Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*

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In Canada Without Poverty v Canada (AG), *the Ontario Superior Court of Justice struck down provisions of the federal* Income Tax Act *that limited the political activities of charitable organizations, on the ground that the provisions violated the freedom of expression of the registered charity before the court. This paper addresses the decision's complex legacy, reflecting on the promise and the perils of charity law's increasing encounters with public law. I address some of the difficult questions raised by the decision: (1) What types of associations are rights-holders under the* Canadian Charter of Rights and Freedoms*? (2) What are the constitutional limitations on the government's ability to set the outer bounds of the registered charity regime? (3) What is the rationale for limiting the political advocacy of charities? While* Canada Without Poverty *has generated significant improvements to the registered charity regime, I argue, the Ontario Superior Court of Justice missed an important opportunity to draw constitutional law and charity law into closer conversation.*

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I. Introduction

In the summer of 2018, the longstanding rules governing the political activities of registered charities came to an abrupt and rather undignified end. In *Canada Without Poverty v Canada (AG)*,[1] Morgan J of the Ontario Superior Court of Justice held that paragraphs 149.1(6.2)(a) and (b) of the *Income Tax Act*[2] ("*ITA*"), which functioned to prohibit charitable organizations from devoting more than 10% of their resources to non-partisan political activities, unjustifiably violated the freedom of expression of the anti-poverty organization before the court. "What is political?", mused Morgan J in the opening paragraph of his judgment, briefly considering the answers of political philosophers before declaring the restrictive provisions of no force and effect.

The Canadian charitable sector reacted swiftly and positively to the

decision.[3] The Government of Canada also responded swiftly, pledging to appeal the decision but also to amend the *ITA* in the manner the decision envisaged.[4] By December 2018, Parliament had enacted those amendments. Registered charities in Canada may now carry out unlimited public policy dialogue and development activities that further a charitable purpose.[5]

The Attorney General of Canada ultimately chose not to appeal *Canada Without Poverty*.[6] The decision thus stands, having produced a happier charitable sector but also considerable legal uncertainty. The statutory amendments to which *Canada Without Poverty* gave rise have improved the registered charity regime in a number of respects. They have increased the regime's coherence by aligning its definitional provisions more closely with the common law tradition upon which they are based.[7] The amendments have also reduced the chilling fear that many registered charities had of falling on the wrong side of the *ITA*'s murky "charity-politics" divide, freeing up charitable resources and encouraging charities' participation in the development of public policy.[8] However, the legacy of *Canada Without Poverty* may be more complex than this happy news suggests. The decision imposes significant constitutional limitations on government in its design of the registered charity regime. Certain elements of Morgan J's reasoning may have far-reaching implications, and are worthy of further reflection. Certain elements of Morgan J's decision may have far-reaching implications and are worthy of further reflection.

I begin this comment by examining the legal context within which *Canada Without Poverty* arose. I explain the difference between not-for-profit status, charitable status and registered charity status, and outline the traditional limitations on the political activities of registered charities in Canada (Part II). I then summarize *Canada Without Poverty v Canada (AG)* (Part II). I reflect on several elements of the decision, including the characterization of Canada Without Poverty ("CWP") as a constitutional rights-holder, the treatment of its freedom of expression claim, and the rejection of the government's attempts to justify the *ITA*'s limits on the political activities of registered charities (Part III). Finally, I consider the promise and perils of charity law's increasing encounters with public law.

I argue that, in failing to consider what *charity law* has to say about the relationship between charity and politics, the Ontario Superior Court of Justice missed an important opportunity to draw constitutional law and charity law into closer conversation.

II. The Context of *Canada Without Poverty v Canada (AG)*

A. Consequences and Conditions of Registered Charity Status

The applicant in *Canada Without Poverty* was an incorporated not-for-profit organization that was also a charity and a registered charity. While these terms are often used interchangeably, each refers to a distinct legal status.[9] We begin by distinguishing the charity, the registered charity, the not-for-profit organization, and the "non-profit organization" defined in paragraph 149(1)(l) of the *ITA*, and by identifying the legal privileges and burdens that are associated with each.

Charity is for the common law "a concept of purpose".[10] A substantial part of the common law of charities is devoted to identifying criteria by which decision-makers may determine whether or not a purpose is charitable at law.[11] The principal criteria are well known. First, in order

9. This confusion is not unique to Canada: see Jennifer L Beard "Charities, Election Campaigning and the *Australian Constitution*" (2019) 43:2 Melbourne Law Review (advance) 1 at 3 [Beard, "Election Campaigning"].

10. *Incorporated Council of Law Reporting for the State of Queensland v Federal Commissioner of Taxation*, [1971] HCA 44, citing *Stratton v Simpson*, (1970) 44 ALJR 487 (HCA). ("Charity is for law a concept of purpose. A charitable institution is an instrument designed for carrying a charitable purpose into effect".) See also Jennifer L Beard, "Charity Law and Freedom of Political Communication: The Australian Experience" in Matthew Harding, ed, *Research Handbook on Not-For-Profit Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2018) at 256 [Beard, "Charity Law"].

11. Matthew Harding, *Charity Law and the Liberal State* (Cambridge, UK: Cambridge University Press, 2014) at 6-7.

to be charitable, a purpose must fall within one of four broad categories of charitable purposes that were articulated by the House of Lords in *Commissioners for Special Purposes of Income Tax v Pemsel* in 1891.[12] The four "heads of charity", as these categories are commonly known, are the relief of poverty, the advancement of education, the advancement of religion and "other purposes beneficial to the community, not falling under any of the preceding heads".[13] Second, to be charitable, a purpose must also benefit the community or a substantial segment of the community within the meaning of the public benefit doctrine.[14] Third, to be charitable in certain jurisdictions (including Canada and the United Kingdom), a purpose must not be "political".

The corollary of the common law's conceiving of charity in terms of purposes is that the term "charity" is not descriptive of a corporate form or legal person.[15] Historically the term was used primarily to describe charitable trusts: the equitable obligations binding certain persons (called trustees) to deal with segregated funds for identified charitable purposes.[16] Today, the term "charity" may equally describe a not-for-profit corporation, an unincorporated association, or a voluntary gift that is created for charitable purposes. The specific consequences that the common law attaches to charitable status will depend on which form the charity takes. However, the common privileges and burdens of charitable status are well known. They include exemption from various rules against the perpetual duration of trust property, the subjection of charity trustees and directors to a stringent level of judicial supervision, and the special protection of charity property by the courts and by the Crown.

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12. [1891] AC 531 (HL (Eng)) [*Pemsel*].
13. *Ibid* at 583. The Supreme Court of Canada has taken the position that *Pemsel* is now the starting point: see *Vancouver Society of Immigrant & Visible Minority Women v MNR*, [1999] 1 SCR 10 at para 144 [*Vancouver Society*].
14. See *e.g. Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 at 307 (HL (Eng)) [*Oppenheim*]. The public benefit doctrine is the subject of chapter three of *Oppenheim*.
15. Beard, "Election Campaigning", supra note 9 at 4.
16. David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees*, 19d (London, UK: LexisNexis, 2018).

In a Canadian context, the "charity" must also be distinguished from the "registered charity". While a legal person, equitable obligation, or transfer of property may be a charity by virtue of the purposes to which it is devoted, an entity may only become a *registered* charity by successfully applying to the Minister of National Revenue for registered charity status in prescribed form.[17] The *ITA* recognizes three types of registered charities: the charitable organization, the public foundation, and the private foundation.[18] Foundations fund other charities, generally speaking, while charitable organizations carry out charitable activities themselves.

Charitable status and registered charity status are linked in Canada. This is because the Minister of National Revenue and her delegates at the Canada Revenue Agency ("CRA") Charities Directorate, as well as Canada's federal courts, have long relied on the common law definition of charity to give meaning to the registered charity provisions. The Supreme Court of Canada confirmed the propriety of this approach in *Vancouver Society of Immigrant & Visible Minority Women v MNR*,[19] stating that "the [*ITA*] appears clearly to envisage a resort to the common law for a definition of 'charity' in its legal sense as well as for the principles that should guide [the court] in applying that definition".[20]

However, the relationship between the *ITA* and the common law authorities has always been somewhat strained. This is because, unlike most statutes governing charities, the *ITA* defines charitable organizations by reference to their *activities*. The common law, as we have seen, defines charities by reference to their primary purposes. It requires that any activities that charities undertake be ancillary to, and in furtherance of,

17. *ITA*, *supra* note 2, s 248(1), "registered charity" (*organisme de bienfaisance enregistré*).
18. *Ibid*.
19. *Vancouver Society*, *supra* note 13.
20. *Ibid* at para 143, citing *Positive Action Against Pornography v MNR*, [1988] 2 FC 340 at para 347. This despite the fact that the common law tradition defined charity by reference to purposes, while the *ITA* definitions relied heavily on the concept of "charitable activities". See *ITA*, *supra* note 2, s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*).

those purposes, but it does not require charities to engage in activities that are "charitable" in themselves.[21] Until 2018, by contrast, the *ITA* definition of a charitable organization did not even refer to charitable purposes.[22] Instead, the *ITA* defined a "charitable organization" (œuvre de bienfaisance) as (1) an organization (whether or not incorporated) that (2) was not-for-profit,[23] and (3) devoted all of its resources to charitable activities carried on by the organization itself.[24] In 1999, the Supreme Court of Canada clarified that the *ITA* required a charitable organization to have charitable purposes that "define the scope of the activities engaged in by the organization".[25] However, the *ITA*'s reference to charitable activities has historically muddied the relationship between the common law and the registered charity regime, and caused the frequent elision, in the Canadian case law, of two concepts that the common law treats differently.[26]

Finally, the charity and the registered charity must be distinguished from the not-for-profit organization and the paragraph 149(1)(l) non-profit organization. As a matter of private law, a not-for-profit organization is an association (whether incorporated or not) that is constituted for a purpose other than profit. It is very common for an

21. Joyce Chia & Miranda Stewart, "Doing Business To Do Good: Should We Tax the Business Profits of Not-for-Profits" (2012) 33 *Adelaide Law Review* 335 at 349.
22. In December 2018, following *Canada Without Poverty v AG*, Parliament amended s 149.1(1) to require that a charitable organization "be constituted and operated exclusively for charitable purposes": see *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 27, 2018 and Other Measures*, SC 2018, c 27.
23. "Not-for-profits" do make profits, but no part of that profit can be distributed for the personal benefit of any proprietor, member, trustee or settlor thereof.
24. *ITA*, supra note 2, s 149.1(1), "charitable organization" (*oeuvre de bienfaisance*). Section 149.1(1) defines a "charitable foundation" (*fondation de bienfaisance*) as (1) a corporation or trust that (2) is not-for-profit, (3) is constituted and operated exclusively for charitable purposes, and (4) is not a charitable organization.
25. *Vancouver Society* supra note 13 at para 159.
26. *Ibid* at para 153.

organization (like CWP) to be at once a not-for-profit organization, a charity, and a registered charity. As a matter of Canadian tax law, however, an organization may not be both a registered charity and a "non-profit organization". This is because paragraph 149(1)(l) of the *ITA* defines a non-profit organization as (1) a club, society or association, that (2) is organized and operated exclusively for a non-profit purpose, and (3) in the opinion of the Minister, is not a charity within the meaning assigned by subsection 149.1(1).[27]

To be a registered charity, then, is to enjoy a particular tax status, which has consequences distinct from those that flow from either common law charitable status or non-profit status under the *ITA*. Like non-profit organizations, registered charities are exempted from most forms of federal income tax.[28] Unlike non-profit organizations, however, registered charities are among the short list of designated "qualified donees" that are entitled to issue valuable tax receipts to corporate and individual donors.[29] In *Vancouver Society*, the Supreme Court of Canada stated that this latter benefit, which is "designed to encourage the funding of activities which are generally regarded as being of special benefit to society", is often a "major determinant" of an organization's success.[30]

B. The Political Advocacy Rules

The common law in Canada prohibits charities from pursuing political purposes. The prohibition is generally traced back to a 1917 decision of the English House of Lords, in which Lord Parker suggested that trusts for the attainment of political objects had "always" been held invalid, because "the Court has not means of judging whether a proposed change in the law will or will not be for the public benefit".[31] The doctrine received

27. *ITA*, *supra* note 2, s 149(1)(l).
28. *ITA*, *supra* note 2, s 149(1)(f). Other exempted entities include non-profit organizations, labour organizations, low-cost housing corporations for the aged and municipal authorities.
29. *ITA*, *supra* note 2, ss 110.1, 118.1. Registered charities are subject to onerous reporting requirements.
30. *Vancouver Society*, *supra* note 13 at para 128.
31. *Bowman v Secular Society Ltd*, [1917] AC 406 (HL (Eng)) at 442.

a comprehensive treatment in the 1981 case of *McGovern v Attorney-General*,[32] where the English High Court held that charities cannot have as a principal purpose to further the interests of a particular political party, or to procure changes in domestic or foreign law, or to procure reversals of government policy or of particular government decisions. Later case law has established that charities also cannot promote the maintenance of an existing law or government policy.[33] However, the common law doctrine is concerned with primary purposes, not activities or incidental purposes. Charities are permitted to carry out political activities, at common law, to pursue charitable purposes.

Because the common law of charities has historically functioned as the default legislative dictionary for the registered charity regime, the political purposes doctrine has always limited the *purposes* for which registered charities in Canada may be constituted. Because the *ITA* historically defined a charitable organization by reference to charitable activities, however, the revenue agency also took the Act to limit the political *activities* of registered charities. Between 1978 and 1985, both the CRA and the courts adopted a very restrictive view of registered charities' ability to engage in political activities.[34] Charities protested these interpretations in large numbers, complaining that regulatory overreach hindered and "chilled" charities' efforts to advocate on behalf of the communities they served. Government responded to the protests by withdrawing its original "Political Objects and Activities" guidance, and, eventually, adding subsection 149.1(6.2) to the *ITA*.[35] The new

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32. [1982] 1 Ch 321 (Eng) at para 340 [*McGovern*].
33. *Re Hopkinson* [1949] 1 All ER 346 (Ch). See the discussion in Hubert Picarda, *The Law and Practice Relating to Charities*, 4d (West Sussex: Bloomsbury Professional, 2010) at 240.
34. For a detailed account of this period, see Samuel Singer, "Charity Law Reform in Canada: Moving from Patchwork to Substantive Reform" 57:3 Alberta Law Review 1 [forthcoming in spring 2020] [Singer, "Charity Law Reform"].
35. *An Act to Amend the Income Tax Act and related statutes and to amend the Canada Pension Plan, the Unemployment Insurance Act, 1971, the Financial Administration Act and the Petroleum and Gas Revenue Tax Act*, SC 1986, c 6, s 85(2).

subsection provided as follows:

> (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
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> (*a*) it devotes part of its resources to political activities,
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> (*b*) those political activities are ancillary and incidental to its charitable activities, and
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> (*c*) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,
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> the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

The historical record suggests that government intended subsection 149.1(6.2) as a relieving provision.[36] From the perspective of the common law position, however, subsection 149.1(6.2) was a *limiting* provision, which restricted the ability of registered charities to pursue charitable objects by engaging with the political process. Under the new provision, a charitable organization that wanted to further its objects through political activities could do so only where (1) the organization devoted "substantially all" its resources to charitable activities;[37] (2) the organization's political activities were "ancillary and incidental" to its charitable activities; and (3) the organization did not carry out partisan political activities.[38] As the CRA generally interprets "substantially all" to

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36. Singer, "Charity Law Reform", *supra* note 34 at 16.
37. The CRA interpreted "substantially all" to mean 90 per cent or more of a charity's (financial, physical or human) resources, with a lower threshold applied to charities with modest resources: see Canada Revenue Agency, "Policy Statement CPS-022, Political Activities" (September 2003), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-022-political-activities.html#toc14> [perma.cc/H799-9EWP] [CRA Policy Statement].
38. See Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 405-6.

mean "more than 90%",[39] the provisions came to be known as "the 10% rule".

The *ITA* contained little further guidance on the difference between "political" and "charitable" activities. However, the legislative records indicate that the government's intention in enacting subsection 149.1(6.2) was to create an operational distinction between "direct" and "indirect" political activity.[40] "Direct" political activity was understood to entail the presentation of information and views *directly to government*, while "indirect" political activity entailed efforts *to influence public opinion* on matters of public policy. "Direct" political activity would be treated as charitable activity and thus be subject to no limits, while "indirect" political activity would be treated as political activity that was subject to the 10% rule.[41] This interpretation of subsection 149.1(6.2) was eventually concretized in CRA Policy CPS-022.[42]

Subsection 149.1(6.2) was the subject of a great deal of criticism during the 32 years between its enactment and the Ontario Superior Court decision that struck it down.[43] Commentators decried the provision's inconsistency with the common law treatment of political activity, and its failure to clearly define what was "political" and what

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39. Canada Revenue Agency, *CRA Views: Meaning of Substantially All*, Technical Interpretation 2002-0137767, (15 May 2002), online: *Tax Interpretations* <www.taxinterpretations.com/cra/severed-letters/2002-0137767>.
40. *Canada Without Poverty*, *supra* note 1 (Factum of the Applicant at paras 17-8 [Factum of the Applicant, *CWP*]) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2018/04/Factum-of-the-Applicant-CWP.pdf> [perma.cc/NNV2-YQ8Y]. See also *Canada Without Poverty*, *supra* note 1 at paras 6, 7.
41. Background Statement of the Honourable Perrin Beatty, Minister of National Revenue Regarding Political Activities of Charitable Organizations (29 May 1985) at 2, *Canada Without Poverty*, *supra* note 1 (Application Record at 882).
42. CRA Policy Statement, *supra* note 37.
43. *Canada Without Poverty*, *supra* note 1.

was not.[44] Despite these criticisms, subsection 149.1(6.2) and CPS-022 remained cornerstones of the registered charity regime. Their influence on the charitable sector increased in 2012, when the government of Prime Minister Stephen Harper initiated an expanded "political activities" audit program and provided CRA with eight million dollars to carry it out. Registered charities began complaining of "witch hunts" against organizations that were opposed to the government's policies.[45]

In 2015, Liberal leader Justin Trudeau won the federal election and formed a majority government. Having campaigned on a promise of improving relations between the charitable sector and the federal government, Prime Minister Trudeau quickly identified political activities reform as a top priority of his government.[46] In accordance with the Prime Minister's direction, the Minister of National Revenue soon announced the appointment of an expert panel "to review the rules governing the political activities of charities".[47] That panel submitted its report in March 2017, recommending that the *ITA* be amended to "explicitly allow charities to fully engage without limitation, in non-partisan public policy dialogue and development provided that it is

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44. Some of this criticism is described in Singer, "Charity Law Reform", *supra* note 34. See also Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 408-9.
45. See Shawn McCarthy, "Group's Charitable Status Being Audited", *The Globe and Mail* (8 May 2012), online: <www.theglobeandmail.com>; Broadbent Institute, "Stephen Harper's CRA: Selective Audits, "Political" Activity, and Right-Leaning Charities" (20 October 2014), online: *Broadbent Institute* <www.broadbentinstitute.ca/stephen_harper_s_cra>.
46. Mandate Letter from Prime Minister Trudeau to Minister Lebouthillier, Minister of National Revenue (12 November 2015), online: <www.pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-national-revenue-mandate-letter >.
47. *Canada Without Poverty*, *supra* note 1 (Affidavit of Zachary Euler (sworn 16 February 2017) at para 46), cited in Factum of the Applicant, *CWP*, *supra* note 40 at para 11.

subordinate to and furthers their charitable purposes".[48] No legislative reform had yet occurred, however, when *Canada Without Poverty* was heard in 2018.

III. The Decision in *Canada Without Poverty v Canada (AG)*

A. Facts and Issues

CWP is a not-for-profit corporation that has operated as a registered charity in Canada for 45 years.[49] Its primary corporate object is "to relieve poverty in Canada by" a number of means, including undertaking and disseminating research into factors that contribute to poverty, and "providing information to government officials, and the public to increase knowledge of poverty related issues and how to more effectively relieve poverty".[50] CWP also has as a corporate object "to uphold and ensure compliance with international human rights law as it relates to the relief of poverty".[51] CWP describes itself as having consistently "engaged with political processes" in order to promote legal changes that would alleviate poverty in Canada.[52] In recent years, "it has placed its resources and efforts behind civic engagement and public dialogue, with the ambition of bringing about legislative and policy change for the effective relief of

48. Marlene Deboisbriand et al, "Report of the Consultation Panel on the Political Activities of Charities" (31 March 2017), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html> [perma.cc/U2B4-B27A] [*Report on Political Activities of Charities*].
49. *Canada Without Poverty*, *supra* note 1 (Affidavit of Leilani Farha at para 4) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2016/09/CWP-v.-AG-Farha-Affidavit.pdf> [perma.cc/FP38-5LNV].
50. *Canada Without Poverty*, *supra* note 1 at para 14.
51. *Ibid*.
52. *Ibid* (Amended Notice of Application at para 3) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2016/10/Amended-Notice-of-Application.pdf>.

poverty".[53]

In 2014, CWP became a subject of Prime Minister Harper's enhanced political activities audits. The CRA issued an audit report on CWP in January 2015, in which it concluded that most of CWP's activities were restricted "political activities", as they involved communications to the public about law reform or other policy issues related to poverty relief.[54] The Charities Directorate gave notice to CWP that it intended to revoke its charitable registration. In response, CWP filed a Notice of Application in the Ontario Superior Court of Justice, seeking a declaration that subsection 149.1(6.2) of the *ITA* violated sections 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[55] The Charities Directorate agreed not to proceed with revocation until a court had ruled on the constitutional challenge.[56]

B. The Decision

Justice Morgan heard argument on the constitutional challenge to subsection 149.1(6.2) on April 23, 2018. As the proceeding was brought by application, the evidence was given by affidavit.[57] No interveners participated. The written submissions of the parties built upon Supreme Court of Canada authority that prescribes different tests for the adjudication of positive and negative freedom of expression claims.[58] CWP took the position that it was asserting a negative section 2(b) right. In its submission, subsection 149.1(6.2) constituted a restriction "within

53. *Canada Without Poverty*, *supra* note 1 at para 18.
54. Factum of the Applicant, *CWP*, *supra* note 40 at para 36; *Canada Without Poverty*, *supra* note 1 at para 19.
55. *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.
56. Factum of the Applicant, *CWP*, *supra* note 40 at para 34.
57. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.05(3)(g.1) and 39.01(1).
58. Factum of the Applicant, *CWP*, *supra* note 40 at paras 44-46; *Canada Without Poverty*, *supra* note 1 (Attorney General, Respondent's Memorandum of Fact and Law at paras 46-50 [Respondent's Memorandum, *CWP*]) online (pdf): <www.cwp-csp.ca/wp-content/uploads/2018/04/Respondents-Factum.pdf> [perma.cc/5XGU-UEEN].

an existing statutory platform," which aimed to "restrict the public dissemination of any materials whose content includes recommendation for changes to laws and policies".[59] This restriction violated section 2(b) of the *Charter*, and could not be justified under section 1. For its part, the Attorney General of Canada characterized CWP's claim as a positive "demand for financial support from the state".[60] If subsection 149.1(6.2) did violate section 2(b) (which the Attorney General denied), it was a limit that was justifiable in a free and democratic society.[61]

The Ontario Superior Court of Justice ultimately agreed with CWP's position on the constitutional invalidity of subsection 149.1(6.2) and CRA's 10% rule in application of that statutory provision.[62] However, Morgan J's reasons for judgment depart significantly both from the written arguments of the parties and the established legal framework for adjudicating allegedly "positive" freedom of expression claims. I summarize the key findings and holdings from *Canada Without Poverty* here and discuss them in more detail below.

Justice Morgan preceded his legal analysis with a detailed discussion of CWP's purposes and activities. He highlighted CWP's commitment to co-engagement with poverty constituencies, and situated that commitment within the broader context of shifting national and global approaches to poverty relief.[63] Morgan J drew attention to CWP's submissions on the incoherence of the ITA's treatment of political activities, and noted the conclusion of the Consultation Panel on the Political Activities of Charities that subsection 149.1(6.2) was outmoded and required legislative change.[64]

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59. Factum of the Applicant, *CWP*, *ibid* at paras 49-51.
60. Respondent's Memorandum, *CWP*, *supra* note 58 at paras 1, 47.
61. *Ibid* at para 51.
62. *Canada Without Poverty*, *supra* note 1 at para 42.
63. *Ibid* at para 17, citing the House of Commons Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*, 40th Parliament, 3rd Session (November 2010) at 175.
64. *Ibid* at para 26, citing the *Report on Political Activities of Charities*, *supra* note 48 at 5.

Justice Morgan then addressed the parties' constitutional arguments. He made two important factual findings: first, that there was "no way to pursue the Applicant's charitable purposes…while restricting its politically expressive activity to 10% of its resources as required by CRA", and, second, that the Applicant could not function — "or [would have] difficulty in functioning — in the absence of registered charity status".[65] Then, relying on a combination of section 2(a), 2(b), and 2(d) authorities, he concluded that subsection 149.1(6.2) of the *ITA* violated CWP's freedom of expression:

> [46] In *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713, at para 97, the Supreme Court reasoned that, "For a stateimposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice." The evidence of the Applicant is uncontroverted that this test is met with respect to the analogous state-imposed cost or burden on its rights under s. 2(b).
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> [47] The Applicant, a registered charity, has a right to effective freedom of expression – i.e. the ability to engage in unimpaired public policy advocacy toward its charitable purpose. The burden imposed by the impugned section of the *ITA* and by the policy measure adopted by CRA in administering that section runs counter to that right.
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> [48] The Applicant is therefore in a position that is akin to that of the agricultural workers in *Dunmore*. The shortcomings of a legislative regime undermine or burden the exercise of a *Charter* right. This burden prevents or impairs the right holder from taking advantage of a state-supplied platform that it could otherwise freely access were it not for its insistence on exercising that right. The Applicant's right to freedom of expression under s. 2(b) of the *Charter* is thereby infringed.[66]

Having accepted that subsection 149.1(6.2) and the accompanying policy measure limited a *Charter*-protected right, Morgan J turned to the question of whether the provisions were reasonable and justified under section 1 of the *Charter*.[67] Contrary to the written submissions of both parties, he found that the government had failed to demonstrate a "pressing and substantial objective" for the burden it had placed on the pursuit of public policy advocacy. Since government was unable to justify

65. *Ibid* at paras 42-43.
66. *Ibid* at paras 46-48.
67. *Ibid* at para 49.

the identified limitation, the Court declared that, pursuant to section 52(1) of the *Constitution Act, 1982* and effective immediately, paragraphs 149.1(6.2)(a) and (b) of the *ITA* were of no force and effect.[68]

IV. Reflections on *Canada Without Poverty v Canada (AG)*

A. Reflection One: The Registered Charity as Rights Holder

A first element of *Canada Without Poverty* that merits reflection is the decision's depiction of "the registered charity" as the holder of a right under the *Charter*. In most *Charter* cases, there is no question that the "person" who has challenged a law enjoys the rights they claim and is entitled to assert those rights. However, the law on the status of corporations and unincorporated associations as rights-holders is complex and in large part unsettled. In this context, Morgan J's conclusion that CWP enjoyed freedom of expression raises a number of challenging questions. Upon what basis was CWP recognized as a constitutional person entitled to section 2(b) protection, and to what other non-human entities would such *Charter* protection extend?

The constitutional personhood question is a question about "who or what is entitled to claim the protection of any given constitutional right".[69] Because it arises only rarely in *Charter* litigation, it is a question with which the courts have comparatively little expertise.[70] In Canada, as in the United States, issues of constitutional personhood have been

68. *Ibid* at para 72.
69. Zoe Robinson, "Constitutional Personhood" (2016) 84:3 George Washington Law Review 605 at 606. See also *R v Cook*, [1998] 2 SCR 597, where L'Heureux-Dubé J notes the crucial first step of determining whether a *Charter* claimant "is indeed the holder of a right under the Canadian constitution" at para 85.
70. Martha Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39:1 McGill Law Journal 58 at 85.

addressed on a right-by-right and claimant-by-claimant basis.[71] The courts have applied a purposive analysis, assessing whether the right asserted could meaningfully apply to a claimant based on "the language of the right in combination with the nature of the specific interests embodied therein".[72]

The case law on the constitutional personhood of corporations and unincorporated associations is particularly complex. The Supreme Court of Canada has held that a corporation enjoys the right to be tried within a reasonable time under the *Charter*,[73] but does not enjoy the right against self-incrimination,[74] nor the right to life, liberty and security of the person.[75] It has not yet determined whether corporations enjoy freedom of conscience and religion. The Court has protected commercial expression in a number of high-profile cases brought by for-profit corporations, leading commentators to conclude that corporations enjoy section 2(b) protection under the *Charter*.[76] Unions, student federations, and domestic and foreign non-profit corporations have also had their expressive activities protected by various levels of court. However, the Supreme Court of Canada has never specifically discussed the grounds

71. *Ibid* at 86; Robinson, *supra* note 69 at 607. See also Susanna K Ripken, "Citizens United, Corporate Personhood and Corporate Power: The Tension Between Constitutional Law and Corporate Law" (2012) 6 University of St. Thomas Journal of Law & Public Policy 285 at 301.
72. Shaffer, *supra* note 70 at 86, citing *R v CIP Inc*, [1992] 1 SCR 843 at para 852 [*CIP Inc*].
73. *CIP Inc*, *ibid*.
74. *R v Amway*, [1989] 1 SCR 21.
75. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].
76. See Kent Roach & David Schneiderman, "Freedom of Expression in Canada" (2013) 61 Supreme Court Law Review (2d) 429 at 449; Peter W Hogg, *Constitutional Law of Canada: 2003 Student Edition* (Scarborough, Ont: Carswell, 2003); Guy Régimbald & Dwight G Newman, *The Law of the Canadian Constitution*, 2d (Toronto, Ontario: LexisNexis Canada Inc, 2017).

for recognizing these associations as rights-holders,[77] and certain passages in the case law frame freedom of expression as a freedom of individuals.[78]

Given the general lack of clarity surrounding the constitutional personhood of associations, it is unclear upon what basis Morgan J recognized CWP as a rights-holder in *Canada Without Poverty*. A straightforward reading of the judgment suggests that CWP enjoyed freedom of expression by virtue of being a "charity" or a "registered charity". The difficulty with this analysis, as we have seen, is that neither term denotes legal personhood. The term "registered charity" describes a special *taxation* status, while the term "charity" describes a variety of associations and equitable obligations that are "designed for carrying a charitable purpose into effect".[79] Given that the Court has never specifically attributed constitutional personhood to a non-person, one would expect it to articulate compelling reasons before granting "charities" or "registered charities" *Charter* rights against government.[80]

The second possibility is that CWP enjoyed freedom of expression by virtue of being a legal (corporate) person. There is, as we have seen, implicit jurisprudential support for this view. However, it has a number of potential implications that are worth thinking through.

First, if CWP is a rights-holder by virtue of its corporate personhood rather than its charitable status, it follows that some, but not all, charities enjoy freedom of expression and possibly other *Charter* rights. This state

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77. In adjudicating section 2(b) claims by corporations, the Court has focused not on the identity of the rights claimants, but on the importance of commercial and media speech: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326; *Irwin Toy*, *supra* note 75. For further discussion, see Howard Kislowicz, "Business Corporations as Religious Freedom Claimants in Canada" (2017) 51:2:3 Revue Juridique Themis de l'Université de Montreal 337.

78. *RWDSU*, *Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 33-37.

79. Beard, "Charity Law", *supra* note 10 at 252; see also Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at 29.

80. Shaffer makes this argument with the extension of *Charter* rights to the foetus: see Shaffer, *supra* note 70 at 87.

of affairs would, at the very least, create incentives for charities to organize themselves in certain ways. The charitable sector has historically been relatively "organizational-form agnostic",[81] with the *ITA* stipulating only that an unincorporated association may not operate as a public or private foundation. However, if only incorporated charities have *Charter* rights, the corporate form may become even more dominant than it already is. Student associations will be encouraged to incorporate to protect their political expression, and religious organizations will be encouraged to incorporate in order to benefit from religious freedom protections

Second, if CWP is a rights-holder by virtue of its corporate personhood rather than its charitable status, it follows that any rights it enjoys may be equally enjoyed by (non-charitable) not-for-profit corporations and by business corporations. Since *Canada Without Poverty* has arguably expanded the circumstances in which government is required to act in order to respect the freedom of expression of a rights claimant, the possibility of an expansive category of rights-holders merits further thought. My own sense is that the benevolent, non-profit nature of charitable corporations tends to dispel any discomfort that courts may feel about extending constitutional rights to non-human persons.[82] Indeed, I suspect that part of the reason *Canada Without Poverty* generated so little criticism is that CWP is an established charity that commands great respect for its poverty-reduction work. The exceptional features of charitable corporations — particularly their non-profit character and their devotion to the public benefit — may indeed provide valid reasons to give them more rights.[83] However, if we do not identify and justify

81. The term is Evelyn Brody's. See Evelyn Brody, "The Twilight of Organizational Form for Charity: Musings on Norm Silber, A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector" (2002) 30:4 Hofstra Law Review 1261.

82. See *Burwell v Hobby Lobby Stores Inc*, 573 US 682 at 708 (2014) [*Burwell v Hobby Lobby*], noting that the religious freedom rights of non-profit corporations are uncontroversial.

83. See Beard, "Charity Law", *supra* note 10 ("[t]he fact that charities by definition produce public benefit provides a further reason to give the charitable sector as much freedom of speech as is required to engage in vigorous public debate regarding charitable purposes" at 256).

non-profit exceptionalism when it influences legal decision-making, we may find tobacco companies successfully seeking the same protections as CWP.

The experience of the First Amendment jurisprudence is instructive in this regard. In recent years, the Supreme Court of the United States has controversially extended religious freedom and free speech rights to business corporations.[84] *Citizens United v Federal Election Commission* and *Burwell v Hobby Lobby* did not emerge from a vacuum. Both cases are traceable to earlier, less controversial cases in which the Court accorded First Amendment rights to non-profits and charities.[85] At the point at which business corporations come before the courts to claim similar rights, however, "non-profit exceptionalism" proved singularly unsuccessful in halting the expansion of the pool of rights-holders.[86] In *Hobby Lobby*, for example, government urged the Court to 'hold the line' where it stood at that time: non-profit corporations would enjoy free-exercise rights as "persons" under the relevant statute, while for-profit corporations would not.[87] The majority of the Court rejected this argument, reasoning that it was not uncommon for for-profit corporations to also pursue altruistic and religious objectives,[88] and that no known understanding of the term "person" "include[d] natural persons and nonprofit corporations, but not for-profit corporations".[89]

It is not difficult to imagine a scenario in which a Canadian business corporation might rely on *Canada Without Poverty* to claim a constitutional right to take advantage of a state-supplied platform

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84. See *Burwell v Hobby Lobby*, *supra* note 82; *Citizens United v Federal Election Commission*, 556 US 310 (2010) [*Citizens United*].
85. See Richard Schragger & Micah Schwartzman, "Some Realism About Corporate Rights" in Micah Schwartzman, Chad Flanders & Zoe Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016) at 347.
86. See *Citizens United*, *supra* note 84, where the majority of the United States Supreme Court declined to limit its ruling to the constitutional protection of non-profit corporate political speech.
87. *Burwell v Hobby Lobby*, *supra* note 82 at 709.
88. *Ibid* at 712.
89. *Ibid* at 684.

for political speech. One potential source of conflict is paragraph 20(1)(cc) of the *ITA*, which presently allows taxpayers to deduct unlimited lobbying expenses for lobbying related to the taxpayer's business.[90] This provision effectively allows business deductions for activities that would have prohibited for registered charities under former subsection 149(6.2).[91] While paragraph 20(1)(cc) has been in place for many years, it is not inconceivable that it could be amended or repealed: lobbying expenses are not deductible in the US,[92] and the original Canadian provision was the subject of critique.[93] If Parliament decided to limit the lobbying deduction to individual taxpayers, business corporations might argue that they, like charitable corporations, have a constitutional right "to engage in unimpaired public policy advocacy" that furthers their income-producing mandate.[94]

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90. *ITA*, *supra* note 2, para 20(1)(cc). The expenses must be incurred for the purpose of producing income. See also subsections 19, 19.01, and 19.1, which allow taxpayers to deduct advertising expenses for the purpose of gaining or producing income from the business or property.
91. Richard Bridge, "The Law of Advocacy By Charitable Organizations: The Case For Change" (2000) at 16, online (pdf): *Library and Archives Canada* <epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf> [perma.cc/39KR-XRK9].
92. "Publication 529 (2018), Miscellaneous Deductions" online: *Internal Revenue Service* <www.irs.gov/publications/p529> [https://perma.cc/YCN7-FXEU#en_US_2018_publink10004488].
93. When the provision was originally introduced by the Pearson government in 1965 as subsection 11(aa) of the *ITA*, *supra* note 2, the opposition raised concerns of abuse, since the provision would benefit lawyers and other professionals that lobbied governments: see *House of Commons Debates*, 26-3, Volume 3 (15 June 1965) at 2429. I thank Roark Lewis for bringing this point to my attention.
94. Such a challenge would have an American precedent. In *Cammarano v United States*, 358 US 498 (1959), the United States Supreme Court rejected a First Amendment challenge to a Treasury Regulation that denied business expense deductions for lobbying activities.

B. Reflection Two: The "Megaphone v Muzzle" Debate

A second element of *Canada Without Poverty* that merits reflection is the central holding that subsection 149.1(6.2) of the *ITA* violated CWP's freedom of expression by preventing it from taking advantage of a state-supplied platform for political speech. There is no doubt that non-partisan public policy advocacy, the type of expression that disqualified CWP from registered charity status, is *Charter*-protected expression. The question the Ontario Superior Court had to consider was whether subsection 149.1(6.2) represented a (constitutionally acceptable) governmental decision not to support a particular speaker or a (constitutionally unacceptable) attempt to suppress political speech.[95] Justice Morgan arrived at the latter conclusion, but did so without explicitly applying the negative rights/positive rights framework articulated by the Supreme Court of Canada in its section 2(b) jurisprudence.[96] *Canada Without Poverty* thus raises questions both about the usefulness of that framework, and about its application to the registered charity regime.

1. The Positive Rights/Negative Rights Distinction

The Supreme Court of Canada jurisprudence on freedom of expression purports to draw a sharp distinction between negative rights and positive rights claims. The Court has defined a "negative" freedom of expression claim as a claim to "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement".[97] A positive rights claim, on the other hand, is a claim

95. For an early discussion of this distinction, see Richard Moon, *The Constitutional Protection of Freedom of Expression*, 2d (Toronto: University of Toronto Press, 2000) at 176.

96. *Canada Without Poverty*, *supra* note 1.

97. *Baier v Alberta*, 2007 SCC 31 at para 35 [*Baier*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 [*GVTA*], (clarifying that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression at para 35).

"that government must legislate or otherwise act to support or enable an expressive activity".[98]

The Supreme Court of Canada has historically taken a generous approach to negative section 2(b) claims. So low is the bar for establishing an infringement of a "negative" section 2(b) freedom, in fact, that commentators have criticized the Court's over-reliance on the section 1 justification analysis in these cases.[99] The Court has taken a less generous approach to positive rights claims. In particular, the Court has held that section 2(b) does not generally impose a positive obligation on government "to facilitate expression by providing individuals with a particular *means* of expression".[100] A long line of "statutory platform" cases establish that where the government chooses to establish a specific means or statutory platform for expression, it is generally under no constitutional obligation to extend that platform to everyone.[101]

The Supreme Court of Canada has been reluctant to recognize positive rights under any branch of section 2. However, the case law leaves open the possibility that in "exceptional" cases, positive government action may be required in order to make a fundamental freedom meaningful.[102] A majority of the Court identified such an exception in *Dunmore v Ontario (AG)*,[103] striking down labour legislation that excluded agricultural workers from a protective labour rights regime on the basis that it violated associational rights guaranteed under section 2(d).[104] The Court recognized in *Dunmore* that underinclusive legislation "may, in unique

98. *Baier*, *ibid* at para 34.
99. *GVTA*, *supra* note 97 at para 27. See also Michael Plaxton & Carissima Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010) 52 Supreme Court Law Review (2d) 65.
100. *GVTA*, *ibid* at para 29. See also *Baier*, *supra* note 97 at para 20; *Haig v Canada*, [1993] 2 SCR 995 [*Haig*] ("[t]he freedom of expression contained in s 2(b) prohibits gags, but does not compel the distribution of megaphones" at para 72).
101. *Haig*, *ibid* at para 83.
102. *Ibid* at paras 79-80; *Baier*, *supra* note 97 at para 26.
103. 2001 SCC 94 [*Dunmore*].
104. *Ibid*.

contexts, substantially impact the exercise of a constitutional freedom".[105] In concluding that the total exclusion of agricultural workers from the Act substantially interfered with the freedom of association of those workers, the majority relied upon three factors: (1) that the claim was grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant had demonstrated that exclusion from a statutory regime had the effect of a substantial interference with section 2(b) freedom of expression, or had the purpose of infringing freedom of expression; and (3) that the government was responsible for the inability to exercise the fundamental freedom.[106]

In *Baier v Alberta*,[107] the Court incorporated the *Dunmore* factors into a framework for determining positive section 2(b) claims.[108] The claimants in *Baier* alleged that an Alberta statute that prohibited school employees from running for election as school trustees infringed their right to free expression. The Court articulated the following approach for cases where government alleges that a positive rights claim is being advanced:

> [f]irst [the court] must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered... If a "positive rights" claimant cannot satisfy the *Dunmore* criteria…then the s. 2(b) claim will fail.[109]

The Court found that since the claimants in *Baier* wanted the government to enable expressive activity by "legislat[ing] their inclusion into the platform of school trusteeship", their claim was a positive one.[110] This claim did not meet the first two *Dunmore* criteria, in large part because there were alternative ways for the claimants to express themselves on

105. *Dunmore*, *supra* note 103 at para 22.
106. *Ibid* at paras 24-26; *Baier*, *supra* note 97 at para 30.
107. *Baier*, *supra* note 97.
108. *Ibid* at paras 43-45.
109. *Ibid* at para 30.
110. *Ibid* at para 43.

matters relating to the education system.[111] Their claim was therefore dismissed.

Recent case law illustrates that distinguishing between a negative and positive rights claim is not always straightforward.[112] In *Greater Vancouver Transportation Authority v Canadian Federation of Students*,[113] the Supreme Court of Canada addressed the constitutional validity of government advertising policy that permitted commercial but not political advertising on public transit vehicles.[114] The Canadian Federation of Students, which wished to buy advertising space on buses for its "Rock the Vote" campaign, characterized the policy as state interference with the content of their expression. The respondent transit authorities, on the other hand, characterized the policy as an under-inclusive platform for expression.[115] At stake was whether the claim should be resolved using the *Dunmore/Baier* framework, or a less demanding negative rights analysis that the Court had established for expression in a public place.[116]

The majority of the Court agreed with the claimants' characterization of the right. As Plaxton and Mathen observe, the majority offered two related reasons for distinguishing the Federation's "negative" freedom of expression claim from the "positive" rights claim in *Baier*.[117] First, the transit policies in *GVTA* "were not 'underinclusive' in the required sense".[118] The legislative regimes in *Dunmore* and *Baier*, the majority noted, had restricted a statutory platform to a particular class of persons. The transit policies, by contrast, did not prevent any person from using the advertising service as a means of expression, but only restricted the

111. *Ibid* at para 46.
112. See also Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (London, UK: Bloomsbury, 2015) at 185 (Where the state is extensively involved in a domain of activity, what might originally be conceived as negative may take on positive dimensions).
113. *GVTA*, *supra* note 97.
114. *Ibid* at para 1.
115. *Ibid* at para 26.
116. *Montreal (City) v 2952-1366 Québec Inc*, 2005 SCC 62.
117. Plaxton & Mathen, *supra* note 99 at 91.
118. *Ibid*.

content of their advertisements.[119] Second, in order to be characterized as a positive rights claim, a claimant must be requesting "that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded".[120] Since the claimants were seeking to express themselves "by means of an existing platform they are entitled to use",[121] the majority held, their claim was better characterized as a negative rights claim.

2. Did CWP Make a Positive or a Negative Freedom of Expression Claim?

It is unclear from *Canada Without Poverty* whether Morgan J understood CWP's claim to be a negative or a positive rights claim. While both parties framed their written submissions in a manner consistent with the dichotomous *Baier/GVTA* framework, the court did not explicitly adopt either a "negative" or "positive" characterization of CWP's claimed right. Instead, in determining that CWP's freedom of expression had been violated, Morgan J applied part of the established test for an infringement of religious freedom to CWP's "analogous" claim.[122] It is difficult to rationalize this part of Morgan J's opinion, which would certainly have been in issue had the government appealed. *Canada Without Poverty* nevertheless provides a standpoint from which to reflect on the instability of the negative/positive rights distinction, and to consider section 2(b)'s broader application to the registered charity regime.

The Supreme Court of Canada's dichotomous section 2(b) framework relies heavily on the notion that it is possible to distinguish

119. *GVTA*, *supra* note 97 at paras 31-32.

120. *Ibid* at para 35.

121. *Ibid*.

122. As we have seen above, Morgan J characterized subsection 149.1(6.2) as a "state-imposed burden" analogous to the legislated day of rest that was found to violate the religious freedom of Sabbatarian observers in *R v Edward Books and Art Ltd*, [1986] 2 SCR 713: see paras 44 and 46. Two paragraphs later, Morgan J characterized CWP's position as akin to that of the agricultural workers in *Dunmore*, *supra* note 103, suggesting that its claim was a positive rights claim.

statutory regimes that *restrict expressive content* from statutory regimes that *exclude persons (who may express restricted content)*. *Canada Without Poverty* exposes the formalism and malleability of that distinction even more sharply than did *GVTA*. Essentially, there were two plausible interpretations of former subsection 149.1(6.2) vying for dominance in *Canada Without Poverty*. The first was that subsection 149.1(6.2) *excluded a class of taxpayers* defined, in part, by their ability to engage in political expression, from an advantageous statutory platform. If subsection 149.1(6.2) was characterized as such a "category of persons" restriction, CWP's claim would be treated as a positive rights claim. The second interpretation was that subsection 149.1(6.2) *restricted the political expression of a class of taxpayers* within a statutory platform that they were (otherwise) entitled to use. If subsection 149.1(6.2) was characterized as such a "content" restriction, CWP's claim would be treated as a negative rights claim. Neither interpretation was implausible; but the adoption of one or the other would dramatically alter the rights claimant's chance of success. One may speculate that Morgan J chose not to apply the *GVTA/Baier* framework because he recognized the problematic nature of this approach.

While subsection 149.1(6.2) could plausibly be characterized as either a "content" or "category of persons" restriction, however, several contextual factors support a "positive right" characterization of CWP's section 2(b) claim. First, unlike the transit policies in *GVTA*, the registered charity regime restricts its statutory platform to a particular class of taxpayers — corporations or trusts or unincorporated associations that have been accorded registered charity status by the Minister of National Revenue. As Morgan J recognized at the outset of his judgment, subsection 149.1(6.2) was (and is) framed as a set of *criteria* or "*definitional guidelines*" for determining what persons may benefit from that selective statutory

platform.[123] Second, it is clear from the submissions and the judgment that CWP was not asserting a right to engage in political expression *per se*, but rather a right to engage in political expression *as a registered charity*.[124] Because 'engaging in political expression as a registered charity' is not an expressive activity that one can pursue without government enablement in Canada, the better view is that CWP was advancing a positive freedom of expression claim.

Engaging in (limited) political activity as a registered charity is a form of expressive activity that is enabled and supported by government in Canada. The enablement consists principally of the Minister of National Revenue's sole authority to confer registered charity status on an applicant. The support consists principally of the two tax advantages that were identified in Part II: the exemption of registered charities from federal income tax, and the granting of receipting privileges that help registered charities to attract corporate and individual donors. There is an extensive tax literature debating whether these supportive tax rules are better characterized as subsidies for charities, or as proper measures of the

123. See *Canada Without Poverty*, *supra* note 1 at para 5 ("In order to maintain [the fiscal advantages of registered charity status], a charity must remain within the definitional guidelines set out in s 149.1(6.2)" at para 5). It is true, as Richard Moon notes, *supra* note 95, that selective subsidy programs such as the registered charity regime may shift from being regarded as (constitutional) support for speech to being regarded as (unconstitutional) suppression of speech where the allocation criteria are irrelevant to the program's legitimate objectives. However, it is not clear that the definitional guidelines in subsection 149.1(6.2) were irrelevant in that way: see Moon, *supra* note 95 at 176-78.

124. See *e.g.* Factum of the Applicant, *CWP*, *supra* note 40 ("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" at para 55).

tax base.[125] This literature does not appear to have been brought to the attention of the court. However, the dominant view in Canada is that the charitable donation tax credit serves as a form of public subsidy for the quasi-public goods and services that registered charities provide.[126] This view is embraced by the Government of Canada itself, which (unlike the US government) treats all of the tax-favourable measures available to charities as non-structural tax expenditures that support the social objective of "[supporting] the important work of the charitable sector in meeting the needs of Canadians".[127]

The characterization of CWP's claim as a positive rights claim is consistent with case law from the Federal Court, which has characterized registered charity status as "public funding through tax exemptions for the

125. See *e.g.* Evelyn Brody, "Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption" (1998) 23 Journal of Corporation Law 585; Roger Colinvaux, "Rationale and Changing the Charitable Deduction" (2013) 138 Tax Notes 1453. In Canada, see Neil Brooks, "The Role of the Voluntary Sector in a Modern Welfare State" in Jim Phillips, Bruce Chapman, & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2001) 166 at 171; David G Duff, "Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and Canadian Experience" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) 199.

126. See *Alliance for Life v MNR*, [1999] 3 FC 504 ("[i]n the Canadian context the activities of a registered charity are, in effect, subsidized out of the public purse in that donations are deductible for income tax purposes" at para 26).

127. "Report on Federal Tax Expenditures – Concepts, Estimates and Evaluations 2020: Part 4" (2020) online: *Government of Canada* <www.canada.ca/en/department-finance/services/publications/federal-tax-expenditures/2020/part-4.html#_Toc473794482> [https://perma.cc/A6UK-DHXP].

propagation of opinions".[128] It is also consistent with Supreme Court of the United States authority addressing the relationship between the First Amendment and charitable tax status under the Internal Revenue Code ("IRC").[129] US tax law, like Canadian tax law, distinguishes between two major categories of not-for-profit organizations. IRC section 501(c)(4) organizations can engage in substantial lobbying to advance their exempt purposes, but cannot issue tax deductible donation receipts to donors, while section 501(c)(3) organizations may issue donation receipts, but are not permitted to engage in substantial lobbying. In *Regan v Taxation with Representation*,[130] a non-profit corporation was denied section 501(c)(3) status because a substantial part of the corporation's activities consisted of attempting to influence legislation. The corporation challenged the IRC's prohibition against substantial lobbying by section 501(c)(3) organizations on free speech grounds, arguing that the prohibition imposed an "unconstitutional condition" on the receipt of tax-deductible contributions. The Supreme Court unanimously dismissed the First Amendment argument. Tax exemptions and tax deductibility, the Court wrote, were both "form[s] of subsidy that [are] administered through the tax system".[131] Congress was not required to grant such a subsidy to a person that wished to exercise a constitutional right to political speech.[132]

3. The Strength and Scope of CWP's Positive Rights Claim

Assuming I am correct that CWP's successful claim in *Canada Without Poverty* is better understood as a "positive" free expression claim, the decision has substantially extended the range of "exceptional" cases in which positive government action is required in order to make a

128. See also *Human Life International in Canada Inc v MNR,* [1998] 3 FC 202 ("[t]he 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" at para 18).
131. *Ibid* at 544.
132. *Ibid* at 545.

fundamental freedom meaningful. Two aspects of this extension merit comment. First, in comparing CWP's position to that of the agricultural workers in *Dunmore*, Morgan J neglected the broader statutory context in which non-profit organizations operate in Canada. Second, whether or not the *Dunmore* analogy was plausible, the extension of section 2(b) rights to CWP has cleared the way for other constitutional challenges to the registered charity regime, including challenges to the *ITA*'s prohibition on partisan political activity by registered charities.

The first point concerns Morgan J's suggestion that CWP's position was comparable to that of the agricultural workers who were totally excluded from Ontario's protective labour regime. In applying the *Dunmore* criteria to persons making positive section 2 claims, the courts have focused heavily on whether there were "alternative spaces available" to the rights claimant in the social distribution of communicative or associative power.[133] Thus, in concluding that the associative claim of the agricultural workers in *Dunmore* was grounded in a fundamental freedom rather than in access to a particular statutory regime, the Supreme Court of Canada relied heavily on the fact that the workers were "substantially incapable of exercising their fundamental freedom to organize without the protective regime".[134] This lack of an alternative space in which to organize distinguished the agricultural workers from RCMP officers for whom access to a similar protective regime "would serve to enhance rather than safeguard their exercise of a fundamental freedom".[135]

In concluding that CWP was in a position "akin to that of the agricultural workers in *Dunmore*", Morgan J implied that CWP likewise lacked an alternative space in which to express itself politically.[136] This conclusion appears to be linked to the court's factual finding that there

133. See Moon, *supra* note 95, at 38 (arguing that the assessment of a specific limit (time, place and manner) on an individual's opportunity to participate in public communication depends, in large part, on the existence of alternative spaces available to the individual in the distribution of communicative power).
134. *Dunmore*, *supra* note 103, at para 35.
135. *Baier*, *supra* note 97 at para 28.
136. *Canada Without Poverty*, *supra* note 1 at para 48.

was "no way to pursue the Applicant's charitable purposes…while restricting its politically expressive activity to 10% of its resources as required by CRA".[137] From the perspective of CWP *qua* registered charity, these statements may have been accurate. However, from the perspective of CWP *qua* corporation or *qua* association of individuals pursuing a particular altruistic mission, there were, arguably, other potential solutions. At the time of CWP's audit, for example, it was common practice for individuals running advocacy-minded organizations to get around subsection 149.1(6.2) of the *ITA* by creating families of organizations with both a registered charity and a paragraph 149(1)(l) non-profit.[138] Only by framing CWP's section 2(b) right as the *right of a not-for-profit corporation with registered charity tax status* is it possible to conclude that it lacked an alternative space in which to express itself.

The second point is that the extension of section 2(b) rights to CWP has opened the door for future constitutional challenges to the registered charity regime. CWP was careful not to assert in argument that government is constitutionally obliged to confer charitable status on any particular purpose or activity,[139] and the reasons in *Canada Without Poverty* appear to assume that government could change the legal definition of charity without violating the Constitution. However, if it is unconstitutional for the state to decline support to the political expression of entities whose broader objects the state decides to include within the legal definition of charity, it is unclear why it should be constitutional for the state to decline support to the political (and religious and other) expression of entities whose broader objects the state excludes from the legal definition of charity.[140] In either case, government is treating certain

137. *Ibid* at para 42.
138. Robert B Hayhoe & Nicole K D'Aoust, "Policy Forum: Using Dual Structures for Political Activities – Charities and Non-Profits in the Same Family of Organizations" (2017) 65:2 Canadian Tax Journal 357.
139. Factum of the Applicant, *CWP*, *supra* note 40 at para 9.
140. There is an argument that agitation for legislative and political change should itself be a charitable purpose, whether or not that agitation supports another charitable purpose: see Beard, "Charity Law", *supra* note 10 at 261.

entities more advantageously than others in the marketplace of ideas.

The future challenges to the registered charity regime may include a challenge to (new) subsection 149.1(6.2)'s continuing prohibition on partisan political activity by registered charities. CWP specifically did not take issue with this restriction.[141] As a result, the *ITA* continues to prohibit a registered charity from devoting any part of its resources to "the direct or indirect support of, or opposition to, any political party or candidate for public office".[142] However, like non-partisan policy advocacy, partisan political activity is political speech, which the Supreme Court of Canada has described as "the single most important and protected type of expression". If (the old) paragraphs 149.1(6.2)(a) and (b) burdened the former expressive activity, it follows that (the new) 149.1(6.2) burdens the latter activity, and would have to be justified under section one of the *Charter*.[143]

C. Reflection Three: Justifying the Registered Charity Regime

In striking down subsection 149.1(6.2) of the *ITA* as an unjustified violation of CWP's freedom of expression, Morgan J held that the Attorney General had failed to establish a pressing and substantial objective for limiting a *Charter* right.[144] This holding also merits reflection. Principally, it suggests that if government is going to defend its choices regarding the outer boundaries of the registered charity regime against future constitutional challenges, it needs to do a better job of articulating the purposes of those boundaries.

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141. *Canada Without Poverty*, *supra* note 1 at para 9; Factum of the Applicant, *CWP*, *supra* note 40 at para 9.
142. *ITA*, *supra* note 2, ss 149.1(6.1), (6.2).
143. For a similar argument, see Beard, "Charity Law", *supra* note 10 at 267. That is not to say such a violation could not be justified. See Beard, "Charity Law", *supra* note 10, identifying as a legitimate purpose "maintaining the independence of charitable purposes from party politics to preserve the coherence of the sector as a distinctive social force within our democracy" at 270-71.
144. *Canada Without Poverty*, *supra* note 1 at para 64.

If a statutory provision is found to infringe a *Charter* right, a court must next determine whether the infringement is demonstrably justified in a free and democratic society. In order to meet the test established under section one of the *Charter*, (1) the law's objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom";[145] (2) the law must be rationally connected to the objective; (3) the law must impair the right no more than is necessary to accomplish the objective; and (4) the law must not have a disproportionately severe effect on the persons to whom it applies.[146] In order for a statutory objective to be sufficiently important to justify limiting a *Charter* right, it must be consistent with the values of a free and democratic society, and must relate to "pressing and substantial" concerns.

The identification of the objective of a challenged law is thus a task of considerable importance. A law's objective may be defined at varying levels of generality, but should at minimum "supply a reason for infringing the *Charter* right".[147] In some cases, the language of an impugned provision may provide sufficient evidence of the law's objective.[148] In others, the court may look for evidence of the law's objective in expert reports, previous case law, or parliamentary debates.[149] The courts have generally accorded a high degree of deference to governmental articulations of the 'pressing and substantial' objectives of the laws they pass.[150] Ultimately, however, the onus of justifying a *Charter* infringement rests on government: if the Crown makes no submissions on the law's objectives, or offers only vague explanations of what the provisions aim to achieve, its justificatory

145. *R v Oakes*, [1986] 1 SCR 103 at para 73 [*Oakes*], citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 352.
146. *Oakes*, *ibid*; see also Hogg, *supra* note 76 at s 38.8(b).
147. Hogg, *ibid* at s 38.9(a).
148. *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 57 [*Frank*]; *R v Morales*, [1992] 3 SCR 711.
149. *Frank*, *ibid* at para 58.
150. Errol P Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?" in Errol P Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5d (Markham, Ont: LexisNexis Canada, 2014) 293. See also Hogg, *supra* note 76 at s 38.9(c).

arguments are likely to fail.[151]

The Attorney General of Canada struggled to identify the objective of subsection 149.1(6.2) of the *ITA* in *Canada Without Poverty*. Its written submission essentially repeated the text of the law, identifying the objective of the subsection as being to "[permit] registered charities to conduct limited non-partisan political activities, while maintaining the common law prohibition on political purposes".[152] Justice Morgan rejected this "permissive" characterization of the law's objective.[153] In his view, the objective of subsection 149.1(6.2) was to "*limit* political expression — i.e. to keep it to a small percentage of the organization's time, effort and resources".[154] Since the Attorney had provided no further reason for limiting political speech acts done in furtherance of accepted charitable purposes, the Court concluded, it had failed to establish a pressing and substantial objective and its attempts at justification were doomed.[155]

In the wake of *Canada Without Poverty*, government would be well-advised to start identifying why it has chosen to set certain outer boundaries to the registered charity regime. While the limits on non-partisan political activity have been repealed for now, the regime contains other limiting provisions that are now vulnerable to constitutional challenge. One of these, as we have seen, is subsection 149.1(6.2)'s continuing prohibition on partisan political activity by registered charities. Another is the subsection 149.1(1) definition of a "charitable organization", which continues to incorporate into the *ITA* the common law prohibition against political purposes. The Supreme Court of

151. *Vriend v Alberta*, [1998] 1 SCR 493 at paras 110-5. It seems likely that this principle would apply in a similar form under either the *Oakes* test: see *Oakes*, *supra* note 145 or the *Doré* test: see *Doré v Barreau du Québec*, 2012 SCC 12 at para 55.

152. Respondent's Memorandum, *CWP*, *supra* note 58 at paras 57, 62. Interestingly, the Applicant framed the objective of subsection 149.1(6.2) in similar terms: see Factum of the Applicant, *CWP*, *supra* note 40 at para 62.

153. *Canada Without Poverty*, *supra* note 1 at paras 55-56.

154. *Ibid* at para 57.

155. *Ibid* at paras 57-64.

Canada has repeatedly held that political expression is at the core of the expression guaranteed by the *Charter*, and that its value will not easily be outweighed by a governmental objective.[156] If government wants to defend the remaining limits on political advocacy by registered charities, therefore, it will need to identify what purposes those limits serve.

While the legislative record is thin, there are a number of possible rationales for an income tax provision that limits the political advocacy of charities. First, government might establish such a statutory limit in order to effectuate a tax policy decision that certain benevolent activities are deserving of extraordinary fiscal support. More specifically, in a context of limited resources, government might exclude political activities from charitable tax status in order to earmark the highest levels of fiscal support for 'traditional' charitable activities such as feeding the hungry and teaching the young. It is unclear, however, whether a court would accept this objective or consider it sufficiently important to warrant overriding a constitutionally protected freedom. There is no consensus that organizations that feed the hungry are more valuable than organizations that seek to change welfare laws, and budgetary considerations are not generally sufficient for justifying a limit on a *Charter* right.[157] Moreover, municipalities and amateur athletic associations receive the same tax support as registered charities in Canada,[158] which undermines the argument that the *ITA* prioritizes eleemosynary support.

A more pressing reason why government might limit the political advocacy of registered charities is to protect a distinctive and autonomous

156. *Harper v Canada (Attorney General)*, 2004 SCC 33 ("[p]olitical speech…is the single most important and protected types of expression" at para 11). See also *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at paras 88, 91-95; Moon, *supra* note 95 at 35.

157. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 64. See also Lorraine E Weinrib, "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Supreme Court Law Review 469 at 486.

158. *ITA*, *supra* note 2, s 149.1(1), "qualified donee".

role for the charitable sector within Canada's free and democratic society.[159] There are good reasons, as jurists have previously argued, to distinguish charities from government. Charitable activity has a voluntary character that differentiates it from government activity, and allows charities to respond to social problems in a unique and valuable way.[160] However, the coherence and autonomy of the 'voluntary' sector has proven difficult to maintain. The distinction between government and charity may become blurred where government funds and controls charitable projects.[161] It may also become blurred where charities seek to achieve beneficial outcomes, "not directly by means of their own voluntary activity, but by attempting to persuade government to use its coercive powers in a particular way."[162] By limiting the ability of registered charities to engage in political or partisan advocacy, it is arguable that the *ITA* serves the pressing and substantial objective of distinguishing charities from government, and protecting their unique role as voluntary providers of public goods.

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159. In the Australian context, Jennifer Beard identifies "maintaining the independence of charitable purposes from party politics to preserve the coherence of the sector as a distinctive social force within our democracy" as a legitimate government purpose, see Beard, "Charity Law", *supra* note 10 at 270-71.
160. The classic statement of this view is generally attributed to Lord Beveridge: William H Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (London, UK: Allen & Unwin, 1948). See also Matthew Harding, "Distinguishing Government from Charity in Australian Law" (2009) 31:4 *Sydney Law Review* 559; Adam Parachin, "How and Why to Legislate the Charity-Politics Distinction Under the Income Tax Act" (2017) 65:2 Canadian Tax Journal 391 at 398; Darryn Jensen, "The Boundary between Not-for-Profits and Government" in Matthew Harding, ed, *Research Handbook on Not-for-Profit Law* (Cheltenham: Edward Elgar Publishing Limited, 2018) 153; Chan, *supra* note 79 at ch 6.
161. Chan, *ibid*; Jensen, *ibid*.
162. Jensen, *ibid* at 167.

V. Conclusion: The Perils and Promise of Charity Law's Encounter with Public Law

Canada Without Poverty has already established itself as a significant and influential decision. With one bold superior court application, an anti-poverty charity has accomplished what forty years of charity law reform advocacy could not. Registered charities may now participate robustly in public policy dialogue, free from the tyrannical ambiguity of former subsection 149.1(6.2) of the *ITA*. At the same time, *Canada Without Poverty* leaves many questions unanswered. What types of associations are rights-holders under the *Charter*? What are the constitutional limitations on government's ability to set the outer bounds of the registered charity regime? And what is the rationale for limiting the political advocacy of charities?

Charity law, and the lawyers and judges that apply it, will need to increase their engagement with public law in order to grapple with these questions. They are difficult and pressing questions, and it seems highly unlikely that they will disappear from view. It was not charity lawyers who argued *Canada Without Poverty*, after all, but litigators who recognized the significant public law dimensions of subsection 149.1(6.2) and of the CRA's political activities audits.[163] In the wake of *Canada Without Poverty*, it is probable that we will see other public lawyers testing the outer bounds of the sector against the constitutional jurisprudence on freedom of expression, freedom of conscience and religion, freedom of association and equality rights.

If charity law needs to learn from public law, however, public law (and the lawyers and judges that apply it) would also benefit from a deeper engagement with the charity law tradition. We need go no further than *Canada Without Poverty* to illustrate this point. We have seen that the question Morgan J posed in the opening paragraph of his judgment — *"what is political?"* — is one that charity law has grappled with for over 100 years. However, the Ontario Superior Court of Justice largely

163. CWP was represented by David Porter, Geoff Hall, and Anu Koshal, all members of McCarthy Tetreault's Litigation Group in Toronto.

ignored the body of charitable trust cases addressing the relationship between charity and politics. As a result, it failed to note that the principal rationale that charity law offers for denying charitable status to political purposes is a *constitutional law* rationale — namely, that the courts must remain neutral on the public benefit of a change in the law in order not to usurp the function of the legislature.[164]

In a judgment that engaged more deeply with the charity law tradition, Morgan J might have identified the parallels between charity law's treatment of political advocacy and Canadian constitutional law principles, and considered whether the relationship between the two bodies of law was coherent. The High Court of Australia took up a similar challenge in *Aid/Watch Incorporated v Commissioner of Taxation*,[165] considering whether the common law prohibition on political purposes was consistent with the nation's constitutional structure. In its groundbreaking 2010 decision, a majority of the High Court held that agitating for legislative and political change was an "indispensable incident" of Australia's system of representative government, and that an entity's participation in those processes was "for the public benefit" within the meaning of the law of charities, irrespective of the merits of the legislative policy being pursued.[166]

I am hopeful that a Canadian court will consider similar arguments in a future case. Until we grapple more deeply with the relationship between charity law and constitutional law, we will live with the dissonance that follows from *Canada Without Poverty*. On the one hand, Canadian charity law does not recognize that seeking to change the law is, itself, for the public benefit. On the other hand, it appears now to be constitutionally impermissible for the Parliament of Canada to exclude corporations from a favourable tax status on the basis that they pursue their purposes through political advocacy, unless there is a pressing and substantial reason for the exclusion. In this way, Canadian constitutional law suggests that seeking to change the law does benefit the public in a constitutionally indispensable way.

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164. *McGovern*, *supra* note 32 at para 506.
165. [2010] HCA 42.
166. *Ibid* at 555-56; See Beard, "Charity Law", *supra* note 10 at 262 for a discussion.