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DOES CANADA'S REGISTERED CHARITY REGIME WITHSTAND CHARTER SCRUTINY? THE INTERPLAY BETWEEN CHARITIES, POLITICS, AND FREEDOM OF EXPRESSION FOLLOWING CANADA WITHOUT POVERTY

Megan Walwyn *

CITED: (2025) 30 *Appeal* 64

ABSTRACT

In the 2018 decision *Canada Without Poverty v AG Canada*, the Ontario Superior Court of Justice ("ONSC") held that the former iteration of subsection 149.1(6.2) of the *Income Tax Act*, which limited registered charities to spending no more than 10 percent of their resources on non-partisan political activities, unjustifiably infringed the applicant charity's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter"). This decision appears to leave the present subsection 149.1(6.2) vulnerable to a similar constitutional challenge, as it continues to restrict charities from engaging in partisan political activities and pursuing political purposes. Building on charity law scholar Kathryn Chan's paper "Constitutionalizing the Registered Charity Regime," this paper presents a hypothetical *Charter* challenge to test whether the amended subsection 149.1(6.2) could withstand a section 2(b) challenge and, if so, whether it could be justified under section 1. Through its *Charter* analysis, this paper critically examines the long-standing assumption that politics and charities are incompatible and evaluates justifications for maintaining the separation between politics and charities.

* Megan Walwyn recently completed her Juris Doctor at the University of Victoria, Faculty of Law. She became interested in charity and not-for-profit law in Kathryn Chan's Non-Profit Sector Law course at UVic, and wrote this paper as part of this course. Megan has won several awards recognizing her academic achievement and community involvement at UVic Law, including the Law Foundation of BC Public Interest Award for her demonstrated commitment to the public interest combined with high academic achievement. She is currently articling at Farris LLP in Vancouver, and is excited to continue to hone her legal research and writing skills in this position.

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INTRODUCTION

What is political?

This is the question that Justice Morgan of the Ontario Superior Court of Justice ("ONSC") led with in the 2018 decision *Canada Without Poverty v Attorney General of Canada*, ("*Canada Without Poverty*")[1] and is one that the voluntary sector and the Canadian government had grappled with for decades prior. In *Canada Without Poverty*, Justice Morgan found that paragraphs 149.1(6.2)(a) and (b) of the *Income Tax Act* ("*ITA*"),[2] which prohibited registered charities from devoting more than 10 percent of their resources to non-partisan political activities, unconstitutionally and unjustifiably infringed the applicant's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] In doing so, he suddenly and unceremoniously brought an end to the long-established and controversial registered charity regime. Parliament was quick to respond with amendments to subsection 149.1(6.2) of the *ITA* that signified a new era of charities regulation in Canada.

The Canadian charitable sector celebrated these amendments. The changes to subsection 149.1(6.2) and the accompanying policy guidance provided directions and leniency for registered charities to participate in public policy development activities, thus reducing the chilling effect that the prior regime had on charitable advocacy. However, subsection 149.1(6.2) continues to restrict charities from engaging in partisan political activities and from pursuing any political purpose. The present regulatory scheme raises two critical questions that this paper seeks to address: do these remaining prohibitions on the expression of registered charities also violate section 2(b) of the *Charter*, and if so, can they be justified under section 1?

This paper first outlines the common law and statutory rules governing charities' political activities prior to and following *Canada Without Poverty*. Then, building on charity law scholar Kathryn Chan's paper "Constitutionalizing the Registered Charity Regime,"[4] this paper presents a hypothetical *Charter* challenge to test whether the current subsection 149.1(6.2) could withstand a section 2(b) challenge, and if so, whether the provision could be justified under section 1. The question at the heart of this paper is not quite "what is political?", as posed by Justice Morgan. Rather, this paper seeks to answer the questions: why are politics not charitable, and is this position constitutionally valid?

I. REGULATING CHARITIES' POLITICAL ACTIVITIES

A. Common Law Position: Prohibition Against Political Purposes

At common law, there are two criteria for a purpose to qualify as charitable: it must fall within one of the four broad categories of charity described in *Commissioners for Special Purposes*

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1 2018 ONSC 4147 [*Canada Without Poverty*].

2 RSC 1985, c 1 (5th Supp) [*ITA*].

3 Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 Kathryn Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020) 6 Can J Comp & Contemporary L 151.

of Income Tax v Pemsel,[5] and it must provide a public benefit.[6] Regulating and limiting charities' political expression has been a long-standing concern in Canada. This stems from the common law doctrine of political purpose, which bars charities from pursuing political purposes.[7] The political purpose doctrine originated from *obiter dicta* in the 1917 House of Lords case *Bowman v Secular Society* ("*Bowman*"), wherein Lord Parker held that trusts with political objects have "always been held invalid," because courts cannot assess "whether a proposed change in the law will or will not be for the public benefit."[8]

Today, the leading case on the political purpose doctrine is *McGovern v Attorney General*, where Justice Slade held that trusts for political purposes were non-charitable.[9] Justice Slade employed logic akin to that of *Bowman* in finding that a court cannot assess a political purpose's public benefit, as required for a purpose to be considered charitable at law.[10]

B. Pre-*Canada Without Poverty* Political Activities Regulatory Scheme

Prior to 2018, subsections 149.1(6.1) and (6.2) of the *ITA* stipulated that charities could engage in limited non-partisan political activities, as long as "substantially all" of their activities were charitable (and thus non-political). As tax authorities generally interpret "substantially all" to mean over 90 percent, this is often referred to as the "10 percent rule."[11] As a matter of interpretation and enforcement, the Canada Revenue Agency (the "CRA") divided advocacy activities into two categories: submissions to the government and public advocacy.[12]

The CRA interpreted subsection 149.1(6.2) to mean that submissions directly to the government were entirely charitable and could be pursued by charities without limit, provided they were connected to the organization's purpose. However, the CRA considered advocacy that communicated similar policy messages to the public to be a political activity, subject to the 10 percent rule.[13] The CRA also required that less than 10 percent of the political activities be ancillary to the organization's charitable activities and that they be non-partisan, pursuant to paragraphs 149.1(6.2)(b) and (c) of the *ITA*. This rule applied regardless of whether the subject matter of the charity's advocacy fit within the pursuit of its charitable purpose.

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5 [1891] AC 531 (HL) [*Pemsel*]. The House of Lords articulated "four heads" of charitable purposes: (1) relief of poverty; (2) advancement of education; (3) advancement of religion; or (4) advancement of "other purposes beneficial to the community" (at 55).

6 *Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 (HL) at 307.

7 Adam Parachin, "Charity, Politics and Neutrality" (2015) 18 Charity L & Practice Rev 23 at 26 [Parachin, "Neutrality"].

8 *Bowman v Secular Society Ltd*, [1917] AC 406 (HL) at 442 [*Bowman*]. It is interesting to note that Lord Parker's remark was erroneous: See Adam Parachin, "Distinguishing Charity and Politics: The Judicial Thinking Behind the Doctrine of Political Purposes" (2008) 45:4 Alta L Rev 871 at 877-880 [Parachin, "Politics of Purpose"].

9 *McGovern v Attorney General*, [1982] Ch 321 (HC) at 340.

10 *Ibid* at 336-337.

11 Samuel Singer, "Charity Law Reform in Canada: Moving from Patchwork to Substantive Reform" (2020) 57:3 Alta L Rev 683 at 694.

12 Canada Revenue Agency, *Political activities*, Policy Statement CPS-022 (Ottawa: Canada Revenue Agency, 2 September 2003).

13 *Ibid*.

The voluntary sector generally felt that this regulatory regime provided unclear guidance regarding political activities as it "marrie[d] imprecise rules with dire consequences for non-compliance."[14] Many charities complained of an "advocacy chill," whereby they reduced their advocacy work or refrained altogether for fear of having their registered charity status revoked.[15]

C. The *Canada Without Poverty* Decision

Canada Without Poverty ("CWP") is a non-profit corporation that has operated as a registered charity for over 45 years with the stated charitable purpose of "relieving poverty in Canada" by numerous means, including providing information to the government and public "to increase knowledge of poverty related issues and how to more effectively relieve poverty."[16] CWP engaged in public advocacy for "policy and attitudinal change."[17]

In 2014, the CRA audited CWP for the period of April 1, 2009 to March 31, 2012. The audit report concluded that "virtually all" of CWP's activities were communicative or expressive to the public, and thus all "political" in some sense of the word.[18] The Charities Directorate notified CWP that it intended to revoke its charitable status. CWP responded by filing a Notice of Application in the ONSC, seeking a declaration that subsection 149.1(6.2) of the *ITA* unjustifiably violated sections 2(b) and 2(d) of the *Charter*.

CWP argued that it was asserting a negative section 2(b) right: subsection 149.1(6.2) restricted expression "within an existing statutory scheme or platform" aiming to limit the "public communications of charities based on content."[19] CWP submitted that this restriction violated section 2(b) of the *Charter* and could not be justified under section 1. Conversely, the Attorney General of Canada argued that CWP was claiming a positive right to "government financial support through subsidized funding," by virtue of being granted registered charity status under the *ITA*.[20] The Attorney General submitted that subsection 149.1(6.2) did not violate section 2(b), but if it did, that it was justified under section 1.[21]

Justice Morgan ultimately held for the ONSC that subsection 149.1(6.2) and the CRA's 10 percent rule violated CWP's section 2(b) rights. However, Justice Morgan's reasons for judgment deviated significantly from both the parties' written submissions and the well-established legal framework for adjudicating freedom of expression claims.[22]

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14 Adam Parachin, *Charity versus Politics: Reforming the Judicial, Legislative and Administrative Treatment of the Charity-Politics Distinction* (Edmonton: The Pemsel Case Foundation, 2018) at 3 [Parachin, *Charity versus Politics*].

15 *Ibid*.

16 Chan, *supra* note 4 at 163, citing *Canada Without Poverty, supra* note 1 (Affidavit, Leilani Farha at para 4) and *Canada Without Poverty*, *supra* note 1 at para 14.

17 *Canada Without Poverty*, *supra* note 1 at para 12.

18 *Ibid* at paras 19, 11.

19 *Canada Without Poverty, supra* note 1 (Factum of the Applicant) at paras 51–54 [CWP Factum].

20 *Canada Without Poverty, supra* note 1 (Respondent's Memorandum of Fact and Law) at para 47 [AG Canada factum].

21 *Ibid* at paras 40–44, 51.

22 Chan, *supra* note 4 at 165.

Justice Morgan first discussed CWP's purposes and activities. He drew specific attention to CWP's submissions regarding the incoherence of the *ITA*'s distinction between non-partisan "political activities" and charitable activities, and noted that the CRA's interpretation and enforcement of subsection 149.1(6.2) "restrict[ed] virtually all of [CWP's] communications to the public regarding law reform or policy change."[23] He also highlighted the conclusion of a government report, which found that "the restrictions on political participation in subsection 149.1(6.2) of the *ITA* were outmoded and required legislative change."[24]

In his section 2(b) analysis, Justice Morgan made two significant factual findings: (i) that CWP could not pursue its "charitable purposes … while restricting its politically expressive activity to 10 percent of its resources as required by the CRA," and (ii) that CWP could not function, or would struggle to function, without registered charity status.[25] Justice Morgan did not explicitly determine whether CWP was claiming a positive or negative section 2(b) right. Ultimately, relying on section 2(a), 2(b), and 2(d) authorities, Justice Morgan held that the "shortcomings of [this] legislative regime undermine[d] or burden[ed]" CWP's exercise of its section 2(b) rights, impairing it from taking advantage of a "state supplied platform that it could otherwise freely access were it not for its insistence on exercising that right."[26] Justice Morgan concluded that subsection 149.1(6.2) and its accompanying policy measure infringed CWP's freedom of expression.

On the question of justification under section 1, Justice Morgan found that the Attorney General had failed to identify a pressing and substantial objective for the provision, contra both parties' written submissions.[27] The Attorney General submitted that the objective of subsection 149.1(6.1) was to permit registered charities to "use political means to further their views on matters pertaining to the wholly charitable ends, within reasonable limitations designed to ensure that those activities do not predominate."[28] Justice Morgan found that, read differently, this measure ensured "that registered charities [could not] engage in most political activities," and thus its objective was to "limit political expression" without further rationale.[29] Justice Morgan also noted that this purpose seemed to minimize the activity that the government supposedly sought to encourage—"a registered charity's ability to participate in public policy dialogue where these activities advance its charitable purpose."[30]

Without a pressing and substantial objective, Justice Morgan concluded that subsection 149.1(6.2) and the 10 percent rule unjustifiably violated CWP's right to freedom of expression

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23 *Canada Without Poverty*, *supra* note 1 at paras 18, 23.

24 *Ibid* at para 26, citing Canada Revenue Agency, "Report of the Consultation Panel on the Political Activities of Charities" (31 March 2017) at 5, online: <canada.ca/en/revenue-agency/services/charities-giving/charities/about-charities-directorate/political-activities-consultation/consultation-panel-report-2016-2017.html> [perma.cc/7AWY-KN3G].

25 *Ibid* at paras 42–43.

26 *Ibid* at para 48.

27 *Ibid* at para 66; Chan, *supra* note 4 at 177.

28 *Ibid* at paras 53–54.

29 *Ibid* at paras 56–57.

30 *Ibid* at para 59.

under section 2(b) of the *Charter*.[31] The ONSC ordered an immediate declaration that the CRA cease to interpret and enforce subsection 149.1(6.2) with the "substantially all" requirement and that the phrase "charitable activities" used in that section be read to include unlimited non-partisan political activities.[32] This decision thus brought the long-established rules limiting the political activities of registered charities to an "abrupt and rather undignified end."[33]

D. Post-*Canada Without Poverty* Political Activities Regulatory Scheme

The Attorney General ultimately did not appeal *Canada Without Poverty*, and subsection 149.1(6.2) of the *ITA* was amended in 2018 through Bill C-86.[34] This omnibus bill made three key modifications to the *ITA*'s registered charity provisions:

1. the definition of "charitable organization" was amended to clarify that an entity must be "constituted and operated exclusively for charitable purposes";
2. the definition of "charitable activities" was amended to include "public policy dialogue and development activities" carried out to further a charitable purpose; and
3. a clause was added to the definition of "charitable organization" stipulating that an entity that devotes part of its resources to support or oppose any political party or candidate was not considered to be constituted and operated exclusively for charitable purposes.[35]

An explanatory note added that the extent to which a charity could engage in non-partisan political activities would be determined by reference to the common law, rather than the "substantially all" requirement.[36]

The CRA also released a policy guidance to replace policy statement CPS-022, which elaborated on what constituted permissible public policy dialogue and development activities ("PPDDAs") under the amended subsection 149.1(6.2).[37] PPDDAs include activities that a charity undertakes to participate in the public policy development process or to facilitate the public's participation in that process.[38] The policy guidance outlined that a charity can engage in unlimited PPDDAs as long as it carries out these activities in furtherance of its stated charitable purpose.[39] Permissible PPDDAs include an organization providing accurate information related to its charitable purposes to persuade the public with regards to public

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31 *Ibid* at paras 64–66.

32 *Ibid* at paras 70–74.

33 Chan, *supra* note 4 at 152.

34 *Budget Implementation Act 2018, No. 2*, SC 2018 c 27.

35 *Ibid* s 17.

36 Library of Parliament, "Bill C-86: A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures" (14 December 2018) at 13, online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c86-e.pdf> [perma.cc/PR2H-CEXC].

37 Canada Revenue Agency, *Public policy dialogue and development activities by charities*, Policy Guidance CG-027 (Ottawa: Canada Revenue Agency, 21 January 2019) [PPDDA policy guidance].

38 *Ibid*.

39 *Ibid*. To be in furtherance of a charitable purpose, the PPDDAs must be connected to the purpose and provide a public benefit when considered with the purpose.

policy, and advocating to retain, oppose, or change a law, policy, or decision of the Canadian government.[40] However, PPDDAs are strictly non-partisan. Any activity that directly or indirectly supports or opposes a political party or candidate is not a permissible PPDDA.[41]

E. Outstanding Issues with the Current Regime

Following the 2018 *ITA* amendments, the voluntary sector's advocacy regarding political activities has largely quieted. There are, however, some outstanding questions following the *Canada Without Poverty* decision. In *Canada Without Poverty*, CWP framed its section 2(b) challenge specifically with regard to the *ITA*'s restrictions on non-partisan political expression. The current regulatory regime reflects this distinction between non-partisan political activities (now permitted) and partisan political activities (still prohibited). Further, the *Canada Without Poverty* decision addressed only political activities, not political purposes—and the amendments maintained the general prohibition on charities pursuing political purposes.

This raises the question of whether the *ITA*'s remaining prohibitions on registered charities participating in partisan political activities and pursuing political purposes also violate section 2(b) of the *Charter*. If so, is there a "pressing and substantial" objective for these remaining prohibitions, and are they proportional to their objective?

II. CHARTER ANALYSIS OF SUBSECTION 149.1(6.2)

The following sections of this paper consider whether subsection 149.1(6.2)'s continued ban on charities conducting partisan political activities and pursuing political purposes violates section 2(b) of the *Charter*, and whether this infringement is justified under section 1. The following fictitious fact pattern will guide the analysis:

- ABC, a registered charity with the purpose of relieving poverty in Canada, is generally politically active and posts on its website endorsing specific political candidates whose platforms align with ABC's views on a policy issue related to poverty relief.
- In 2023, the CRA audits ABC and issues an audit report which concludes that ABC's posts are impermissible partisan political activities, contravening subsection 149.1(6.2). Moreover, the report finds that ABC's high degree of participation in non-partisan political activities suggests that its purposes are actually political, also contravening subsection 149.1(6.2). ABC is notified that its charitable status will be revoked.
- ABC challenges the revocation, on the basis that subsection 149.1(6.2) unjustifiably infringes its rights under section 2(b) of the *Charter*. ABC challenges both the restrictions on charities engaging in partisan political activities and pursuing political purposes.[42]

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40 *Ibid*.

41 *Ibid*.

42 This fact pattern intentionally mirrors the factual scenario in *Canada Without Poverty*.

A. Preliminary Issue: Registered Charities as Constitutional Rights-holders

For a registered charity to invoke the right to freedom of expression under section 2(b), it must be recognized as a constitutional person entitled to *Charter* protection. Justice Morgan's reasons for judgment in *Canada Without Poverty* did not address this issue. Given the "complex and in large part unsettled" state of the law on the constitutional personhood of corporations and unincorporated associations, it is "unclear upon what basis [Justice] Morgan recognized CWP as a constitutional rights-holder."[43] Thus, ABC's *Charter* challenge could fail at the outset if ABC does not provide a well-reasoned basis for extending section 2(b) protection to registered charities. However, for the following analysis, I will accept the precedent set in *Canada Without Poverty* that registered charities are protected under section 2(b) of the *Charter*.

B. Section 2(b) Analysis

Section 2(b) of the *Charter* states that everyone has the "fundamental…freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[44] Freedom of expression has been described as "the foundation of a democratic society."[45] While section 2(b) protects all manners of expression, political speech is the "linchpin" that "lies at the core" of freedom of expression.[46] Based on its fundamental importance, courts tend to interpret section 2(b) expansively.[47]

Following the ONSC's finding in *Canada Without Poverty* that the former *ITA* subsection 149.1(6.2) violated charities' freedom of expression, it is tempting to simply conclude that the amended subsection 149.1(6.2)'s ongoing prohibitions on partisan political activities and political purposes must also violate charities' section 2(b) rights. However, in *Canada Without Poverty*, Justice Morgan did not follow the well-established section 2(b) analytical framework, which would almost "certainly" have been an issue on appeal.[48] Thus, the issue of whether the *ITA*'s current prohibitions on partisan political expression and political purposes breach ABC's section 2(b) rights merits further reflection.

i. Positive or Negative Rights Claim?

Section 2(b) jurisprudence firmly distinguishes between positive and negative rights claims.[49] Positive claims require the government to "legislate or otherwise act to support or enable an expressive activity."[50] Conversely, negative claims are "freedom from" government action

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43 Chan, *supra* note 4 at 167, 169.

44 *Charter*, *supra* note 3, s 2(b).

45 *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at 172—173.

46 *BC Freedom of Information and Privacy Association v British Columbia (AG)*, 2017 SCC 6 at para 16 [*FOI v BC*], citing *Harper v Canada (AG)*, 2004 SCC 33 at para 1 [*Harper*].

47 *Irwin Toy Ltd v Quebec (AGl)*, 1989 CanLII 87 (SCC) [*Irwin Toy*].

48 Chan, *supra* note 4 at 177.

49 *Ibid* at 173.

50 *Ibid*, citing *Baier v Alberta*, 2007 SCC 31 at para 35 [*Baier*]

that suppresses an expressive activity in which rights-holders could otherwise engage without government enablement.[51] This distinction is important because the characterization of a claim as positive or negative substantially impacts an applicant's likelihood of proving a section 2(b) breach.[52] Positive claims are subject to the framework set out in *Baier v Alberta* ("*Baier*"), which provides an "elevated threshold" to limit situations where the government must act to support freedom of expression.[53] Negative claims are evaluated under the expansive *Irwin Toy* framework.[54]

In practice, characterizing a section 2(b) claim as positive or negative is often difficult and contentious. In her dissent in *Toronto (City) v Ontario (Attorney General)* ("*City of Toronto*"), Justice Abella disagreed with the majority's characterization of the claim and generally criticized the distinction between positive and negative rights as "promot[ing] confusion rather than rights protection."[55] Nonetheless, the current section 2(b) analytical framework continues to require this distinction.

In *Canada Without Poverty*, Justice Morgan did not explicitly characterize CWP's claim as positive or negative, despite the fact that both CWP and the Attorney General framed their written submissions in accordance with this approach.[56] Drawing on Chan's analysis of CWP's claim, ABC's claim could be plausibly classified as either positive or negative:

- Subsection 149.1(6.2) excludes a class of taxpayers defined, in part, by their (in)ability to engage in partisan political expression or pursue political purposes from an advantageous statutory platform. This "category of persons restriction" frames ABC's claim as positive.
- Subsection 149.1(6.2) restricts the political expression of a class of taxpayers (registered charities) within a statutory platform they are otherwise entitled to use. This "content restriction" frames ABC's claim as negative.[57]

Chan highlights several factors to support the position that CWP's section 2(b) claim is properly characterized as positive and these arguments are similarly applicable to ABC's claim. First, the *ITA*'s registered charity regime restricts the benefits of its statutory platform to a class of taxpayers (registered charities) based on criteria in subsection 149.1(6.2) that are used to determine who may benefit from the selective platform.[58] Second, ABC (like CWP) is not asserting a right to engage in political expression in itself, but rather seeks to engage as a *registered charity.* To pursue this claim, ABC requires government enablement: the Minister of National Revenue has "sole authority" to grant ABC registered charity status,

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51 *Ibid*, citing *Baier* at para 34.

52 *Ibid* at 178.

53 *Toronto (City) v Ontario (AGI)*, 2021 SCC 34 at para 18 [*City of Toronto*].

54 See *Irwin Toy*, *supra* note 47 at 967—977.

55 *City of Toronto*, *supra* note 53 at para 155, per Abella J (dissenting). See paras 152 –156 for a fulsome discussion of this issue.

56 Chan, *supra* note 4 at 177.

57 *Ibid* at 178.

58 *Ibid* at 178 –179, citing *Canada Without Poverty*, *supra* note 1 at para 5.

which confers the corresponding tax advantages.[59] Third, characterizing ABC's claim as positive is consistent with Federal Court jurisprudence, which has described registered charity status as "public funding through tax exemptions for the propagation of opinions."[60] These considerations are consistent with *City of Toronto*, where the majority characterized a claim for access to a particular statutory platform as positive.[61] Therefore, ABC's section 2(b) claim is likely a positive rights claim.

ii. Applying the *Baier* Framework

As a positive rights claim, ABC's claim is properly analyzed using the *Baier* framework. In *City of Toronto*, the Supreme Court of Canada (the "SCC") distilled the *Baier* framework into a single question: "is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or has the purpose of interfering with freedom of expression?"[62] The statutory scheme must "effectively preclude" meaningful expression, representing "an exceedingly high bar…met only in extreme and rare cases."[63]

For ABC's claim, the government could argue that subsection 149.1(6.2) does not violate section 2(b), as it does not restrain speech—it merely withholds tax subsidies for such speech, by barring access to the registered charity statutory regime.[64] This is supported by the SCC's decision in *Baier*. The claimants in *Baier* alleged that a statute which barred school employees from running for a school trustee election infringed their section 2(b) rights, as it prevented them from expressing themselves on education issues. The SCC ruled against the claimants, finding that their claim was "grounded in access to the particular statutory regime," and that their exclusion "deprived them only of one particular means of expression" on education matters.[65]

In *Canada Without Poverty*, Justice Morgan drew an analogy between CWP and the agricultural workers in *Dunmore v Ontario*,[66] implying that CWP lacked an alternative space for political expression.[67] Chan notes that this inference seemed linked to the factual finding that CWP could not pursue its charitable purposes "while restricting its politically expressive activities to 10 [percent] of its resources as required by the CRA."[68] As Chan observes, the only way to conclude that CWP lacked an alternative space for expression is by framing its section 2(b)

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59 *Ibid* at 179.

60 *Ibid* at 180 –181, citing *Human Life International in Canada Inc v MNR,* 1998 CanLII 9053 at para 18 (FCA).

61 *City of Toronto*, *supra* note 53 at paras 29 –32.

62 *Ibid* at para 25.

63 *Ibid* at para 27, citing *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 33; *Baier*, *supra* note 50 at para 27; and *Dunmore v Ontario*, 2001 SCC 94 at para 25 [*Dunmore*].

64 Joyce Chia, Matthew Harding & Ann O'Connell, "Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*" (2011) 35:2 Melbourne UL Rev 353 at 364.

65 *Baier*, *supra* note 50 at paras 44, 48.

66 *Canada Without Poverty*, supra note 1 at para 48.

67 Chan, *supra* note 4 at 182.

68 *Ibid* at 182 –183, citing *Canada Without Poverty*, *supra* note 1 at para 44.

right as "a right to express itself as a not-for-profit corporation with registered charitable tax status."[69] This appears incompatible with the precedent set in *Baier* and the high bar that the SCC articulated for section 2(b) infringements in *City of Toronto*. It would be entirely plausible for a court to find that subsection 149.1(6.2) does not "effectively preclude" ABC's section 2(b) rights, as ABC is free to express itself without restriction; it simply cannot do so as a registered charity. A difficulty with this position is that when a registered charity is issued a notice of intention to revoke, it must pay a revocation tax equal to the fair market value of all its property, less any debts and expenditures incurred while winding up operations.[70] This tax would make it very difficult or impossible for ABC to convert its existing resources to non-charitable uses, suggesting that ABC cannot simply accept the revocation of its registered charity status to enjoy free expression.

ABC could argue that the government is not relieved of its obligations to comply with the *Charter* by providing the option of relinquishing a statutory benefit: this reasoning would immunize governments from *Charter* scrutiny across various benefit programs and legislation.[71] In *Osborne v Canada (Treasury Board)* ("*Osborne*"),[72] the SCC held that legislation which prohibited public servants from engaging in work for or against a candidate or political party infringed section 2(b). The SCC in *Osborne* found that the suggestion that the scope of section 2(b) should be limited because of the particular status of the rights-holder (a public servant) was unsupported.[73] Drawing on this reasoning, ABC could argue that the scope of its right to freedom of expression should not be limited based on its particular status as a registered charity. A difficulty with this argument is that, unlike in *Osborne*, people who work with charities can freely express their personal views on their own time, including by participating in partisan activities.[74]

In the *Canada Without Poverty* section 2(b) analysis, Justice Morgan placed weight on the factual findings that CWP could not pursue its charitable purposes while complying with the *ITA* regime, and could not function, or would have difficulty functioning, without registered charity status.[75] While these findings are case-specific, these circumstances are not unique to CWP as a registered charity, and very well may also be the case for ABC. Depending on the circumstances, ABC may draw on *Canada Without Poverty* to argue that subsection 149.1(6.2)'s bans on partisan political expression and political purposes are at odds with ABC achieving its charitable purpose of relieving poverty. Additionally, ABC would have difficulty functioning without registered charity status—and thus subsection 149.1(6.2) infringes its section 2(b) rights. It is somewhat difficult to imagine a court finding poverty relief to require partisan political expression. However, this finding would be case-specific, and a court may find arguments persuasive regarding the connection between political purposes and poverty relief.

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69 *Ibid* at 183.
70 *ITA*, supra note 2 s 188(1.1).
71 CWP factum, *supra* note 19 at para 57.
72 [1991] 2 SCR 69, 1991 CanLII 60 (SCC) [*Osborne*].
73 *Ibid* at 93.
74 PPDDA policy guidance, *supra* note 37.
75 *Canada Without Poverty*, *supra* note 1 at paras 42–43.

Further, the SCC in *City of Toronto* did not purport to make the *Baier* section 2(b) framework a more challenging hurdle for claimants.[76] Thus, in *Canada Without Poverty*, if CWP brought a positive section 2(b) claim, Justice Morgan implicitly found that the claim met the *Baier* framework by finding that the former subsection 149.1(6.2) breached section 2(b). Consequently, Justice Morgan arguably expanded the scope of "exceptional cases" whereby positive claims breach section 2(b). Drawing on this precedent, ABC could argue that partisan political activity is political speech, akin to non-partisan policy advocacy considered in *Canada Without Poverty*. Therefore, subsection 149.1(6.2) burdens ABC's expressive activities under section 2(b), and would have to be justified under section 1.[77]

Overall, it is not clear whether a court would find that subsection 149.1(6.2) of the *ITA* breaches ABC's right to freedom of expression using the *Baier* framework. However, finding a section 2(b) breach is, at the very least, a plausible outcome of this analysis.

C. Section 1 Analysis

Once a court determines that a claimant's *Charter* right has been infringed, it must then decide whether the state can defend the breach under section 1 as "demonstrably justified in a free and democratic society."[78] Section 1 analyses are guided by "the values and principles essential to a free and democratic society," including "faith in social and political institutions which enhance the participation of individuals and groups in society."[79] In *R v Oakes* ("*Oakes*"), the SCC outlined a two-stage justification test under section 1: (i) the limiting measure must have a "pressing and substantial" objective; and (ii) the means chosen must be proportional to the objective.[80] The proportionality test has three components: (a) the limit must be rationally connected to the objective; (b) the limit must impair the right no more than reasonably necessary to achieve the objective; and (c) the law's deleterious and salutary effects must be proportional.[81] With respect to limits on section 2(b) rights, the SCC has held that freedom of expression is paramount in a democratic society, and should "only be restricted in the clearest of circumstances."[82]

For ABC's claim, the *Oakes* test necessitates engagement with fundamental questions regarding the objectives and proportionality of subsection 149.1(6.2). The following analysis will first discuss potential objectives for subsection 149.1(6.2)'s restrictions on partisan political activities and political purposes. Then, using the most compelling of these objectives (namely, to maintain the separation between charity and politics), this paper will consider the proportionality of subsection 149.1(6.2).

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76 *City of Toronto*, *supra* note 53 at para 21.
77 Chan, *supra* note 4 at 184.
78 *Charter*, *supra* note 3 s 1.
79 *R v Oakes*, 1986 CanLII 46 at paras 69–70 (SCC) [*Oakes*].
80 *Ibid* at 138–139.
81 *Ibid* at 139.
82 *Canada Without Poverty*, *supra* note 1 at para 52, citing *Edmonton Journal v Alberta (AG)*, 1989 CanLII 20 at 1336 (SCC).

i. Does the Limit Have a Pressing and Substantial Objective?

Under the first branch of the *Oakes* test, courts must determine whether an objective is "pressing and substantial" such that it is sufficiently important "to warrant overriding a constitutionally protected right or freedom."[83] In *Canada Without Poverty*, it was at this first stage of analysis that the justification for infringement failed. The Attorney General submitted that the objectives of former subsection 149.1(6.2) were to "recognize that it is appropriate for a registered charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals, and prohibit partisan political activities."[84] Justice Morgan found that this objective was not pressing and substantial, as the government could not justify limiting charities' section 2(b) rights "for the very purpose of ensuring [they] use no more than 10 percent of their resources on the exercise of free expression."[85]

However, there are several compelling objectives for the present subsection 149.1(6.2)'s remaining prohibitions on partisan political activities and political purposes, rooted in rationale for the political purposes doctrine. This section will discuss three potential objectives for subsection 149.1(6.2): (a) to protect the distinct function of the charitable sector by maintaining the separation between charity and politics; (b) to uphold parliamentary sovereignty; and (c) to execute a tax policy decision that certain charitable purposes and activities deserve fiscal support. Based on the following analysis, a court would most likely find objective (a), protecting the distinct function of the charitable sector, to be pressing and substantial.

1. Protect the Distinct Function of the Charitable Sector

Charities play a unique role as advocates in Canada's political sovereignty.[86] In the Australian context, Associate Professor Jennifer Beard argues that maintaining the independence of charitable purposes distinct from party politics is a legitimate purpose, as it "preserves the coherence of the sector as a distinctive social force within our democracy, the charitable purposes of which are, and should be, different" from the government's aims and responsibilities.[87] This purpose is similarly compelling in the Canadian context.

Further, holding charity and politics distinct ensures that political organizations cannot receive registered charity status. Political organizations are strictly regulated and do not receive the same tax benefits as charities. Removing or reducing the limits for registered charities participating in politics could result in broader public sector organizations, which depend on government funding, using tax-subsidized charitable contributions to run advertising campaigns to maintain or increase their funding.[88] Additionally, without regulations in place, there is a legitimate concern that political parties and candidates could use registered charities

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83 *Oakes*, *supra* note 79 at para 69, citing *R v Big M Drug Mart Ltd*, 1985 CanLII 69 at para 139 (SCC).

84 AG Canada Factum, *supra* note 20 at para 52.

85 *Canada Without Poverty*, *supra* note 1 at para 62.

86 Chan, *supra* note 4 at 187–188.

87 Jennifer 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, 2018) 252 at 270.

88 Geoffrey Hale, "Policy Forum: Charity and Politics – A Dubious Mix?" (2017) 65:2 Can Tax J 379 at 385.

to skirt campaign finance laws.[89] This engages the "role and integrity" of charities in Canada's electoral system and the financing of election campaigns, which is relevant to maintaining the "constitutionally prescribed system of representative government."[90]

As a counterargument, the separation between charity and politics may be more theoretical than practical. Charity and politics do not act in isolation: both share a "unified concern for the public benefit," and it is through the prevailing social context (partly coloured by political considerations) that we define the "common good" and determine what is "charitable."[91] Further, the argument that charitable tax subsidies could be used to unjustly skew the balance of political speech fails to recognize the already unequal distribution of political speech; charitable advocacy may actually lessen this inequality "by representing under-represented interests and improving the quality of decision-making through charities' expertise and connection with the voiceless."[92] However, while this view accounts for the "inherent nature of charity and politics," it ignores the fact that the registered charity regime "must retain its credibility and legitimacy in the eyes of the public."[93] All considered, maintaining the separation between charity and politics to protect the charitable sector's distinct function is a compelling objective that a court would likely find to be pressing and substantial.

2. Uphold Parliamentary Sovereignty

An alternative objective for subsection 149.1(6.2) could be to uphold parliamentary sovereignty. This objective is most relevant to the prohibition on charities pursuing political purposes. At common law, a purpose must provide a public benefit to be charitable. This objective stipulates that evaluating whether a political purpose is charitable would require courts to impermissibly intrude into the realm of Parliament when considering the purpose's public benefit, as doing so would require courts to acknowledge a public benefit in the specific law reform or party being advocated for by the charity.[94]

There are several conceptual difficulties with this objective, especially if a political purpose is non-partisan. First, it is inconsistent with how courts assess the public benefit of religious charities. Instead of finding a public benefit in specific religious doctrines, courts broadly assume that religion generally provides a public benefit.[95] Courts could similarly abstract political purposes to a level of non-controversy by assuming that there is a public benefit in advocacy related to law reform generally, rather than considering specific reforms.[96]

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89 Andrew Coyne, "Problem with Charities Isn't their Politics, It's Their Generous Tax Credit", *National Post* (27 August 2014), online: <nationalpost.com/opinion/andrew-coyne-preferred-tax-status-corrupts-the-definition-of-charity-and-should-be-abolished> [perma.cc/YNZ5-5MNW].

90 Beard, *supra* note 87 at 272.

91 Nicola Silke, "Please Sir, May I Have Some More – Allowing New Zealand Charities a Political Voice" (2002) 8:2 Canterbury L Rev 345 at 360.

92 Chia, Harding & O'Connell, *supra* note 64 at 366.

93 Silke, *supra* note 91 at 361.

94 Susan Glazebrook, "A Charity in All but Law: The Political Purpose Exception and the Charitable Sector" (2019) 42:2 Melbourne UL Rev 632 at 652; Parachin, *Charity versus Politics supra* note 14 at 10.

95 Parachin, "Neutrality", *supra* note 7 at 33.

96 Parachin, *Charity versus Politics*, *supra* note 14 at 10. This was the approach taken by the High Court of Australia in *AID/WATCH Inc. v Commissioner of Taxation*, [2010] HCA 42.

Second, the parliamentary sovereignty objective is inconsistent with judicial commentary on law reform. Broadly, courts frequently and properly suggest that Parliament could take action where the common law is confused or outdated, or where new situations have arisen that would benefit from legislative regulation.[97] The case *Vancouver Society of Immigrant and Visible Minority Women v MNR* provides an example of this in the charity law context: the SCC commented that Canadian charity laws were "in need of reform" and that it was "difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded." [98] Thus, it appears clearly within the purview of the courts to comment on the desirability of law reform without unduly entrenching into the legislature's domain. Indeed, charity law scholar and Associate Professor Samuel Singer posited that "there are few people better qualified than judges" to assess the public benefit of a change in the law.[99]

The third conceptual difficulty with the parliamentary sovereignty objective is that it ignores the effect of the *Charter* on the role of the courts in interpreting law. Today, courts play a constitutionally validated role in interpreting and enforcing constitutional rights and freedoms–a role that "overtly involve[s] courts in the normative evaluation of law."[100] In *Charter* jurisprudence, courts rule on the public benefit of *Charter*-based law reform activities.[101] This suggests that it is irrational to justify a ban on charities pursuing political purposes as changes to the law may further constitutional values, a perspective consistent with *Charter* jurisprudence.[102]

3. Tax Policy

A third objective for subsection 149.1(6.2) is that, in a context of limited fiscal resources, the government ought to reserve funds to fiscally support traditional charitable activities, such as "feeding the hungry or teaching the young," and thus bar political activities from charitable tax status.[103] However, Chan notes several criticisms of this objective. Firstly, organizations that seek law reform are not unanimously considered more valuable than those which seek to feed the hungry.[104] Further, budgetary constraints have generally been found insufficient to justify limits on *Charter* rights.[105] Given the fact that both municipalities and amateur athletic associations are considered "qualified donees" under the *ITA*, it is challenging to

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97 Glazebrook, *supra* note 94 at 652.

98 *Vancouver Society of Immigrant and Visible Minority Women v MNR*, 1999 CanLII 704 at paras 179, 201 (SCC).

99 Singer, *supra* note 11 at 687, citing LA Sheridan, "Charitable Causes, Political Causes and Involvement" (1980) 4:2 Philanthropist 5 at 12.

100 Parachin, "Politics of Purpose", *supra* note 8 at 883.

101 *Ibid*.

102 Mayo Moran, "Rethinking Public Benefit: Charity in the Era of the *Charter*" in Jim Phillips, Bruce Chapman & David Stevens, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) 251 at 265.

103 Chan, *supra* note 4 at 187.

104 *Ibid*.

105 *Ibid*, citing *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 at para 64.

argue that the *ITA* stringently prioritizes philanthropic support.[106] Therefore, this objective is not particularly compelling, and would likely not be considered pressing and substantial.

ii. Is the Limit Proportional to its Objective?

The second branch of the *Oakes* test involves determining whether an unconstitutional limit on a *Charter* right is proportional to its objective. For ABC's claim, to find subsection 149.1(6.2) proportional, a court would have to be satisfied of three factors on a balance of probabilities: (a) that there is a rational connection between the section 2(b) infringement and the law's objective; (b) that subsection 149.1(6.2) minimally impairs section 2(b) rights; and (c) that the impact of the section 2(b) infringement is proportional to the likely benefits of subsection 149.1(6.2).[107] The following analysis will discuss proportionality using the objective of protecting the distinct role of the charitable sector, identified above as the most persuasive.

1. Rational Connection

The rational connection requirement is satisfied if a limit on a *Charter* right is "carefully designed to achieve the objective in question" and is not "arbitrary, unfair or based on irrational considerations."[108] The SCC has described the rational connection test as "not particularly onerous"; it must be reasonable that the limit "may further the goal, not that it will do so."[109]

Based on this low bar, a court would likely find that the limit in subsection 149.1(6.2) is rationally connected to the law's objective: a registered charity pursuing a political purpose would almost certainly blur the line between charities and political organizations. For the restriction on partisan political activities, however, there is some merit to the argument that the limit is arbitrary.

ABC may argue that under the present regulatory scheme, a charity could align all its policy recommendations with those of a particular candidate; as long as it does not name the specific candidate, this would be considered a permissible PPDDA. However, if the registered charity named the candidate, this communication would become partisan, and thus unlawful under subsection 149.1(6.2). Therefore, while subsection 149.1(6.2) and its policy guidelines purport to distinguish between partisan and non-partisan activities in furtherance of a charity's objective, this distinction may be arbitrary in practice, and thus not rationally connected to the objective of maintaining the separation between charity and politics. Despite this, a court would likely find that the present regulatory scheme may further Parliament's objective to protect the charitable sector's distinct function, and as a result satisfies the rational connection test.

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106 *Ibid*, citing *ITA*, *supra* note 2 s. 149.1(1) "qualified donee".

107 *Oakes*, *supra* note 79 at 139.

108 *Ibid*.

109 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 228; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48 [*Wilson Colony*].

2. Minimal Impairment

The test for whether a law minimally impairs a *Charter* right is whether "there is an alternative, less drastic means" of realizing its objective.[110] A limit can fall within a "range of reasonable alternatives" to achieve its objective; a law is not overly broad merely because a court can "conceive of an alternative which might better tailor objective to infringement."[111] At this stage, courts will consider evidence adduced by the government as to why it did not choose less intrusive and equally effective measures to accomplish its objective.[112]

The government may argue that the limits on partisan activities and political purposes in subsection 149.1(6.2) minimally impair ABC's section 2(b) rights, as these restrictions apply only to registered charities—non-profit organizations are not subject to the same limitations. Therefore, subsection 149.1(6.2) tailors its impingement on freedom of expression to what is required by its objective, by confining its restrictions to organizations accorded registered charity status.[113]

At this stage, courts may also look to laws and practices in other jurisdictions.[114] ABC would likely highlight more relaxed approaches taken in other countries to regulate charities' political activities. For example, in the United States, charities can have political purposes; however, such entities are excluded from some fiscal benefits associated with charitable status if a "substantial part" of their activities are political.[115] In Scotland, while an entity cannot be charitable if its purpose is to promote a political party, charities can participate in any general political engagement, including "supporting a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation."[116]

ABC could argue that to minimally impair its section 2(b) rights, the government ought to take a more lenient approach to regulating charities' political activities, akin to that employed in the United States and Scotland. For instance, the CRA could create a new form of advocacy organization within the umbrella of registered charity that may be eligible for fewer tax concessions and subject to more stringent reporting requirements.[117] However, there are some significant drawbacks to this approach: it would further complicate an already complex regulatory scheme for registered charities; more stringent reporting requirements would require scarce charitable resources to be directed towards ensuring compliance; and, following the controversial United States Supreme Court decision *Citizens United v Federal Election Commission*,[118] there would likely be skepticism towards the Canadian government adopting or shifting towards the American approach. On balance, it seems likely that a court would find that subsection 149.1(6.2) minimally impairs registered charities' section 2(b) rights, given the substantial disadvantages to alternative measures of achieving its objective.

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110 *Wilson Colony*, *supra* note 109 at para 55.

111 *RJR-MacDonald Inc v Canada (AG)*, 1995 CanLII 64 at para 160 (SCC).

112 *Ibid*.

113 This is a similar line of reasoning to that of the SCC in *FOI v BC*, *supra* note 46 at para 53.

114 *Carter v Canada (AG)*, 2015 SCC 5 at paras 103–104.

115 Glazebrook, *supra* note 94 at 654.

116 *Ibid* at 655; Chia, Harding & O'Connell, *supra* note 64 at 362.

117 Chia, Harding & O'Connell, *supra* note 64 at 365.

118 558 US 310 (2010).

3. Proportional Balancing Between the Law's Salutary and Deleterious Effects

The third component of the *Oakes* proportionality test requires that the salutary effects of the impugned law outweigh its deleterious impact on the affected rights-holder, with reference to the identified legislative objective.[119] This inquiry focuses on the law's practical impact, and necessitates examining benefits that the measure will "yield in terms of the collective good sought to be achieved" and the importance of the limitation on the right to determine whether the restriction is justified.[120]

The deleterious effect of subsection 149.1(6.2) is that it restricts registered charities from fully participating in political discourse—an activity that charities are arguably well-equipped to do, and one that "lies at the heart of the guarantee of free expression."[121] Based on their frontline experience, grassroots connections, and proximity to communities, charities are uniquely situated to contribute to public dialogue, raise awareness on matters of collective interest, and generally "facilitate participatory forms of justice."[122] Charities also offer "ready sources of normative perspectives on law and policy" as their organizing principle is idealism, distinct from the marketplace's emphasis on economic self-interest.[123] There is also evidence that charities are trusted groups to speak out on politics: a 2013 study found that 79 percent of Canadians have "some or a lot of trust in charities," and 62 percent of Canadians generally value charities' opinions on issues of public concern "because they represent a public interest perspective."[124]

The government could argue that, because of this notable public trust in charities, the salutary effect of subsection 149.1(6.2)—to protect the distinct function of charities as separate from politics—is especially important. The impugned law may "enhance more than harm the democratic process," as it purports to preserve the coherence of registered charities as unique social forces within our democracy and maintain the constitutionally prescribed system of representative government.[125] In amending subsection 149.1(6.2) in 2018, the government could argue that Parliament was attempting to reduce the advocacy chill that the previous regulatory scheme had on the voluntary sector, while retaining some limits on charities' political activities to maintain charities as distinct from political organizations. The deleterious effects of subsection 149.1(6.2) are mitigated by the fact that charities' political voices are not entirely silenced by the registered charity regime: charities can contribute to political discourse through PPDDAs, following *Canada Without Poverty*.

As section 1 of the *Charter* mandates that limits on constitutional rights be demonstrably justified, the government would have to introduce evidence of the benefits that society stands

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119 *Oakes*, *supra* note 79 at 138–139.

120 *Canada (AGI) v JTI-Macdonald Corp*, 2007 SCC 30 at para 45.

121 *Harper*, *supra* note 46 at para 41.

122 Adam Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mule & Gloria DeSantis, eds, *Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal, McGill-Queen's University Press, 2017) 33 at 34.

123 *Ibid*.

124 Gloria DeSantis & Nick Mule, "Advocacy: A Contested yet Enduring Concept in the Canadian Landscape" in Nick Mule and Gloria DeSantis, *supra* note 122 at 9.

125 Beard, *supra* note 87 at 270–272.

to gain from subsection 149.1(6.2)'s restrictions on charities conducting partisan political activities and pursuing political purposes. While this evidence may dictate the outcome of a court's proportional balancing analysis, the salutary effects of subsection 149.1(6.2) appear to outweigh its deleterious impacts on charities' freedom of expression.

CONCLUSION

For its high degree of influence and impact in the Canadian charity law sphere, the *Canada Without Poverty* decision raises several significant questions that have yet to be addressed by the courts—namely, how can the government draw constitutionally-compliant boundaries between registered charities and other organizations, and what is Parliament's objective for continuing to limit charities' political advocacy?[126] Justice Morgan's finding that the former *ITA* subsection 149.1(6.2) and associated policy guidelines violated charities' right to freedom of expression under section 2(b) appears to leave the present subsection 149.1(6.2) vulnerable to a similar constitutional challenge.

The outcome of this challenge would likely depend on the evidence presented by the parties, and the court's willingness to engage more deeply with constitutional law and charity law than Justice Morgan did in *Canada Without Poverty*. The freedom of expression analysis in this paper casts doubt on whether Justice Morgan would have found the former subsection 149.1(6.2) to violate CWP's section 2(b) rights had he applied the governing framework from *Baier* for analyzing positive rights claims. Despite this issue, it is at least plausible that a court would find that the current *ITA* provisions and policy guidelines governing charities' political advocacy breach section 2(b). As subsection 149.1(6.2) likely advances a pressing and substantial objective and proportionately limits charities' section 2(b) rights, the provision may be justified under section 1 of the *Charter*. Thus, the question shifts from asking whether section 2(b) *could* be used to strike down subsection 149.1(6.2), to whether it *should*. I suggest that to preserve charities' distinctive role in Canadian society, this should be answered in the negative.

126 Chan, *supra* note 4 at 189.