200 – 2006 West 10th Avenue
Vancouver, BC V6J 2B3
Coast Salish Territories
www.wcel.org

tel: 604.684.7378
fax: 604.684.1312
toll free: 1.800.330.WCEL (in BC)

Submission of the West Coast Environmental Law Research Foundation November 16, 2016[1]

The West Coast Environmental Law Research Foundation ("West Coast") is a BC incorporated society registered as a charity since 1978. West Coast has extensive practical experience with the challenges of participating in public policy development related to our charitable purpose (protection and preservation of the environment) under the current rules.[2]

Summary

The current Canadian approach to charities' involvement in public debate and public policy development is antiquated, subjective, arbitrary and confusing –denying Canadians the right to have their voices heard through the charities they support. Legislative reform is needed to protect the free speech of charities.

A new law should:

1. Define "charity" based on the societal goals an organization seeks to achieve (its charitable purposes), consistent with modern realities and our constitutional democracy
2. Ensure charities are free to choose the most effective approaches to achieve their purposes unless an activity is expressly prohibited by statute
3. End restrictions on charities' participation in public debate and public policy development
4. Explicitly protect the free speech of charities, by clarifying that charities can be constituted and operated to:
    a. raise awareness of, or advocate for, a particular perspective or approach to achieving charitable purposes;
    b. advocate for a change in a government decision, policy or law related to achieving charitable purposes;
    c. take a position on an issue or policy related to their charitable purposes, regardless of whether a political party or candidate for public office has also done so, and,
    d. report or comment on a policy or position, or proposed policy or position, of any level of government related to their charitable purposes, regardless of whether such policy or position is in writing or expressed by a named elected official or candidate for public office
5. If a new law restricts charities' participation in the electoral process, any prohibition should be limited to *direct* participation by a charity in an electoral campaign on behalf of (or in opposition to) any political party or candidate for public office, and not be used to limit the free speech of charities as set out above.

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[1] Via electronic mail: consultation-policy-politique@cra-arc.gc.ca
[2] i.e., *Income Tax Act,* RSC 1985, c 1 (5th Supp), s 149.1(6.2) [*ITA* or *Income Tax Act*], and CPS-022 and related case law.

Introduction

Canadians have long moved beyond the narrow, moralistic view of charity that characterized the Victorian period. Unfortunately, our laws have not.

Without legislative reform, Canadian charities law will remain stuck in the antiquated view that charity is limited to alleviating societal problems after they arise – whether it be pollution or poverty –but not preventing or enabling systemic solutions to the same problems. Based on our current law, soup kitchens might be considered charitable, but the CRA does not consider advocacy to defend the rights of the poor[3] or prevent poverty[4] to be charitable in the legal sense. Similarly, cleaning up pollution may be charitable, but advocating for stronger laws to keep our air and water clean may not be.

Simply put, our laws are out of touch with contemporary Canadian views of charity. In recent polling about how acceptable various advocacy activities by charities were,[5] over 80 percent of Canadians across the country felt that it was acceptable or very acceptable for charities to: engage in letter writing campaigns (83%), place advertisements in the media (87%), meet with government ministers or senior public servants (91%), use research results to support a message (92%) and speak out on issues like the environment, poverty and health care (94%). Close to 2/3rds were also fine with charities holding legal street protests or demonstrations. In our experience, whatever the motivation of Victorian do-gooders may have been, many donors today want to support charities that advance lasting, systemic solutions and not simply band aid fixes. In many cases this will require legislative or policy change, and public debate about the best way to do so.

Supporting the work of a charity is a critical way for individuals to combine our efforts to address challenges facing our society or environment in a way we could not do alone. It is this common thread, of providing tax incentives to enable collective efforts aimed to benefit the community, which firmly links contemporary views of charity (and the proposals in this submission) to the common law of charity as it has evolved to date.

Limiting charities' involvement in public debate and public policy development silences the voices of the millions of Canadians who rely on the charities they support to advance solutions they could not achieve alone. Furthermore, it exacerbates an already very uneven playing field between the individuals and the charities they support on one hand and powerful economic interests on the other.[6]

The historic rationale for judicial restraint in recognizing as charitable organizations seeking to change law or policy lies in the courts' reticence to opine on whether the particular position advanced by an organization is beneficial to society.[7] Historical cases and commentary remind of a time when it was considered of potentially uncertain social benefit, and thus uncharitable, to advocate for the end of slavery or the right of women to vote.[8]

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[3] *Notre Dame de Grace Neighbourhood Association v Revenue Canada*, [1988] 2 CTC 14.

[4] "'Preventing poverty' not a valid goal for tax purposes, CRA tells OXFAM Canada", CBC News (July 25, 2014), online:<http://www.cbc.ca/news/politics/preventing-poverty-not-a-valid-goal-for-tax-purposes-cra-tells-oxfam-canada-1.2717774>.

[5] Muttard Foundation, "Talking about Charities 2013 Surveys Results", online: <https://www.muttart.org/publications/surveys-results/>.

[6] See text accompanying notes 9 and 10 below.

[7] Typically citing the House of Lords decision in *Bowman v Secular Society Ltd.,* [1917] AC 406 at 442.

[8] See e.g., *Edmund Jackson vs. Wendell Phillips & others*, 14 Allen 539, 96 Mass. 539, online: <http://masscases.com/cases/sjc/96/96mass539.html>. Note that in this case, heard shortly after the abolition of slavery by the 13th Amendment to the Constitution of the United States, and given Massachusetts' particular legal context, a trust to create a "public sentiment that will put an end to negro slavery" was held to be valid, whereas one to advance women's right to vote was not.

The commonly advanced rationale for this harkens back to tax policy. Because of the tax advantages charities receive, we are told, it is acceptable, and even desirable to limit charities involvement in public debate and public policy development on matters on which there is no societal consensus. This rationale cannot be sustained, however, when one considers the tax advantages afforded to some of the most powerful economic actors in our society to advance their views on the same subjects. From a tax perspective, corporations may deduct unlimited amounts of lobbying and advocacy expenses to advance their private interests,[9] as well as most advertising expenses in Canadian newspapers, television and radio stations.[10] By way of contrast, charities working for the public benefit are limited to using at most 10 percent of their already more limited resources for "political purposes".

Courts in other common law jurisdictions have recognized that in a free and democratic society, encouraging open debate on matters of public policy, in which divergent perspectives on the best way to achieve a societal goal may be expressed, is a healthy, desirable, *and charitable* purpose.[11] In many European jurisdictions (e.g., France, Netherlands, Poland, Hungary, Spain) there are few restrictions on the free speech of the equivalent to Canadian charities; the same is true in Israel, Japan and South Africa.[12] In Appendix B we have also set out recommendations from the Council of Europe in this regard.

The courts, still technically bound by case law from the 1800s, have urged legislators to take responsibility for modernizing our charitable laws. We urge Parliament to take up this challenge for the benefit of all Canadians and our environment.

Proposed Changes to the Income Tax Act - Topline recommendations

1. **Define "charity" based on the societal goals an organization seeks to achieve (its charitable purposes), consistent with modern realities and our constitutional democracy.**

Rationale

Despite the passage of hundreds of years, charities today are still required to demonstrate that their purposes and activities are charitable in the sense that they are analogous to the categories established in the Preamble to the *Statute of Uses* in 1601,[13] summarized in 1891 by the House of Lords decision in the *Pemsel case*.[14] The categories established by these precedents: relief of poverty; advancement of education; advancement of

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[9] *ITA, supra* note 2, s 20(1)(cc).

[10] *Ibid.* ss 19(1), 19.01, 19.1.

[11] See: *Aid/Watch Inc. v Commissioner of Taxation*, [2010] HCA 42 at paras 44-47 [*Aid/Watch*].

[12] Lester Salamon, *The International Guide to Nonprofit Law* (Toronto: John Wiley & Sons, 1997), noted up to the extent possible with English language resources; International Center for Not-for-Profit Law, "Political Activities of NGOs: International Law and Best Practices" (2009) 12 The International Journal of Not-for-Profit Law, online <http://www.icnl.org/research/journal/vol12iss1/special_1.htm>.

[13] In *Native Communications Society of B.C. v. Minister of National Revenue*, [1986] 3 FC 471, Stone J. restated the list of charitable objects in the preamble of the *Statute of Elizabeth* (43 Eliz. I, c. 4) as follows (at 478-9):

... the relief of aged, impotent, and poor people ... maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities ... repair of bridges, ports, havens, causeways, churches, seabanks and highways ... education and preferment of orphans ... relief, stock or maintenance for houses of correction ... marriages of poor maids ... supportation, aid and help of young tradesmen, handicraftsmen and persons decayed ... relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.

[14] *The Commissioners for Special Purposes of the Income Tax* v *Pemsel*, [1891] AC 531 at 583 [*Pemsel*].

religion and other purposes beneficial to the community remain the standard used by the Canadian courts and the CRA to determine whether an organization should be granted or retain charitable status. Furthermore, the Canadian courts have held that it is not sufficient for an organization to be constituted for purposes beneficial to the community, their purposes must also be charitable in the sense that they are analogous to the categories identified in 1601 and 1891,[15] reasoning which the Supreme Court of Canada has aptly described as "circular".[16]

The superior courts in some common law jurisdictions, notably Australia[17] and New Zealand,[18] have rendered judgments that have modernized the understanding of charity in important ways in those jurisdictions, but the Canadian courts have expressly declined to do so.[19] As part of these shifts, other common law jurisdictions have chosen to embody contemporary understandings of charity in statutory definitions to complement but not replace the common law. They have done so by listing and updating charitable purposes recognized by the courts but retaining a category of other analogous purposes of benefit to the community.[20] In Appendix A we have provided an example of what such a provision could look like.

We recommend that a statutory definition of charitable purposes should expressly include protection of the environment, conservation of natural resources and advancement of environmental sustainability, as well as purposes recognized by other common law jurisdiction.[21] We leave for charities working in other areas to refine other purposes proposed in Appendix A.

As set out further below, amending the *ITA* to provide a definition of charitable purposes that reflects modern realities will better enable charities to work for systemic change, not just band aid solutions, and to bring their expertise to bear in public debate and policy development related to their purposes. Doing so will benefit all Canadians.

2. Ensure charities are free to choose the most effective approaches to achieve their purposes unless an activity is expressly prohibited by statute.

Rationale:

The *Income Tax Act* currently defines "charitable organization" as "an organization, whether or not incorporated … all the resources of which are devoted to charitable activities carried on by the organization

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[15] *Guaranty Trust Co. of Canada v Minister of National Revenue,* [1967] SCR 133 at 148: "The difference is also often one of focus: the four heads of charity concern what is being provided while the 'for the benefit of the community' requirement more often centers on who is the recipient."

[16] *Vancouver Society of Immigrant and Visible Minority Women v MNR,* [1999] 1 SCR 10 at paras 45, 177, 201, online: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1676/index.do> [*Vancouver Society of Immigrant and Visible Minority Women*]

[17] *Aid/Watch*, *supra* note 11.

[18] *Re: Greenpeace of New Zealand Incorporated*, [2014] NZSC 105 [*Re: Greenpeace New Zealand*].

[19] *Vancouver Society of Immigrant and Visible Minority Women, supra* note 16.

[20] In this manner a statute can provide an analogy for the purposes of developing the common law, and additionally "[w]here statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and [also] picks up the case law as it stands from time to time." *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, [1999] HCA 67 cited in *Aid/Watch* at paras 22-23.

[21] E.g., in Australia this includes promoting public debate related to the best way to advance charitable purposes and promoting or opposing a change to any matter established by law, policy or practice related to charitable purposes.

itself".[22] There are a number of problems inherent in this approach. First and foremost among these is the challenge of attributing a charitable or non-charitable character to any activity without reference to a purpose. Second, if a charity is to devote all their resources to charitable activities, how is to administer itself or raise funds to achieve its charitable purpose?[23]

Although the courts have held that "it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature"[24] the language of the *Income Tax Act* continues to focus on "charitable activities". As Mr. Justice Gonthier, concurring on this point in *Vancouver Society for Immigrant and Visible Minority Women* noted under the heading "The Distinction Between Charitable Purposes and Charitable Activities" at paras 52 and 54:

> In the law of charity, the courts' primary concern is to determine whether the purposes being pursued are charitable. It is these purposes which are essential, not the activities engaged in, although the activities must, of course, bear a coherent relationship to the purposes sought to be achieved. (I pause to emphasize that motive and purpose are not synonymous. The courts are not, in general, concerned with the motive of a donor or volunteer, only with the purpose being pursued.) A common source of confusion in this area is that judges and commentators alike often conflate the concept of "charitable purposes" and "charitable activities". The former is a long-established concept in the common law of charitable trusts. The latter is a much more recent innovation: it is contained in the ITA , but has no history in the common law....
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> In the Law Reporting case, supra, at p. 86, Russell L.J. illustrated this point by supposing the example of a company which published the Bible for profit, and compared it to one which published the Bible without a view to profit, but with the purpose of distributing copies of it to the public. In each case, the activity engaged in — publishing the Bible — is identical. But the purposes being pursued are very different, and consequently the status of each company also differs. Although the former company clearly would not be pursuing a charitable purpose, the latter almost certainly would be. This example demonstrates that an activity, taken in the abstract, can rarely be deemed charitable or non-charitable. Rather, it is the purpose underlying the activity to which the courts must look initially in assessing whether the activity is charitable. It must then be determined whether there is a sufficient degree of connection between the activity engaged in and the purpose being pursued, but this is a distinct inquiry involving separate considerations. Purposes are the ends to be achieved: activities are the means by which to accomplish those ends. Purposes must be evaluated substantively. Activities are assessed by determining the degree to which they actually are instrumental in achieving the organization's goals.

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[22] *ITA, supra* note 2,149.1.

[23] Carl Juneau, *Charitable Activities under the Income Tax Act: A Historical Perspective* (Pemsel Case Foundation Occasional Paper, 2015), online: http://www.pemselfoundation.org/wp-content/uploads/2016/05/Juneau-Paper-July-16-2015.pdf [Juneau].

[24] *Vancouver Society of Immigrant and Visible Minority Women, supra* note 16 at para 152: "While the definition of "charitable" is one major problem with the standard in s. 149.1(1) , it is not the only one. Another is its focus on "charitable activities" rather than purposes. The difficulty is that the character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group disseminating hate literature. In other words, it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature,"; and at para 153 : "Unfortunately, this distinction has often been blurred by judicial opinions which have used the terms "purposes" and "activities" almost interchangeably. Such inadvertent confusion inevitably trickles down to the taxpayer organization, which is left to wonder how best to represent its intentions to Revenue Canada in order to qualify for registration." Commentators have further noted that under the *ITA*, writing a fundraising letter is not actually considered a charitable activity: Juneau, supra note 23.

A number of explanatory CRA policies attempt to address the statutory problem of the *ITA* emphasis on charitable activities rather than purposes, e.g., by providing guidance about acceptable limits on particular types of activities which are said to be "non-charitable" or deeming them to be charitable in certain circumstances. However, these distinctions are not intuitive, are subject to varied or arbitrary interpretation, and in any result are ultimately non-binding on the ministerial decisions under the *ITA*. We submit that a statutory change to focus the definition of charity on charitable purposes, rather than activities, is a preferable solution.

Such an approach is consistent with judicial commentary rejecting the premise that otherwise lawful activities aimed at achieving an organization's charitable purposes can be inherently uncharitable.

3) End restrictions on charities' participation in public debate and public policy development.

Rationale:

Positive examples of charities' contribution to policy development, in Canada and abroad –from laws aimed at preventing drunk driving or ending acid rain, to the ending of apartheid –abound. The benefit of charities' involvement in public policy development is acknowledged even in our current legal framework. Given their expertise and experience, and the long track record of beneficial laws and policies resulting from charities' work, in our submission there is no compelling reason to limit charities involvement in public debate and public policy development.

As noted above, Canadians have a very high level of comfort with the involvement of charities in advocacy activities. But perhaps more importantly, as courts in other common law jurisdictions have recognized, encouraging public involvement in matters of government, politics and policy is itself a socially beneficial purpose essential to the functioning of our democracy.

> Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system… [T]the Constitution informs the development of the common law. Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government. [25]

Referring back to the rationale offered in earlier case law for restricting charities' political activity, the Australian High Court in *Aid/Watch* held that:

> The system of law which applies in Australia thus postulates for its operation the very "agitation" for legislative and political changes of which Dixon J spoke in Royal North Shore Hospital . There is none of the "stultification" of which Tyssen wrote in 1888. Rather, it is the operation of these constitutional processes which contributes to the public welfare. [26]

Likewise in Canada, charities provide a critical mechanism through which citizens make their voices heard on issues and causes of societal importance. Following the reasoning of the Australian High Court, Canada can be said to be undermining our citizens' ability to participate in a foundational element of Canadian constitutional process by limiting charities' involvement in public policy development and public debate.

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[25] *Aid/Watch,* supra note 11 at para 44.

[26] *Ibid* at para 45.

3. Amend the Income Tax Act to explicitly protect the free speech of charities.

We propose amending the *ITA* to include the following provision:

Free Speech of Charities

The Minister may not deny registration, impose penalties or revoke the registration of a charity[27] on the basis that the charity:

(a) advocates for a particular perspective or approach to achieving a charitable purpose; or,

(b) undertakes research, analysis, education, awareness-raising or advocacy on issues of public debate related to a charitable purpose, regardless of whether the position taken by the charity requires a change in a government decision, policy or law.

Rationale:

Over the years, two principal themes or "sources of friction" emerge from the Canadian case law: 1) whether so-called "political objects" (e.g., a purpose related to changing law or policy, or reflecting a particular way of achieving one's charitable purposes) are charitable objects under the fourth category of the *Pemsel* case; 2) whether sharing information with the public that promotes a particular view on an issue is "education" in the sense meant by the second *Pemsel* case category, or otherwise charitable under the fourth head.[28] Based on historical precedents, the Canadian courts have felt compelled to answer both questions in the negative, while at the same time encouraging Parliament to update the law. Given the reticence of the Canadian courts to evolve the law in this area, we consider it essential that the *Income Tax Act* be amended to explicitly protect the right of charities to participate in public debate and public policy development in order to address specific anomalies in our case law. As noted above, courts in other common law jurisdictions have already done so.

A further reason for embodying this protection in legislation relates to the doctrine of "collateral political purposes". Even where a charity's written objects are themselves charitable, if a charity undertakes too much of an activity that the CRA or a court considers "political", such that its "political" activities are not considered "incidental and ancillary" to its charitable activities, its status may be revoked on the basis that it is really constituted for an unstated "collateral political purpose".

Although in theory remaining below the 10% threshold should insulate a Canadian charity from this threat, in our experience, even where we carefully tracked our involvement in law reform initiatives related to our purpose of preserving and protecting the environment, where the CRA took no issue with our political time tracking policies or how we calculated resources devoted to political activities in our T3010, and these amounts were well below 10%, we were told that the extent of our "political activities" demonstrated a collateral political purpose and that this could be grounds for revocation of our registration.

4. Clarify and limit any restrictions on charities' participation in the electoral process

We submit that if a new law restricts charities' participation in the electoral process, any prohibition should be limited to *direct* participation by a charity in an electoral campaign on behalf of (or in opposition to) any political party or candidate for public office, and not be used to limit the free speech of charities as set out above.

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[27] Note that below we have proposed replacing the definition of "charitable organization" with a new definition of "charity".

[28] Richard Bridge, *The Law of Advocacy by Charitable Organizations* (Vancouver: Institute for Media, Policy and Civil Society, 2000) at 8.

Rationale

The restriction on partisan activity of charities has received much less scrutiny or attention in the Canadian literature or media than the broader issue of political activities. However, in our submission, the overly broad definition of "partisan" activity in CRA policy (which presumably flows from the prohibition on "indirect" as well as "direct" support for a party or candidate for public office in ITA s. 149.1(6.2)(c)) has perhaps the greatest chilling effect on charities' speech of any element of current charities law and policy. This is because while *some* political activity is in still permitted, partisan activity is completely prohibited, and any amount is in theory grounds for revocation. Thus, the stakes are very, very high for a charity who is accused of partisan conduct.

Yet, the rules are anything but intuitive, clear and unambiguous. In the current context, the most mundane factual description of government action may be seen by the CRA to be partisan if the name of a politician is given, or their party is noted, even outside the election period. For example, we understand that we are forbidden from descriptively referencing the party who currently holds a majority in Parliament (e.g., the former Conservative government, the new Liberal government). We have had charities lawyers advise us that even naming a Minister in his or her official capacity would be considered partisan by the CRA. Charities are also prohibited from criticizing or commending named Members of Parliament or political parties for positions they take on issues related to the charities' purposes at any time (unless the views of all MPs/parties are communicated as well, which may not be possible or feasible in the circumstances). Even something as simple as reporting that the government passed a bill related to a charity's purposes, without indicating how all opposition parties voted, may be considered partisan.

In our submission, descriptive reporting or issue-based commentary of this nature is not what most Canadians think of as partisan. Instead, the common understanding of "partisan" activity is direct support or opposition to a candidate for public office or a political party. And in our view, any absolute prohibition on charities activities should thus be limited to direct participation in an electoral campaign to support or oppose a candidate or party. In our view, outside of the election period there is little rationale for restricting charities' speech.

This does not mean that communications by charities aimed at "indirectly supporting" parties and candidates will be unregulated. To the contrary, broad restrictions are already placed on all third parties during the election period under the *Canada Elections Act*.

In what was an historical anomaly, in 1986 at the time that the ITA was amended to prohibit charities from engagement in partisan political activities, limits on third party involvement in the electoral process under the *Canada Election Act* were not being enforced by Elections Canada following a successful constitutional challenge to that Act.[29] It was not until the Lortie Commission reported in 1991 that third party spending limits were re-enacted, and not until the 2004 case of *Harper v. Canada (Attorney General)* [30] that the Supreme Court of Canada affirmed the constitutionality of the present regime. However, today, the *Canada Elections Act* regulates communications by charities and others which "promote or oppose a registered party or the election of a candidate."[31]

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[29] Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, (Ottawa: Communication Group, 1991) [Lortie Commission] at 332. The Commission reports that although the case, *National Citizens' Coalition Inc. v Attorney General of Canada* (1984), 32 Alta. LR (2d) 249 (QB), was from Alberta, Elections Canada did not attempt to enforce the impugned provisions elsewhere in Canada either during this period.

[30] *Harper v Canada (Attorney General),* [2004] SCC 33 [*Harper*]

[31] *Canada Elections Act*, SC 2000, c 9, s 319. Although note that election advertising is defined more broadly than partisan political activity, in that the definition of election advertising also includes communication that

The judicial history of Parliament's efforts to limit communications by third parties during the election period is instructive in that it offers another perspective on the role of third parties, like charities, in the political process, and what the courts have considered reasonable limits on this. First of all, the Supreme Court of Canada has affirmed that:

> The right to play a meaningful role in the electoral process under s. 3 of the Charter implicates a right of meaningful participation in that process. Meaningful participation is not limited to the selection of elected representatives.....Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy.
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> This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices": Libman, at para. 47. [32]

Furthermore, in *Harper*, the court affirms that:

> Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, *supra*, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the Charter and warrants a high degree of constitutional protection.[33]

In this context, election spending limits are primarily about what limits are reasonable on political expression in order to ensure that the wealthy do not "dominate the political discourse" to the "detriment of others with less economic power.[34]

> To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions[35] [emphasis added].

In finding that the infringement of free speech represented by third party election advertising limits is justified in a free and democratic society, the Supreme Court of Canada put weight on the fact that the limitations applied only during the election period itself, the relatively generous nationwide $150,000 spending limit during this short period, that the limitations applied to all types of third parties. By way of contrast, earlier absolute prohibitions on election advertising had been struck down by the courts.[36]

"takes a position on an issue with which a registered party or candidate *is associated* during the election period." By way of contrast, CRA guidance provides that a charity does not engage in prohibited partisan political activity when it makes the public aware of its position on an issue provided it does not *explicitly* connect its views to any political party or candidate for public office [emphasis added].

[32] *Harper, supra* note 30 at paras 70-71.

[33] *Ibid.* at para 84.

[34] *Ibid.* at para 72.

[35] *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569 at 61.

[36] *National Citizens' Coalition Inc. v Attorney General of Canada, supra* note 29.

This would be straightforward enough if the story ended here. However, the otherwise level playing field the *Canada Elections Act* attempts to create is distorted by the differential treatment of tax treatment of charities as compared to corporations. While charities risk revocation of their registration for even referencing named politicians or political parties *at any time*, corporations are free to deduct most advertising expenses in Canadian newspapers, television or radio stations from income regardless of whether they have directly political or partisan content.[37]

Because the stakes are so high for charities if bona fide efforts to communicate about issues they work on are deemed to be partisan activity, the current rules can have an immobilizing and silencing effect. In the result, citizens may not have access to important information relevant to the public debate and public policy development. Or perhaps even more significantly, they may hear disproportionately from large-scale economic interests who don't face the same limitations on their speech, which raises the same public policy concerns as Parliament sought to rectify with election spending limits. In the result, all Canadians lose out. As the Supreme Court of Canada has said:

> The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner. Canadians understandably have greater confidence in an electoral system which ultimately encourages increased participation.[38]

In our submission, the ambiguity and silencing effect of the current law could be greatly reduced if the absolute prohibition in the ITA were limited to direct support for candidates or parties, or what is referred to in the US legislation as "direct participation" in an election campaign. The concept of "indirect support", depending on its interpretation by auditors, has the potential to capture far too broad an array of activities, messages and communications, and to deny citizens cogent, reasoned information about issues of importance to them. To the extent that special rules should apply during the election period, the *Canada Elections Act* already covers this and further restrictions in the ITA are unnecessary.

Responses to Consultation Questions

Question 1: Awareness, Issues and Challenges Regarding CRA Approach to "Political activities"

Awareness: All of the charities that we work with closely are "hyper-aware" that there *are* restrictions on charities' involvement in public debate and public policy development, although there is considerable confusion as to precisely what these restrictions are. Prior to the political activities audits of recent years, we felt some level of confidence in following CRA policy interpretations as set out in CPS-022 with the benefit of occasional legal advice. However, given the arbitrary and shifting nature of how the CRA has applied current law and policy, in our submission it is not actually possible at present for charities to "know" what the rules are, nor plan their activities with any confidence.

Issues and Challenges: As set out in more detail above, some major problems with current law and CRA policy may be summarized as follows:

- A view of charity stuck in the mores of the Elizabethan and Victorian eras which prefers ameliorating problems and band aid fixes over systemic solutions to societal problems.
- A focus on "charitable activities" rather than "charitable purposes" in the definition of charitable organization, leading to a misplaced emphasis on categorizing a myriad of different types of

[37] See note 10 above.

[38] *Harper, supra* note 30 at para 91.

communications and activities as permissible or not, rather than focusing on the more important question of whether the activities of the charity are related to achieving its charities purposes.

- Overly broad restrictions on charities' participation in "political" activities, which dramatically limit the free speech of charities, and thus the voices of those who support them, while other organizations who receive more generous tax benefits (and in particular, corporations) remain unrestricted.
- An overly restricted view of "education", which limits the ability of charities to provide information to the public related to their charitable objectives, or to advocate for a particular approach to achieving their charitable purposes.
- An overly broad definition of "partisan political activity" that bars charities from analyzing, criticizing or commending the actions of named elected officials, parties or candidates for public office, even when these actions directly related to their charitable purposes.
- The significant administrative burden associated with supporting staff in interpreting charities law and reporting on their activities because of the above, which takes away from the actual work directed at achieving the charities' purposes, and the related stress associated with the uncertainty of the rules.

Impact: All of these problems hinder our ability to effectively advocate for the cause we were constituted to advance (preservation and protection of the environment) and the people we serve.

Take, for example. our efforts as a public interest law organization to protect and preserve the environment from the threat of climate change. One of our purposes, approved by the CRA, is "to educate the public about laws, regulation and current issues related to the environment", but according to CRA policy, for an activity to be educational we cannot just "raise awareness" of the problem, we must present in a balanced way opposing views. On one analysis of the current law, this would mean that we must give the claims of climate deniers equal weight in any of our communications, despite that the fact that the science of climate change has long passed the point where we feel we could ethically do so, because the federal governments has, to date, failed to legislate in this area. It seems likely that today a court would find that addressing climate change is itself a charitable purpose, but what about when we sounded the alarm twenty-five years ago? Like advocacy for women's right to vote, the social benefit of the cause may only clear after efforts to raise awareness about it have been successful, yet our laws restrict charities from this essential activity.

Furthermore, while oil companies resisting regulation of greenhouse gas pollution are free to advertise their views to the public without restriction and receive a tax benefit by deducting these expenses, we may use only 10% of our resources in efforts to share our legal analysis about the most effective legal tools to limit greenhouse gas pollution.

As a result of these kinds of limitations, Canadians are denied the full benefit of the expertise and experience of the charitable sector in public policy development, and Canadians have less opportunity to have their collective voices heard in public debates related to the charitable purposes of the charities they support.

Question 2: CRA Policy Guidance

Is the CRA's policy guidance on political activities clear, useful, and complete? No.

Although the policy (CPS-022) itself is written in plain language and provides helpful examples, it fails to set a clear *legal* standard for charities to follow. Especially given the reticence of the Canadian courts to evolve the common law in this area as the courts in other jurisdictions have done, legislative reform is essential to fix our broken charities laws. By definition, this cannot be done through non-binding policy.

For many years we relied on parsing the wording of policy guidance to understand exceptions and restrictions related to political and partisan activity. But in our first experience of an actual audit, this seemed to provide little assistance, and indeed we were reminded that the decisions of the minister (delegated to the Director General of the Charities Directorate) cannot be fettered by policy, i.e., the auditors have no obligation to follow CRA policy. Despite its plain language, the content of the policy is given vastly different interpretations by different actors, and we have little confidence that we can rely on it.

Below we have made specific recommendations about new legislative wording related to political and partisan activity. These are intended to fully capture and go beyond all existing exceptions to Canadian common law or statutory restrictions on political activity. If any existing exception found in CPS-022 is not covered by our proposal, then this is an oversight and it should be considered included herein.

Once legislative change has occurred, new policy guidance will likely be required to educate charities about the new rules, and a variety of formats should be provided to accommodate different learning styles. Of the currently available guidance materials, the specific factual scenarios outlined in CPS-022 are among the most helpful.

We note that the CRA has also asked for feedback about its policies regarding charities' accountability for the use of their resources, linking to an on-line description of the books and records that a charity is expected to keep. We wish to raise one important issue in this regard.

As a legal charity we have been told by the CRA that asserting solicitor client privilege over certain client-related records, as our legal and ethical obligations require us to do, is in and of itself grounds for revocation on the basis of a failure to maintain and produce adequate books and records. Particularly in light of the recent Supreme Court of Canada decisions in *Canada (Attorney General) v Chambre des notaires du Québec*[39] and *Canada (National Revenue) v Thompson*[40] we submit that this position is legally unsupportable. We recommend that the *ITA* be amended to clarify that an assertion of solicitor client privilege is an exception to the requirement to produce adequate books and records, and may not be grounds for revocation.

3. Future policy development

3.1 Should changes be made to the rules governing political activities? Yes

> *"Considering that the law of charity in Canada continues to make reference to an English statute enacted almost 400 years ago, I find it not surprising that there have been numerous calls for its reform, both legislative and judicial"*
>
> -*Vancouver Society of Immigrant and Visible Minority Women,* per Iacobucci, J.[41]

Changes are urgently needed to the rules governing "political activities" and such changes must be made first and foremost through legislation, rather than non-binding policy, for the reasons set out below.

Judicial calls for reform

Writing for the majority of the Supreme Court of Canada in *Vancouver Society of Immigrant and Visible Minority Women*, Mr. Justice Iacobucci found that "it is difficult to dispute that the law of charity has been plagued by a lack of coherent principles on which consistent judgment may be founded." He further noted

[39] 2016 SCC 20

[40] 2016 SCC 21.

[41] *Vancouver Society of Immigrant and Visible Minority Women, supra* 16 at para 127.

the "circular reasoning and retrospective bias"[42] present in the current common law standards about what is considered charitable. Yet the Supreme Court of Canada declined to adopt a new approach, holding that: "If this is to be done, especially for the purposes of the *ITA*, the specifics of the desired approach will be for Parliament to decide."[43]

The same position has been taken by the Federal Court of Appeal. In the words of Mr. Justice Strayer: "I would heartily agree that this area of the law requires better definition by Parliament which is the body in the best position to determine what kinds of activity should be encouraged in contemporary Canada as charitable and thus tax exempt."[44]

Thus, as noted above, while the superior courts in other common law jurisdictions, notably Australia and New Zealand have rendered judgments that have addressed some of the problems presently plaguing Canadian charity law, the Canadian courts have declined to do so.

More than a decade and a half has passed since the above-noted cases urging the federal government to shoulder the responsibility for modernizing the law in this area, and we submit that the time has come to do so, according to the principles set out herein.

Non-binding policy is not sufficient – changes must be made through legislation

It is a well-established legal principle that legislation and policy have different impacts on how a decision-maker exercises his or her authority. A decision-maker is expected to follow procedural and substantive requirements set out in legislation; legislation is the appropriate place for mandatory requirements. By way of contrast, a decision-maker's discretion cannot be fettered by policy.[45] During our audit we experienced firsthand the implications of this distinction.

Take the following example: CPS – 022 states as follows:

> **7.3 Communicating with an elected representative or public official**
>
> When a registered charity makes a representation, **whether by invitation or not,** to an elected representative or public official, the activity is considered to be charitable. Even if the charity explicitly advocates that the law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed, the activity is considered to fall within the general scope of charitable activities [emphasis added].

As part of our audit we provided a list of all government meetings we had during the audit period, the topics discussed and resources expended on these meetings. The auditors, however, indicated that they also needed to know whether the meetings had been invited by government or not. They told us that they considered uninvited meetings to be a political activity, despite the plain wording of CRA policy. They reminded us that the CRA had no obligation to follow its policy.

In this type of environment, policy alone can provide little certainty in planning and reporting. Furthermore, having been through this Kafkaesque experience, we have no trust that changes made to policy will have any impact at all.

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[42] *Ibid.* at para 201. 1.

[43] *Ibid.,* at para 202.

[44] *Human Life International in Canada Inc. v The Minister of National Revenue*, [1998] 3 FC 202 at para 19.

[45] "Administrative decision-makers are bound to apply the law of the land, not their administrative policies, to the facts before them": *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.,* 2013 FCA 250 at para 75.

For non-lawyers, the notion that the CRA provides policy guidance but does not legally have to follow it, is not well-understood. We note that consultation question 2 does not make this clear, which we consider an omission, as those making submissions may assume that the policy guidance would be binding in some way.

The courts have urged modernization in the law and clearly signalled that this is Parliament's responsibility; merely updating non-binding policy will be insufficient to allow the kind of certainty and predictability that is a "cardinal principle of Canadian taxation law".[46]

3. 2 If so, what should those changes be?

In our submission, for the reasons set out above, a new law should:

1. Define "charity" based on the societal goals an organization seeks to achieve (its charitable purposes), consistent with modern realities and our constitutional democracy
2. Ensure charities are free to choose the most effective approaches to achieve their purposes unless an activity is expressly prohibited by statute
3. End restrictions on charities' participation in public debate and public policy development
4. Explicitly protect the free speech of charities, by clarifying that charities can be constituted and operated to:
    a. raise awareness of, or advocate for, a particular perspective or approach to achieving charitable purposes;
    b. advocate for a change in a government decision, policy or law related to achieving charitable purposes;
    c. take a position on an issue or policy related to their charitable purposes, regardless of whether a political party or candidate for public office has also done so, and,
    d. report or comment on a policy or position, or proposed policy or position, of any level of government related to their charitable purposes, regardless of whether such policy or position is in writing or expressed by a named elected official or candidate for public office.
5. If a new law restricts charities' participation in the electoral process, any prohibition should be limited to *direct* participation by a charity in an electoral campaign on behalf of (or in opposition to) any political party or candidate for public office, and not be used to limit the free speech of charities as set out above.

To do so, we recommend repealing ITA, s. 149.1(6.2) and replacing it with two new provisions. The first would explicitly protect the free speech of charities as set out below:

Free Speech of Charities

The Minister may not deny registration, impose penalties or revoke the registration of a charity on the basis that the charity:

(a) advocates for a particular perspective or approach to achieving charitable purposes; or,

[46] *The Queen v Canada Trustco Mortgage Company,* [2005] 2 SCR 601 at para 7.

(b) undertakes research, analysis, education, awareness-raising or advocacy on issues of public debate related to charitable purposes, regardless of whether the position taken by the charity requires a change in a government decision, policy or law.

Secondly, we would replace the prohibition in s. 149.1(6.2) on "direct or indirect support of, or opposition to, any political party or candidate for public office" with a narrower restriction on "electioneering",[47] defined as follows:

Electioneering

"Electioneering" means participation in a political campaign on behalf of (or in opposition to) any political party or candidate for public office, but does not include:

(a) taking a position on an issue or policy related to a charity's purposes, regardless of whether a political party or candidate for public office has also done so, or,

(b) reporting or commenting on a policy or position, or proposed policy or position, of any level of government related to charitable purposes, regardless of whether such policy or position is in writing or expressed by a named elected official or candidate for public office.

Statutory Definition of Charity and Charitable Purposes

Finally, as noted above, we recommend amending the ITA to include statutory definitions of "charity" and "charitable purposes". The definition of charitable purposes should include purposes not only recognized to date by the Canadian courts, but also those recognized in other common law jurisdictions, while leaving the courts free to evolve the common law by recognizing future purposes analogous to those set out in statute and beneficial to the community. Modernization and expansion of some purposes will also be required, for example to reflect Charter protections as they are now understood in Canada. Australia in particular has undertaken legislative reform of this nature, and section 12 of the 2013 Australian *Charities Act* is commended to you for consideration.[48] In particular, the Australian legislation explicitly includes law reform advocacy in its definition of charitable purposes.

Furthermore, taking this approach, it should be possible to simplify the ITA by replacing the current definitions of charitable organization and charitable foundation with a single definition of "charity" defined by the entity's purposes not their activities. In Appendix A we have built on the Australian model to offer an idea of how such a provision could read.

While we recommend expressly including protection of the environment, conservation of natural resources and advancement of environmental sustainability in a statutory definition (as well-established charitable purposes) charities who work in other areas will be better positioned to comment on the language of the other proposed sub-sections.

Conclusion

As one prominent Canadian lawyer has said: "Any description of current Canadian charity law must include the words complicated, confusing, unclear, and contradictory."[49] Our outdated and ambiguous laws serve to silence the voices of the charitable sector in ways that are not beneficial to our society.

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[47] Alternatively this could be used as a new definition of "partisan political activity".

[48] *Charities Act 2013* (No. 100, 2013) s 12. Online:<https://www.legislation.gov.au/Details/C2013A00100>.

[49] W. Laird Hunter Q.C., *Feature Report on Charities Law* (Charity Central, 2009) Online: <http://www.charitycentral.ca/docs/33-4hunter-en.pdf>.

By legislatively ending restrictions on charities' participation in public debate and public policy development, expressly protecting charities' free speech, and freeing charities to choose the most effective means to achieve their purposes, including advocacy and law reform, we all benefit and the true role of charity is upheld. As a leading University of Melbourne Law Review article on this topic notes:

> At the base of the pyramid of arguments against the political purposes doctrine is the argument that the distinction between 'charity' and 'politics' misconceives the true role of charity. Instead, advocacy and engagement with politics are better conceptualised as an essential, and perhaps the most effective, method of achieving charitable purposes. [50]

Proposals to end restrictions on charities' involvement in public policy development are long-standing. For example, in 2001 the Institute for Media, Policy and Civil Society in Association with the Canadian Centre for Philanthropy held the National Dialogue on Charities and Advocacy "a cross-Canada consultation process with voluntary sector leaders on this subject", involving over 700 people.[51] 91 percent of dialogue survey respondents were of the view that "the status quo was not acceptable and that the law of advocacy by charities must change." Of the options considered through this dialogue there was very strong support for short-term amendments to the ITA to clearly specify only what charities cannot do, otherwise leaving charities to determine the appropriate activities, including appropriate levels of advocacy to achieve their objects. In the longer-term a majority of participants supported "the creation of a new, modern definition of 'charity' to replace the existing and badly dated common law categories of charities."

The time has come to do so.

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50 Joyce Chia, Matthew Harding and Ann O'Connell, *Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation* (Melbourne: Melbourne Law School, 2011) at 366-367, first published (2011) 35(2) Melbourne University Law Review.

51 The Dialogue included 17 daylong consultation sessions in the following cities: St John's, Halifax, Fredericton, Montreal, Ottawa, Toronto (4 sessions), Winnipeg, Saskatoon, Edmonton, Calgary, Vancouver, Victoria, Yellowknife, and Whitehorse, attended by 704 people, 490 of whom completed written surveys: IMPACS, *Let Charities Speak: Report of the Charities and Advocacy Dialogue*, online < http://trinaisakson.com/wp-content/uploads/2010/12/IMPACS-2002-03-Let-Charities-Speak_Report-of-the-Charities-and-Advocacy-Dialogue-English.pdf>.

APPENDIX A: PROPOSED STATUTORY PROVISIONS

Qualified Donees

149.1 (1) In this section and section 149.2,

charity means an organization that is constituted and operated exclusively for charitable purposes, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof.

charitable purposes for the purposes of the administration of this act, means any of the following:

(a) prevention or relief of poverty;
(b) advancement of education;
(c) advancement of religion;
(d) promotion of equality and diversity;
(e) promotion of health, including the prevention or relief of sickness, disease or human suffering,
(f) promotion of reconciliation, mutual respect and tolerance between groups of individuals or communities in Canada and the advancement of conflict resolution;
(g) promotion or protection of human rights;
(h) protection of the natural environment, conservation of natural resources or advancement of environmental sustainability;
(i) prevention or relief of suffering of animals;
(j) advancement of the arts, culture, heritage or sciences;
(k) advancement of citizenship or community development, including rural or urban regeneration;
(l) promotion of civic responsibility or voluntary work;
(m) advancement of community welfare including addressing the needs of those disadvantaged by race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;
(n) prevention and elimination of discrimination based on race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;
(o) promotion of agriculture and industry;
(p) any other purpose of benefit to the community that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (o);
(q) promoting public awareness or public debate regarding the preferred approaches to advancing any of the purposes mentioned in paragraphs (a) to (p);
(r) promoting or opposing a change to any matter established by law, policy or practice of any level of government in Canada, another country or internationally, if the change is in furtherance of one or more of the purposes mentioned in paragraphs (a) to (q); and,
q) the disbursement of funds to a qualified donee.

Free Speech of Charities

The Minister may not deny registration, impose penalties or revoke the registration of a charity on the basis that the charitable organization:

(a) advocates for a particular perspective or approach to achieving charitable purposes; or,

(b) undertakes research, analysis, education, awareness-raising or advocacy on issues of public debate related to charitable purposes, regardless of whether the position taken by the charity requires a change in a government decision, policy or law.

Electioneering

A charity must not engage in electioneering.

"Electioneering" means participation in a political campaign on behalf of (or in opposition to) any political party or candidate for public office, but does not include:

(a) taking a position on an issue or policy related to a charity's purposes, regardless of whether a political party or candidate for public office has also done so, or,

(b) reporting or commenting on a policy or position, or proposed policy or position, of any level of government related to charitable purposes, regardless of whether such policy or position is in writing or expressed by a named elected official or candidate for public office.

Appendix B: Council of Europe, *Legal Status of Non-governmental Organisations in Europe*, Recommendation CM/Rec(2007)14, adopted by the Committee of Ministers of the Council of Europe on 10 October 2007[52]

In this 2007 document the Council of Europe recommended that governments of its member states be guided in their legislation, policies and practices by the minimum standards set out in this recommendation. Although the recommendation refers to non-governmental organizations, it is clear from the recommendations regarding tax incentives that the recommendations are intended to apply to entities that receive tax advantages similar to Canadian charities.

Below are excerpts potentially relevant to modernizing Canadian charitable law:

II. Objectives

11. NGOs should be free to pursue their objectives, provided that both the objectives and the means employed are consistent with the requirements of a democratic society.

12. NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law.

13. NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties.

14. NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities without any special authorisation being required, but subject to any licensing or regulatory requirements generally applicable to the activities concerned.

15. NGOs should be free to pursue their objectives through membership of associations, federations and confederations of NGOs, whether national or international. . . .

VI. Fundraising, property and public support

A. Fundraising

50. NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties. . . .

C. Public support

57. NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies, income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits.

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[52] Online: <https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf>.