p 1461 & p 1533.

⁶⁵ Davies-Ostrom Affidavit, *supra* note 7, paras 45-48, AAR, Vol 5, Tab 5.

⁶⁶ *City of Montreal v 2952-1366 Québec Inc.*, 2005 SCC 62, para 88, RBA, Tab 13.

The objective of subsection 149.1(6.2) is pressing and substantial

52. As outlined in the Department of Finance Technical Notes, the objective of subsection 149.1(6.2) of the *Income Tax Act* is to:⁶⁷
- recognize that it is appropriate for a registered charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals, and
 - prohibit partisan political activities “such as supporting or opposing a political party or candidate”.
53. The Technical Notes and statements made by the Ministers of National Revenue and Finance prior to the enactment of subsection 149.1(6.2), outline that the government’s concern was reconciling the common law with the definitions under the *Income Tax Act*.⁶⁸ The common law meaning of charity allows an organization whose main purposes are charitable to engage in political activities that are incidental or ancillary to its primary charitable purposes, but the *Income Tax Act* requires a “charitable organization” to devote all of its resources to charitable activities. As a result, a registered charity that engaged in political activities risked losing its registration under the *Income Tax Act*.
54. The Minister of National Revenue stated that the government wished to allow registered charities to “use political means to further their views on matters pertaining to the wholly charitable ends, within reasonable limitations designed to

⁶⁷ Euler Affidavit, *supra* note 14, Exhibit “9”, AAR, Vol 4.

⁶⁸ Euler Affidavit, *supra* note 14, AAR, Vol 4, Exhibit “4”: Revenue Canada Taxation Release and Notes for An Address by the Honourable Perrin Beatty, Minister of National Revenue to the Consumers’ Association of Canada (Toronto Branch), March 11, 1985; Exhibit “6”: Securing Economic Renewal Budget Papers, Supplementary Information and Notices of Ways and Means Motions on the Budget, Tabled in the House of Commons by the Honourable Michael H. Wilson, Minister of Finance, May 23, 1985; Exhibit “7”: Background Statement by the Honourable Perrin Beatty, Minister of National Revenue, Regarding Political Activities of Charitable Organizations, May 29, 1985.

ensure that those activities do not predominate”.⁶⁹

55. However, the Minister of National Revenue also outlined the federal government’s position that the new provision would not impact the common law prohibition on political purposes and that organizations with political purposes would still not qualify for registration as a charity under the *Income Tax Act*.⁷⁰

I should point out that there is an important distinction between organizations which qualify for registration as charities and other quite different groups which are constituted in the first place for the purpose of “political action”; the latter are groups whose purposes are predominantly political and, therefore, not, in law, charitable. The budget proposal does not deal with the latter category: to do so would require careful consideration of additional factors as a matter of tax policy. [emphasis added]

56. As a result, the objective of subsection 149.1(6.2) was – and continues to be – pressing and substantial. Without the provision, organizations are at risk of losing their “registered charity” status under the *Income Tax Act* for conducting any political activities, even those that fit within the common law, *i.e.*, activities that are “incidental or subservient” to their charitable purposes.⁷¹

The means chosen to meet that objective are proportionate

57. The remaining requirements of the section 1 test are also met. The objective of permitting registered charities to conduct limited non-partisan political activities, while maintaining the common law prohibition on political purposes is proportionate to the means used to achieve it because those means are rationally connected to the objective, the limit minimally impairs the rights, and there is proportionality between the effects and the law’s objective.

⁶⁹ Euler Affidavit, *supra* note 14, para 20, AAR, Vol 4, Exhibit “7”: Background Statement by the Honourable Perrin Beatty, Minister of National Revenue, Regarding Political Activities of Charitable Organizations, May 29, 1985, p 883.

⁷⁰ *Ibid.*

⁷¹ As allowed for in *Scarborough Community Legal Services*, *supra* note 41, para 16.

58. There is a rational connection between the objective and the limits outlined in subsection 149.1(6.2) because the provision incorporates the common law in the statutory framework applicable to “registered charities”.⁷² It permits a “charitable organization” to devote “substantially all”, rather than “all” of its resources, to charitable activities if the organization conducts non-partisan political activities that are “ancillary and incidental” to its charitable activities.⁷³
59. Subsection 149.1(6.2) minimally impairs the freedom of expression because it ensures that organizations with “registered charity” status can engage in some political activities. The provision mitigates the otherwise strict requirement for exclusively charitable activities under the definition of “charitable organization” in subsection 149.1(1) of the *Income Tax Act*.⁷⁴
60. The deleterious effects of the limit are therefore proportional to the positive effects of the limit. Registered charities are permitted to conduct limited non-partisan political activities that are ancillary and incidental to their charitable activities. As such, the federal government maintains the integrity of the “registered charity” tax regime by ensuring that only organizations with charitable purposes, and not organizations with political purposes or predominantly political activities, have access to the tax benefits of registration.
61. As outlined by the Supreme Court of Canada, Parliament’s desire to limit the class of charitable organizations to the restrictive common law categories reflects a preferred tax policy, given the tremendous tax advantages available to registered charities and the consequent loss of revenue to the public.⁷⁵ The restriction on political activities is one element of that preferred tax policy.

⁷² *ACAT*, *supra* note 39, paras 56-65. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, (“*Hutterian Brethren*”), para 48, Applicant’s BOA, Tab 35.

⁷³ *Vancouver Society*, *supra* note 31, para 155.

⁷⁴ *Hutterian Brethren*, *supra* note 72, para 55.

⁷⁵ *Vancouver Society*, *supra* note 31, para 200.

D. Conclusion

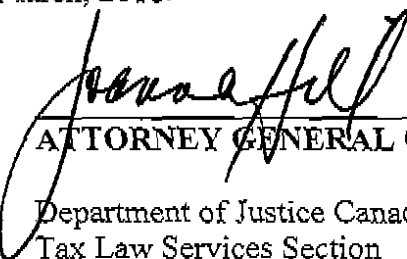
62. Parliament is not required to expand the scope of subsection 149.1(6.2) to extend the financial benefits of charitable registration to organizations whose activities and purposes do not meet the definition of charity under the common law.
63. Canada Without Poverty has not established a violation of its freedom of expression because subsection 149.1(6.2) does not interfere with the organization's capacity and ability to advocate for changes to legislation and policy related to poverty elimination. As a not-for-profit corporation, Canada Without Poverty can conduct its political activities without restriction. Having the status of a "registered charity" under the *Income Tax Act* does not expand or restrict the ability of the applicant to express itself. The *Charter* does not guarantee public funding of organizations through tax exemptions.

PART IV – ORDER SOUGHT

64. The Attorney General of Canada asks that the application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario, this 29th day of March, 2018.



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PART V – AUTHORITIES**Legislative**

1. *Income Tax Act*, RSC, c. 1 (5th supp.) as amended, ss 110.1(1)(a), 118.1(1) “total charitable gifts”, “total gifts”, 118.1(3), 149(1)(f), 149(1)(l), 149.1(1) “charitable organization”, 149.1(2), 149.1(4.2), 149.1(6), 149.1(6.1), 149.1(6.2), 149.1(10), 149.1(14), 165(3), 168, 172(3), 188.1, 188.2 & 248(1) “registered charity”
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 2(b)
3. *An Act to amend the Income Tax Act and related statutes*, 33-34-35 Elizabeth II, SC 1986, c 6, section 85(2)
4. *Canada Not-for-profit Corporations Act*, SC 2009, c 23

Caselaw

1. *Human Life International Inc. v MNR*, 1998 CarswellNat 366, [1998] FCJ No 365 (FCA)
2. *Haig et al. v The Queen et al.*, [1993] 2 SCR 995, 1993 CarswellNat 2353
3. *Vancouver Society of Immigrant and Visible Minority Women v Canada (Minister of National Revenue – MNR)*, [1999] 1 SCR 10, [1999] SCJ No 5
4. *A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42, [2007] SCJ No. 42
5. *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue*, 2016 FCA 193
6. *Bowman v Secular Society Ltd.*, [1917] AC 406, 1917 WL 18005
7. *McGovern v Attorney General*, [1982] 2 WLR 222
8. *Action by Christians for the Abolition of Torture v Her Majesty the Queen*, 2002 FCA 499
9. *Scarborough Community Legal Services v Her Majesty the Queen*, [1985] FC 555, 1985 CarswellNat 174
10. *Re Public Trustee and Toronto Humane Society et al.*, 60 OR (2d) 236, [1987] OJ No 534
11. *Positive Action Against Pornography v Minister of National Revenue*, [1988] 2 FC 340, 1988 CarswellNat 689
12. *Her Majesty the Queen v Native Women's Association of Canada et al.*, [1994] 3 SCR 627
13. *Baier v Alberta*, 2007 SCC 31, 2007 CarswellAlta 853

14. *Alliance for Life v The Minister of National Revenue*, [1999] 3 FC 504, [1999] FCJ No 658 (FCA)
15. *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31
16. *Canadian Arab Federation v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1283
17. *City of Montreal v 2952-1366 Québec Inc.*, 2005 SCC 62
18. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567

Other sources

1. Donovan W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2012)
2. IT-496R, Non-Profit Organizations, dated August 2, 2001