

# **Tax Audits of Environmental Groups: The Pressing Need for Law Reform**

A Law Reform Analysis for DeSmog Canada

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## Introduction

At the same time as the Federal Government slashed its overall 2012 budget, it set aside a special allocation of \$13.4 million dollars to audit “political activities” of Canada’s charitable groups.<sup>1</sup> Since then, the Canada Revenue Agency (CRA) has undertaken audits of more than 52 charities for the purpose of investigating whether these organizations have exceeded their allowable limits of political activities.<sup>2</sup> CRA has audited groups such as Amnesty International Canada, Pen Canada, and the Canadian Centre on Policy Alternatives – as well as seven of Canada’s most prominent environmental charities, including the David Suzuki Foundation, Tides Canada, West Coast Environmental Law, the Pembina Foundation, Environmental Defence, Equiterre and the Ecology Action Centre. Since several of these organizations had previously criticized government policies, many observers accused government of using audits to intimidate and silence opposing political views.<sup>3</sup>

It is alleged that teams of auditors are combing through the records of groups to see if any have exceeded the 10% cap on the amount of donated money that can be spent on “political” work related to their charity (like promoting related law reform or publicly advocating that government make green decisions).<sup>4</sup> Indeed, if the auditors can eventually

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<sup>1</sup> *Postmedia News* “Budget 2012: Planned cuts by department” (March 29, 2012) Online: <http://news.nationalpost.com/2012/03/29/budget-2012-planned-cuts-by-department>. See also: Carol Linnitt. *DeSmog Canada* “\$13.4 million allocated to carry audit of Canadian charities beyond 2017, documents show” (February 18, 2014). Online: <http://www.desmog.ca/2014/02/16/13-4m-allocated-carry-audit-canadian-charities-beyond-2017-documents-show>

<sup>2</sup> *BC Local News* “Editorial: Transparency goes both ways” (August 09, 2014) Online: <http://www.bclocalnews.com/opinion/270355201.html>

<sup>3</sup> Gareth Kirkby (2014) “An Uncharitable Chill” (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 23 ; Evan Solomon and Kristen Everson. *CBC News* “Seven environmental charities face Canada Revenue Agency Audits” (February 06, 2014) Online: <<http://www.cbc.ca/news/politics/7-environmental-charities-face-canada-revenue-agency-audits-1.2526330>> Audits” (February 06, 2014) Online: <http://www.cbc.ca/news/politics/7-environmental-charities-face-canada-revenue-agency-audits-1.2526330>; Gerald Caplan. *Globe and Mail*. “As CRA audits charities, there’s a scandal within a scandal” (November 14, 2014) Online: <http://www.theglobeandmail.com/news/politics/as-cra-audits-charities-theres-a-scandal-within-a-scandal/article21599291/>; Dean Beeby. *The Canadian Press*. “Charities ‘muffled’, ‘harassed’ by Canada Revenue Agency audits: study” (July 10, 2014) Online: <http://globalnews.ca/news/1444175/charities-muffled-harassed-by-canada-revenue-agency-audits-study/>

<sup>4</sup> Carol Linnitt. *DeSmog Canada*, “Pen Canada, Freedom of Expression Charity Supported by Margaret Atwood and Yann Martel, to Undergo Political Activity Audit” (23 July, 2014), online: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>; *DeSmog Canada*. *Huffington Post Canada*. “Harper’s Audit-the-Enemy Strategy Fulfills Nixon’s Dream” (September 24, 2013) Online: [http://www.huffingtonpost.ca/desmog-canada/nixon-harper\\_b\\_3636684.html](http://www.huffingtonpost.ca/desmog-canada/nixon-harper_b_3636684.html) *Toronto Star*.

show that the 10% cap has been exceeded, these organizations may have their charitable tax status revoked and may be forced to close – since they could:

- be required to give away all the charity’s assets within 12 months, or forfeit them; and
- lose all donors that require charitable tax receipts.<sup>5</sup>

Clearly, this program has the potential to eliminate a significant portion of civil society that speaks for clean air, clean water and a healthy biosphere.

Even if the audits do not lead to de-registration of charitable groups, the auditing process by itself has had a profound effect across all Canadian charities. Although most groups audited so far have been found without fault<sup>6</sup>, an audit is an intimidating, time-consuming, costly and resource-intensive process that all want to avoid.<sup>7</sup> Responding to an audit uses up scarce resources and diverts the charity from doing its regular charitable work, sometimes for several years.<sup>8</sup>

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“Charities under audit fire band together for answers from Canada Revenue Agency: Editorial” (August 11, 2014) Online:

[http://www.thestar.com/opinion/editorials/2014/08/11/charities\\_under\\_audit\\_fire\\_band\\_together\\_for\\_answers\\_from\\_canada\\_revenue\\_agency\\_editorial.html](http://www.thestar.com/opinion/editorials/2014/08/11/charities_under_audit_fire_band_together_for_answers_from_canada_revenue_agency_editorial.html)

<sup>5</sup> The Charities Directorate of CRA may revoke the registration of any registered charity that fails to comply with the requirements of the *Income Tax Act*. [ITA, s 168(1).] Where the Minister revokes the registration of a charity, the charity becomes liable for a revocation tax equivalent to the fair market value of all its property, minus amounts expended during a one-year ‘winding-up period’ on charitable activities and gifts to arms’-length charities. [ITA, s 188(1), (1.1), (1.2), (1.3).] At the end of the one-year period, the charity must pay to the federal Receiver General the remainder of the revocation tax (minus amounts expended to other charities). [ITA, s 189(6.1)(c).] -- See Professor Kathryn Chan, ‘The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales’ (2010) 89 Cdn Bar Rev 373, 398-99 and Professor Kathryn Chan, *Charities Regulators and the Institutional Public Law-Private Law Divide* (Unpublished), 58-59.

<sup>6</sup> Only one of the newly-audited groups has lost its charitable status -- in January, 2015 Dying With Dignity had its charitable status annulled. See <http://www.theglobeandmail.com/news/politics/cras-political-activity-audit-strips-dying-with-dignity-of-charitable-tax-status/article22534463/> Note that Physicians for Global Survival was also de-registered as of August, 2014, but the investigation of that group began before the new audit initiatives. See: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>

<sup>7</sup> Many charities which have gone through the auditing process describe it as “extremely taxing”. It is asserted that once the CRA makes allegations, charities are assumed guilty until they can prove that they are innocent -- Althia Raj, “CRA Got Few Complaints About Charities’ Politics Prior to 2012”, *Huffington Post* (08 December 2014), online: <[http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities\\_n\\_6279178.html](http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities_n_6279178.html)>. Proving innocence is no easy feat; David R. Boyd, an environmental lawyer and professor at Simon Fraser University, has noted that “[i]t is ... very challenging to do the record keeping required to meet the 10 per cent threshold...” -- Raveena Aulakh, “Audits of environmental charities linked to position on oilsands”, *Toronto Star* (07 February 2014), online: <[http://www.thestar.com/news/world/2014/02/07/audits\\_of\\_environmental\\_charities\\_linked\\_to\\_position\\_on\\_oilsands.html](http://www.thestar.com/news/world/2014/02/07/audits_of_environmental_charities_linked_to_position_on_oilsands.html)>.

<sup>8</sup> Audits can take three to four years to complete. Dean Beeby, “Small B.C. charity struggles with onerous Canada Revenue Agency demands”, *Toronto Star* (30 July 2014),

Charities are spending scarce resources on time-tracking systems, administrative measures and legal training to deal with the specter of potential audits. Perhaps more important, there is now a palpable “advocacy chill” that stops charities from speaking out on important policy issues – even when the issue directly relates to their charitable mission and even when they have the legal right to do so.

A Royal Roads University study of 16 charities has documented the “advocacy chill” created by the audits:

*The interview data demonstrates that the government is now, in effect or by design, ‘muffling’ or ‘silencing’ the contribution of charities to public debates by ‘distracting’ them with CRA audits.<sup>9</sup>*

The chill extends well beyond those organizations actually being audited. As one non-profit veteran has noted:

*There’s so much fear out there, nobody wants to be involved in (political activity) because all of a sudden they’re potentially audited and an “enemy.”<sup>10</sup>*

The executive director of Toronto-based Canadian Journalists for Free Expression has stated:

*They [Government] want to bully people into not speaking out against them, that’s the entire point of the audit...And it’s working, that’s the really sad thing.<sup>11</sup>*

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online:<[http://www.thestar.com/news/canada/2014/07/30/audit\\_forces\\_small\\_charity\\_to\\_translate\\_boxes\\_of\\_documents.html](http://www.thestar.com/news/canada/2014/07/30/audit_forces_small_charity_to_translate_boxes_of_documents.html)>Althia Raj, “CRA Got Few Complaints About Charities’ Politics Prior to 2012”, *Huffington Post* (08 December 2014), online: <[http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities\\_n\\_6279178.html](http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities_n_6279178.html)>.

<sup>9</sup> Dean Beeby. *The Canadian Press* “Canadian charities feel “chill” as tax audits widen into political activities” (July 10, 2014)

Online:[http://www.thestar.com/news/canada/2014/07/10/canadian\\_charities\\_feel\\_chill\\_as\\_tax\\_audits\\_widen\\_into\\_political\\_activities.html](http://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html) See also: Gareth Kirkby (2014) “An Uncharitable Chill” (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 26.

See also: Evan Solomon and Kristen Everson. CBC News “Seven environmental charities face Canada Revenue Agency Audits” (February 06, 2014) Online: <http://www.cbc.ca/news/politics/7-environmental-charities-face-canada-revenue-agency-audits-1.2526330>

<sup>10</sup> Dean Beeby. *The Canadian Press* “Canadian charities feel “chill” as tax audits widen into political activities” (July 10, 2014) Online:

[http://www.thestar.com/news/canada/2014/07/10/canadian\\_charities\\_feel\\_chill\\_as\\_tax\\_audits\\_widen\\_into\\_political\\_activities.html](http://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html)

<sup>11</sup> Jeremy J. Nuttall. *TheTyee.ca* “Pattern of Charity Audit Bias “Disturbing” Says Free Speech Advocate (October 22, 2014) Online: <http://thetyee.ca/News/2014/10/22/Charity-Audit-Bias/>

Environmental Law Centre report:

*Tax Audits of Environmental Groups: The Pressing Need for Law Reform*

The Royal Roads University study found that charities are being less assertive in their law reform efforts to achieve their charitable mission. “Many organizations have toned down their public communications in the wake of the audits...”<sup>12</sup> This advocacy chill prevents Canadian charities with unique expertise on issues of health, poverty, environment, families, safety, etc. from carrying out their historic role of speaking out on how society can best respond to related problems.<sup>13</sup>

This situation could have extremely serious social repercussions. In fact, so-called “political” law reform work carried out by charities is critically important to a healthy society. The “political” work of the Cancer Society gave us laws against smoking in public places. The “political” work of Mothers Against Drunk Driving has saved hundreds of lives by toughening drunk driving laws. And the “political” work of environmental organizations has established parks, eliminated the lead in gasoline that was poisoning our children, cleaned up the Great Lakes and the BC pulp industry, and benefited society in countless other ways.

As distinguished legal commentators have pointed out, in many circumstances “advocacy and engagement with politics are... an essential, and perhaps the most effective, method of achieving charitable purposes.” Charitable advocacy helps society recognize and actually respond to the problems that charities address.<sup>14</sup>

If the environmental charities currently being audited are put out of business, Canada will be the poorer. And Canada’s environment will be far less secure. Perhaps more serious, if charities continue to shy away from any political activity at all, public debate about how to solve society’s problems will be seriously impoverished – as those with some of the best expertise on such problems will remain silent.

Environmental groups are not alone. The Royal Roads University study states that “[t]here is evidence that three specific charitable sectors are being singled out for CRA attention – environmental, development and human rights, and charities receiving donations from labour unions”<sup>15</sup> – all sectors that have criticized Harper government actions. Observers

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<sup>12</sup> Dean Beeby, “Charities ‘muffled,’ ‘harassed’ by Canada Revenue Agency audits: study”, *The Canadian Press* (10 July 2014), online: < <http://globalnews.ca/news/1444175/charities-muffled-harassed-by-canada-revenue-agency-audits-study/>>.

<sup>13</sup> Imagine Canada, *Sector Source: About Charities*, online: < <http://sectorsource.ca/research-and-impact/sector-impact/about-charities>>. As US legal scholar Elias Clark has pointed out, we should be concerned about undue restrictions on the political activities of charities who deliver messages “aimed at...government..., which can effect the most immediate solution to society’s problems.” Elias Clark (1960) “The Limitation on Political Activities: A Discordant Note in the Law of Charities” *Virginia Law Review*, Vol 46. At p 452.

<sup>14</sup> Joyce Chia et al.(2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at pp 366-367.

<sup>15</sup> Dean Beeby, “Charities ‘muffled,’ ‘harassed’ by Canada Revenue Agency audits: study”, *The Canadian Press* (10 July 2014), online: < <http://globalnews.ca/news/1444175/charities-muffled-harassed-by-canada-revenue-agency-audits-study/>>.

have noted this focus on groups critical of government – comparing it with President Nixon who was impeached for attempting to direct tax audits at his “enemies list” and the Obama administration that targeted tax audits at Tea Party political opponents.<sup>16</sup> Government has denied political targeting of critics, but serious concerns have been raised about the possibility that the audits were politically targeted to weaken opposition to government’s resource and other policies.<sup>17</sup>

Critics have noted that the special auditing program was announced at the same time as Government was:

- Giving top priority to oil pipelines opposed by most environmental groups;
- Rewriting the *Canadian Environmental Assessment Act* to exclude most environmental groups from participating in environmental assessments – as an oil industry lobbyist had specifically requested<sup>18</sup>;
- Dramatically weakening the *Fisheries Act* and other environmental laws to facilitate pipeline and other resource development, at the request of industry (a move so extreme that even two former Conservative Fisheries Ministers objected)<sup>19</sup>;
- Launching unprecedented political attacks on environmental groups, with the Minister of Natural Resources accusing “environmentalists and other radical groups

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<sup>16</sup> George Will. *Washington Post* “Opinion: IRS Scandal Carries Echoes of Watergate” (May 13, 2013) Online: [http://www.washingtonpost.com/opinions/george-will-irs-scandal-carries-echoes-of-watergate/2013/05/13/78f03660-bbf1-11e2-97d4-a479289a31f9\\_story.html](http://www.washingtonpost.com/opinions/george-will-irs-scandal-carries-echoes-of-watergate/2013/05/13/78f03660-bbf1-11e2-97d4-a479289a31f9_story.html) See also: *As CRA Audits Charities, There’s a Scandal Within a Scandal*, <http://www.theglobeandmail.com/news/politics/as-cra-audits-charities-theres-a-scandal-within-a-scandal/article21599291/>

<sup>17</sup> The CRA has stated “the process for identifying which charities will be audited for any reason is handled by the Charities Directorate of the CRA alone in a fair and consistent way.” See: “*As CRA Audits Charities, There’s a Scandal Within a Scandal*”, <http://www.theglobeandmail.com/news/politics/as-cra-audits-charities-theres-a-scandal-within-a-scandal/article21599291/> However, a number of charities targeted have largely been opponents of the Harper government’s energy and pipeline, suggesting bias in their selection (Dean Beeby, “Canada Revenue Agency’s ‘political’ targeting of charities under scrutiny,” *The Globe and Mail*, ((03 August 2014), online: <<http://www.theglobeandmail.com/news/politics/canada-revenue-agencys-political-targeting-of-charities-under-scrutiny/article19900854/>>). The Broadbent Institute raised questions about the possibility of political interference in audits of charities; they have recently released a report adding to the growing amount of evidence that the “CRA may be less interested in compliance with the law than it is in politically motivated retribution against the Harper government’s critics.” (Stephanie Levitz, “Left-leaning think tank accuses Canada Revenue Agency of only targeting left-leaning charities”. *The Canadian Press*, (21 October 2014), online: <<http://news.nationalpost.com/2014/10/21/left-leaning-think-tank-accuses-canada-revenue-agency-of-only-targeting-left-leaning-charities/>>).

<sup>18</sup> Unless the group was directly affected, or had specific expertise. See [Appendix A](#) for the history of how industry proposed the precise wording of the statutory amendments.

<sup>19</sup> “Feds trying to gut Fisheries Act under the radar, say two former federal Conservative fisheries ministers”, *Hill Times* [http://www.hilltimes.com/news/news/2012/05/28/feds-trying-to-gut-fisheries-act-under-the-radar-say-two-former-federal-conservative/30896?page\\_requested=1](http://www.hilltimes.com/news/news/2012/05/28/feds-trying-to-gut-fisheries-act-under-the-radar-say-two-former-federal-conservative/30896?page_requested=1) Also, note the changes in the *Jobs, Growth and Long-term Prosperity Act* which included major weakening of the *Fisheries Act*, *Canadian Environmental Assessment Act*, *Species at Risk Act* and *National Energy Board Act*, and the changes in the *Jobs and Growth Act* with major weakening of the *Navigable Waters Protection Act* (now the *Navigation Act*). Also, see [Appendix A](#).

“of “threatening to hijack our regulatory system to achieve their radical ideological agenda”<sup>20</sup>; and

- Enforcing unprecedented policies to muzzle government scientists to prevent them from discussing issues related to oil and resource developments.<sup>21</sup>

Critics also alleged that staff moved back and forth between the Prime Minister’s Office/Minister Jason Kenney’s office and Ethical Oil – the private group which launched complaints against a number of environmental groups with the CRA.<sup>22</sup>

Additional information about the possibility of political targeting of audits is found below. However, this paper reaches no final conclusions about whether Government has actually directed audits at its critics. The important thing is that the audits themselves – and the mere *perception* that they may be targeted – are clearly silencing charities that have much to offer society.

This situation raises crucial policy issues and highlights the need to reform Canadian charity law to: eliminate the potential for political targeting of audits; to clarify the rules governing charities’ political activities; and to give due recognition to the important beneficial role charities play when they advocate legal and social reform to advance their charitable purposes.

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<sup>20</sup> The Honourable Joe Oliver (at the time, the Minister of Natural Resources) published an open letter, in which he accused “environmentalists and other radical groups” of “threaten[ing] to hijack our regulatory system” and blocking projects, like, presumably, the Northern Gateway Pipeline (Crawford Kilian, “‘Environmentalists, other radical groups,’; threaten pipeline: Joe Oliver”, *The Tyee*, (09 January, 2012), online: [http://thetyee.ca/Blogs/TheHook/Environment/2012/01/09/Environmentalists\\_other\\_radical\\_groups/](http://thetyee.ca/Blogs/TheHook/Environment/2012/01/09/Environmentalists_other_radical_groups/)). For more details on this, see below.

<sup>21</sup> A *New York Times* editorial has condemned these policies, stating, “This is more than an attack on academic freedom. It is an attempt to guarantee public ignorance.” For the specifics of these unprecedented policies, see [Appendix B](#) and the ELC’s submission to the Federal Information Commissioner on the muzzling of scientists issue online at [http://www.elc.uvic.ca/press/documents/2012-03-04-Democracy-Watch\\_OIPLtr\\_Feb20.13-with-attachment.pdf](http://www.elc.uvic.ca/press/documents/2012-03-04-Democracy-Watch_OIPLtr_Feb20.13-with-attachment.pdf) Note the federal Information Commissioner has responded to the ELC submission by launching an investigation into the issue. For the *New York Times* editorial comment see “Silencing Scientists”, *New York Times* editorial, September 21, 2013. See also: Emily Chung. CBC News “Federal scientists muzzled by media policies, report suggests” (October 08, 2014) Online: <http://www.cbc.ca/news/technology/federal-scientists-muzzled-by-media-policies-report-suggests-1.2791650>

<sup>22</sup> Tim Gray of Environmental Defence has argued that there was an “organized effort” by individuals linked to the Prime Minister’s office and Minister Jason Kenney’s office to influence the CRA’s auditors by spurring tax complaints against environmental organizations. Ethical Oil acknowledges that it filed complaints against Environmental Defence, David Suzuki Foundation and Tides Canada. Ethical Oil was originally headed by Alykhan Velshi, a former senior staffer in Jason Kenney’s office who left the lobby group a few months after he started it to take up a senior position in Prime Minister Harper’s office. Former Kenney Executive Assistant Jamie Ellerton has become the Executive Director of Ethical Oil in Toronto. Sources: Althia Raj. Huffington Post. “CRA got few complaints about charities’ politics prior to 2012” (May 12, 2014) Online: [http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities\\_n\\_6279178.html](http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities_n_6279178.html); The Canadian Press “List of charities undergoing tax audits related to political activities” (July 21, 2014) Online: <http://www.news1130.com/2014/07/21/list-of-charities-undergoing-tax-audits-related-to-political-activities/>; Ethical Oil “About EthicalOil.org” <http://www.ethicaloil.org/about/> (Accessed December 20, 2014)

The most prominent law reform concerns are:

- The potential, under current federal law, for politicians to direct CRA auditing – unlike jurisdictions like the United Kingdom;
- The vagueness of current Canadian charitable law and regulation, which allows for undue bureaucratic discretion in applying CRA rules on acceptable “political activities” – in contrast to more clearly defined rules in jurisdictions such as the United States;
- The overly restrictive limits on political activity of charities in Canada – in comparison to many jurisdictions that have more liberal limits, or none at all.
- Draconian punishments administered by the Canada Revenue Agency (CRA) to control political activities of the charitable sector – in contrast to jurisdictions like the US, England and Wales; and
- The need to change the law to ensure that the public interest in a strong charitable sector is adequately represented at appeals of decisions to revoke charitable status of a group.

The report will be broken down into three parts. [Part One](#) outlines current charitable laws and regulations, issues related to political activities, and recent events and problems associated with the post-2012 auditing of charities. [Part Two](#) examines comparable charity rules in other jurisdictions. [Part Three](#) discusses possible law reforms, and makes specific recommendations for such law reform.<sup>23</sup>

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<sup>23</sup> We would like to thank Professor Kathryn Chan, of the University of Victoria, Faculty of Law, for her assistance on various aspects of Charity Law and the Political Purposes Doctrine.

## PART I – Canadian Charity Law on Political Activities

*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.*

*– Justice Iacobucci, Supreme Court of Canada, 1999<sup>24</sup>*

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### **Why are charities limited in expressing their political opinions?**

#### **The Common Law**

To understand the current constraints on the political activities of charities, one must look at the definition of “charity” articulated in the *Statute of Charitable Uses in 1601* and centuries of common law rules – which culminated in the 1891 House of Lords decision in the *Pemsel Case*. *Pemsel* has guided Commonwealth charity law for over a century, and it narrowly restricted the type of activities that the law would recognize as charitable.<sup>25</sup> Under the *Pemsel* test, for an organization to be granted a charitable status in common law, it must have one or more of the following “charitable purposes”:

1. Relief of poverty;
2. Advancement of education;
3. Advancement of religion; or
4. Other purposes beneficial to the community.

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<sup>24</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10, 169 DLR (4<sup>th</sup>) 34 [Vancouver Society] at para 126.

<sup>25</sup> *Commissioners for Special Purposes of the Income Tax v. Pemsel (H.L.)* [1891] A.C. 531. See Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: <[http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf)> at p 7; and Andrew Kitching (2006) “Charitable Purpose, Advocacy and the Income Tax Act” (Ottawa, ON: Library of Parliament – Law and Government Division). Online: <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0590-e.htm>>

Under the traditional common law, political activities have not met the definition of a “charitable purpose.” During the twentieth century, a “political purposes doctrine” emerged, which disqualified any organization with a main or dominant political purpose from charitable status.<sup>26</sup> This doctrine recognized that political purposes could potentially be aimed at achieving the fourth category (“purposes beneficial to the community”) – but it was felt that courts could not judge whether a proposed political activity would lead to quantifiable benefit for the public. Therefore, Canadian courts refused to recognize political purposes as charitable under the fourth *Pemsel* category.<sup>27</sup>

Note, however, that many legal commentators have criticized this narrow historical approach as outdated in a modern state where courts frequently make broad value judgments. Recently, courts in New Zealand and Australia have abandoned this traditional approach, as is described later in this paper.<sup>28</sup>

### ***Canadian Legislation and Policy – Limited Political Activities Allowed***

Although the definition of “charitable purposes” is only defined in common law, legislation and CRA administrative policies have modified these common law rules in Canada.<sup>29</sup> The statutory law on charities is primarily embedded within the federal *Income Tax Act* (ITA).<sup>30</sup> The ITA contains provisions on tax exemptions and deductions for charitable donations. CRA policies give guidance on how ITA provisions are interpreted internally by the CRA.

This legislation and policy has long recognized that it is beneficial for charities to work for social change to further their mission. As Government’s *Economic Action Plan 2014*

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<sup>26</sup> Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf)

at p 356. See also: Professor Kathryn Chan (2014) “The Co-Optation of Charitable Resources by Threatened Welfare States” *Queen’s Law Journal*, Vol 40. Online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516610](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516610) at p 12.

<sup>27</sup> This principle in common law was first stated by the House of Lords decision *Bowman v Secular Society* in 1917. This holding was affirmed by the Supreme Court of Canada in *Vancouver Society* at para 121. See Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at p 357.

<sup>28</sup> See Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf).

<sup>29</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 19.

<sup>30</sup> Also see the *Canada Revenue Agency Act*, SC 1999, c. 17. Note that unlike some jurisdictions, Canadian charitable law for the most part does not have its own dedicated legislation (aside from Ontario’s *Charities Accounting Act*, which is limited in scope). See Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 7.

acknowledges, “Given their unique perspectives and expertise, it is broadly recognized that charities make a valuable contribution to the development of public policy in Canada.”<sup>31</sup>

Therefore, the ITA and corresponding CRA administrative policies do allow charitable organizations to engage in political activities. To clarify, an organization will not be granted charitable status if it contains a *core* purpose of political nature. However, a charity with core “charitable” purposes can engage in *some* political activities that are directly related to its charitable purposes.

The relevant provisions of the *Income Tax Act* concerning political activities by charities are sections 149.1(6.1) and 149.1(6.2). Section 149.1(6.2) permits charitable organizations<sup>32</sup> that devote substantially all of their resources to charitable activities, to engage in political activities:

- That are “ancillary and incidental to its charitable activities;” and
- That are non-partisan: “do not include direct or indirect support of, or opposition to, any political party of candidate for public office.”<sup>33</sup>

The *Income Tax Act* provisions relating to charities are general. The ITA itself does not provide clarification on how much an organization can spend on political activities and whether certain activities of a political nature can be considered as “charitable” *per se*, and therefore immune to the 10% limit on political activity. This vagueness is in stark contrast to the “attempts that have been made elsewhere in the ITA to have taxation consequences determined with the utmost certainty by an application of quasi-mathematical formulae”.<sup>34</sup>

### ***CRA Policies: The Ten Percent Rule***

The CRA publishes their interpretation of *ITA* in the form of policy statements and guidance. Through such policy statements, the CRA has established a rule capping the political activities of charities at 10% of their annual resources.<sup>35</sup> With respect to the spending limits of allowable charitable political activity, the CRA states in Policy Statement

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<sup>31</sup> *Canada’s Economic Action Plan 2014*, “Enhancing Transparency and Accountability for Charities” <http://actionplan.gc.ca/en/initiative/enhancing-transparency-and-accountability>

<sup>32</sup> Note that section 149.1 (6.1) of the *Income Tax Act* contains a similar provision for charitable foundations, though the latter provision refers to “charitable purposes” and “political purposes”, rather than “charitable activities” and “political activities” (*Income Tax Act*, R.S.C, 1985, c. 1 (5<sup>th</sup> Supp.), s. 149.1(6.1).

<sup>33</sup> *Income Tax Act*, R.S.C, 1985, c. 1 (5<sup>th</sup> Supp.), s. 149.1(6.2).

<sup>34</sup> Maurice Cullity, QC, *Charity and Politics in Canada – a Legal Analysis* (13 December, 2013), online: <<http://www.pemselfoundation.org/sites/default/files/M%20Cullity%20Charity%20and%20Politics%20-%20January%2010%202014.pdf>>, at p 2.

<sup>35</sup> Note that the CRA states such policy statements are only to be used as a general guide, and thus, are not binding on legal decisions.

CPS-022 that the maximum that a charity can spend on political activities annually is generally 10% of its total annual resources.<sup>36</sup>

In applying the “Ten Percent Rule”, the CRA divides political activities into three categories<sup>37</sup>:

- Prohibited activities (illegal and “partisan activity” as defined in ITA)
- Charitable activities (allowable, and not counted against the 10% limit)
- Political activities (allowable, but counted under the 10% limit)

It is important to note that *partisan* political activity by a charity is clearly prohibited, as are illegal activities. Quite properly, charities are not allowed to pursue partisan politics.

On the other hand, the CRA considers certain types of political activities acceptably “charitable,” and these activities are unrestricted. These activities include public awareness campaigns about a political issue related to the charities’ work, provided that the campaign does not attempt to persuade or influence the public to engage in lobbying on the charity’s behalf for changes in legislation.<sup>38</sup> Also unrestricted are direct communications between a charitable organization and an elected representative or public official for the purpose of advocating that a law, policy, or decision of any level of government in Canada or a foreign country ought to be retained, opposed, or changed.<sup>39</sup> This type of lobbying for change is still considered “charitable” if the charitable organization publically releases copies of such communications in their entirety, with no explicit call to political action by the public.

Finally, the policy allows a limited amount of non-partisan political activity that is not considered “charitable” *per se* – but is ancillary and incidental to the organization’s charitable activities. Such political activities are the ones governed by the 10% cap – and count towards the 10% spending limit. In enforcing this cap, CRA policy presumes an activity is political if the charity:<sup>40</sup>

- Explicitly communicates a call to political action;
- Explicitly communicates to the public that a law, policy, or decision of any government domestic or foreign should be retained, opposed, or changed;

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<sup>36</sup> However, note that the percentage is higher for small charities. See Canada Revenue Agency (CRA) “Policy Statement CPS-022” Section 9. Online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>> (Accessed November 30, 2014)

<sup>37</sup> Canada Revenue Agency (CRA) “Policy Statement CPS-022” Section 6. Online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>> (Accessed November 30, 2014)

<sup>38</sup> Canada Revenue Agency (CRA) “Policy Statement CPS-022” Section 7. Online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>> (Accessed November 30, 2014)

<sup>39</sup> Canada Revenue Agency (CRA) “Policy Statement CPS-022” Section 7. Online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>> (Accessed November 30, 2014)

<sup>40</sup> Canada Revenue Agency (CRA) “Policy Statement CPS-022” Section 6.2. Online: <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>> (Accessed November 30, 2014)

- Explicitly indicates in its materials (internal and external) that the intention of the activity is to incite political action; or
- Makes a gift to qualified donees if it can reasonably be considered the gift is intended for political activities.<sup>41</sup>

To a great extent, the current auditing initiatives focus on the 10% cap on this non-partisan political activity.

### **A Key Problem – the Rules are Ambiguous and Confusing**

It is very difficult for charities to determine whether a particular activity will be considered by the CRA to be “charitable” or “political.”<sup>42</sup> The relevant statutory provisions are sparse, and they are ambiguous because of confusing underlying case law. Furthermore, CRA guidance is not only ambiguous, but subject to change without the approval of the legislature.<sup>43</sup>

For example, CRA rules state that a public awareness campaign about a political issue related to the charities’ work can be considered “charitable,” if the campaign does not attempt to influence the public to lobby for changes in legislation. However, the rules state that explicit communication to the public that a law should be changed is considered “political,” not “charitable.” In practice, the distinction between these two activities can be highly ambiguous and subject to different interpretations.

As another example, the CRA has broad discretion to decide whether a political activity is – or is not – “incidental” or “ancillary” to the organization’s charitable activities. Similar vague rules in Australia (since changed) led a law journal study to object:

*A qualitative test allowing ‘ancillary’ or ‘incidental’ political activity creates an intolerable degree of uncertainty when the consequences imperil the very existence and financial viability of the organisation. This uncertainty is also compounded by ignorance of the permissible scope of political activity. The result is a ‘chilling effect’ which deters*

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<sup>41</sup> This fourth definition of “political activity” was introduced in the 2012 federal budget. This new measure essentially prohibits a charity from exercising political activities beyond their 10% spending limits through making contributions towards political activities being conducted by a separate charity. The wording of this addition is problematic because the meaning of “can be reasonably be considered” is ambiguous and leaves foundations, charitable organizations that make large donations to other charities, at the risk of inadvertently exceeding their 10% spending limit on political activities.

Source: Terrance Carter and Karen Cooper (2012) “Playing by the rules: political activities fair game for charities” Carters Charity Law Bulletin No.286. Online: < <http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm>> at p 6.

<sup>42</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society* Online: <[http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf)> at p 14.

<sup>43</sup> Professor Kathryn Chan, personal communication.

*organisations from engaging in any political activity...<sup>44</sup>*

Furthermore, this broad CRA discretion has been applied inconsistently and arbitrarily in the past – therefore, past CRA auditing decisions do not necessarily provide charities with definitive guidance.<sup>45</sup> Without clear rules, charities are forced to apply “worst-case scenarios” and err on the side of limiting political activity – even though that may well impair the ability of the charity to achieve its charitable aims. With such vague rules – and when a breach of the rules could destroy the very organization – who would dare to test the boundaries and conduct 8% or 9% political activities? In such circumstances, many charities understandably choose to keep such activities far below the allowable 10% or abandon such activities altogether.<sup>46</sup>

### **A Key Problem – If a Group Exceeds the 10% Rule It May Have to Close Down**

Due to the fact that – unlike some jurisdictions – our charity rules are housed in the *Income Tax Act*, Canada provides for remarkably harsh penalties for charities that stray over the line.<sup>47</sup> The CRA often suspends or revokes the charitable status of an organization in response to a wide range of violations. For example, a charity’s status can be revoked if charity directors misuse charitable property for their own gain, if the charity has misfiled their annual taxes, or *if the charity exceeds its 10% spending limit on political activities.*<sup>48</sup>

Thus, even a minor miscalculation leading to exceeding the 10% cap authorizes the CRA to revoke the registration of a charitable organization.<sup>49</sup> Revocation of charitable status can devastate a charitable group’s funding base – cutting off absolutely all funding from donors who require charitable tax receipts for their donations.<sup>50</sup>

In addition, where the Minister revokes the registration of a charity, the charity becomes liable for a revocation tax equal to the value of *all its property* (minus amounts expended

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<sup>44</sup>Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: <[http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf)>] at p 364.

<sup>45</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: <[http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf)> at p 14.

<sup>46</sup> Professor Kathryn Chan, personal communication.

<sup>47</sup> This is partly due to the constitutional reality that the federal government can only govern the registration aspect of charities for tax purposes, and therefore the *Income Tax Act* has become the regulatory tool in Canada. The provinces have constitutional jurisdiction to regulate other aspects of charities. See: Adam Aptowitzer (2009) “Bringing the Provinces Back In: Creating a Federated Canadian Charities Council” *C.D. Howe Institute Commentary Issue 200*. Online: [http://www.cdhowe.org/pdf/commentary\\_300.pdf](http://www.cdhowe.org/pdf/commentary_300.pdf) at p 7. See below for a discussion of the more remedial approach taken to straying charities in England and Wales.

<sup>48</sup> Adam Aptowitzer (2009) “Bringing the Provinces Back In: Creating a Federated Canadian Charities Council” *C.D. Howe Institute Commentary Issue 200*. Online: <[http://www.cdhowe.org/pdf/commentary\\_300.pdf](http://www.cdhowe.org/pdf/commentary_300.pdf)> at p 7.

<sup>49</sup> The Charities Directorate of CRA may revoke the registration of any registered charity that fails to comply with the requirements of the *Income Tax Act*. [ITA, s 168(1).]

<sup>50</sup> Professor Kathryn Chan in personal communications November 26, 2014.

during a one-year ‘winding-up period’ on charitable activities and gifts to arm’s-length charities).<sup>51</sup> And at the end of the one-year period, the charity must pay the remainder of all that revocation tax to the federal Receiver General.<sup>52</sup> The effect is that the charity loses all of its assets.

Many critics have argued that the potential imposition of such a catastrophic “death penalty” for even minor infractions of the 10% rule is inappropriately harsh.

If a group disagrees with the CRA’s finding of a violation that leads to revocation of charitable status, the group can appeal the decision to the Federal Court of Appeal.<sup>53</sup> However, appeals are expensive and offer little comfort. The appeal is not fulsome, but determined in a summary way, without the benefit of sworn evidence or findings of fact. While the interests of government tax collectors are fully represented, the court often fails to hear from lawyers putting forward the public interest in fostering charities. The individual charitable group bears the burden of proof, and appeals are seldom successful.<sup>54</sup> Only about 50 charities have ever engaged in this appeals process – with the Federal Court of Appeal not overturning a single CRA decision in the last decade.<sup>55</sup>

Perhaps most critical, before an appeal is even decided, the organization may be forced to dispose of their assets to other charities – or else face the possibility of forfeiting them to government.<sup>56</sup>

### **The Result – Just Worrying About Audits Can Devastate Charities**

The rash of audits is not just impacting charities under audit – it is harming the entire charitable sector. Many groups with nothing to hide are still anxious about the CRA audits. The ITA rules on charities’ “political activities” and the corresponding CRA policies are so ambiguous that it is difficult for any charity to be absolutely sure that they are carrying out their political activities within the rules. The potentially catastrophic penalties heighten the anxiety.

Charities worry that they will have to be able to prove that they have not exceeded the 10% cap – regardless of how the CRA eventually characterizes the vague rules. This uncertainty

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<sup>51</sup> The value is the fair market value. See *Income Tax Act*, s 188(1), (1.1), (1.2), (1.3).

<sup>52</sup> *Income Tax Act*, s 189(6.1)(c). See Professor Kathryn Chan, ‘The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales’ (2010) 89 *Cdn Bar Rev* 373, 398-99 and Professor Kathryn Chan, *Charities Regulators and the Institutional Public Law-Private Law Divide* (Unpublished) p. 58-59

<sup>53</sup> Peter Broader (2014) “Pensel Case Foundation Launched to Foster Canada Charity Law” *The Philanthropist*. Vol 25. Online: <<http://www.donorguide.ca/pdfs/BroderArticle.pdf>> at p 208.

<sup>54</sup> For a discussion of the limitations in this appeal process, see Professor Kathryn Chan, ‘The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales’ (2010) 89 *Cdn Bar Rev* 373 at 398.

<sup>55</sup> Mark Blumberg. Canadian Charity Law “Some historical CRA letters when revocation of charity status” (March 15, 2014) Online: [http://www.canadiancharitylaw.ca/blog/some\\_historical\\_cra\\_letters\\_when\\_revocation](http://www.canadiancharitylaw.ca/blog/some_historical_cra_letters_when_revocation)

<sup>56</sup> Unless the charity makes and wins a special application under s. 168(2)(b) of the *Income Tax Act* to delay matters until the determination of the appeal.

has now caused a great many charities to simply refrain from all “political activities” – even though advocacy might be the most effective way to achieve their charitable mission.<sup>57</sup> Thus, the “political activities audits” are forcing the charitable sector towards extreme self-censorship.

The Royal Roads research study confirmed that “charities are self-censoring due to the threat of audits, which place a strain on the groups’ resources.”<sup>58</sup> The study found that even charities not being audited are limiting what they say “in anticipation or fear of a potential audit.”<sup>59</sup> A general sense of fear has diverted the majority of groups under audit from their mission.<sup>60</sup>

Groups fear audits because they know that even if they succeed in passing an audit, the audit process itself can cripple the effectiveness of an organization. As the *Toronto Star* has reported:

*Environmental groups who have gone through the process say it is expensive and time-consuming, especially for smaller organizations that don't have the manpower or the budget. They say the audits prevent their charities from doing their regular work.*<sup>61</sup>

The fact that an inadvertent breach of a vague rule can totally destroy a group makes many reluctant to engage in political activities at all. And if a charity does decide to carry out political activity, it must now divert scarce resources to protect itself from audit. Typically, the group has to:

- Implement detailed, complex time-keeping and internal accounting protocols;

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<sup>57</sup> Peter Broder (2014) “Pensel Case Foundation Launched to Foster Canada Charity Law” *The Philanthropist*. Vol 25. Online: <http://www.donorsguide.ca/pdfs/BroderArticle.pdf> at p 212.

<sup>58</sup> Carol Linnitt. Desmog Canada, “Pen Canada, Freedom of Expression Charity Supported by Margaret Atwood and Yann Martel, to Undergo Political Activity Audit” (23 July, 2014), online: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>.

<sup>59</sup> Carol Linnitt. Desmog Canada, “Pen Canada, Freedom of Expression Charity Supported by Margaret Atwood and Yann Martel, to Undergo Political Activity Audit” (23 July, 2014), online: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>.

<sup>60</sup> Carol Linnitt. Desmog Canada, “Charities Bullied Into Muting Their Messages: Researcher” (21 July, 2014), online: < <http://www.desmog.ca/2014/07/21/charities-bullied-muting-their-messages-researcher>>.

<sup>61</sup> Althia Raj. Huffington Post. “CRA got few complaints about charities’ politics prior to 2012” (May 12, 2014) Online: [http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities\\_n\\_6279178.html](http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities_n_6279178.html)

A typical response to an audit came from Leilani Farha, of Canada Without Poverty: “It’s nerve-racking. We’ve been under audit for more than two years, and it just goes on and on, with no communication . . . It’s a huge drain on the resources of our organization.” Source: Dean Beeby. The Canadian Press “Canadian charities feel “chill” as tax audits widen into political activities” (July 10, 2014) Online: [http://www.thestar.com/news/canada/2014/07/10/canadian\\_charities\\_feel\\_chill\\_as\\_tax\\_audits\\_widen\\_into\\_political\\_activities.html](http://www.thestar.com/news/canada/2014/07/10/canadian_charities_feel_chill_as_tax_audits_widen_into_political_activities.html)

- hire lawyers<sup>62</sup>;
- Finance special seminars;
- Intensively train staff; and
- Change communication processes and structures.<sup>63</sup>

Groups must now devote an inordinate amount of energy and resources towards protecting themselves from audits – resources that otherwise could be spent directly on charitable activities. As one commentator put it:

*A lot of these organizations [being audited] are facing overwhelming legal bills – up to \$100,000 in some cases – as they try to respond to increasingly complex demands from the CRA auditors<sup>64</sup>*

In addition, a group must now routinely go to great lengths to make clear in its accounting exactly how its resources are allocated – to track and document, in detail, everything it does – to identify and characterize thousands of activities as either “charitable,” or “political.” The amount of administrative work required to maintain the accountability necessary to defend an organization against allegations of breaching the political activity rules is enormous.<sup>65</sup>

Yet the additional work must be done. Once an audit is launched, it can stretch on for more than two years, with repeated and onerous demands for detailed paperwork.<sup>66</sup> For example, a small Vancouver charity, CoDevelopment Canada, was recently required by the CRA to translate every single Spanish document it receives from its partners in Latin America into French or English; this includes thousands of receipts – even taxi receipts.<sup>67</sup>

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<sup>62</sup> The lack of clarity surrounding this aspect of charity law leads charities to spend time and resources on seeking legal opinions to ensure that their proposed action is permissible under the current rules (Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 14).

<sup>63</sup> Gareth Kirkby (2014) “An Uncharitable Chill” (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 27.

<sup>64</sup> James Clancy, President of the National Union of Public and General Employees, as quoted *TheTyee*. “View: Is PEN the latest target of Harper’s selective tax audits?” (July 24, 2014) Online: <http://thetyee.ca/Blogs/TheHook/2014/07/24/PEN-CRA-Audit/>

<sup>65</sup> It is alleged that many charities are “now being tied up in paperwork over the audits, instead of being able to fulfil their charitable mandates”. (TheStar.com “NDP hopes to put CRA under microscope on charity audits (August 18, 2014) Online: [http://www.thestar.com/news/canada/2014/08/18/ndp\\_hopes\\_to\\_put\\_cra\\_under\\_microscope\\_on\\_charity\\_audit\\_s.html](http://www.thestar.com/news/canada/2014/08/18/ndp_hopes_to_put_cra_under_microscope_on_charity_audit_s.html))

<sup>66</sup> Dean Beeby, “Foreign-aid charities join together to challenge Canada Revenue Agency audits”, *Toronto Star* (10 August 2014), online: <[http://www.thestar.com/news/canada/2014/08/10/foreignaid\\_charities\\_join\\_together\\_to\\_challenge\\_canada\\_revenue\\_agency\\_audits.html](http://www.thestar.com/news/canada/2014/08/10/foreignaid_charities_join_together_to_challenge_canada_revenue_agency_audits.html)>

<sup>67</sup> Dean Beeby, “Small B.C. charity struggles with onerous Canada Revenue Agency demands”, *Toronto Star* (30 July 2014), online: <[http://www.thestar.com/news/canada/2014/07/30/audit\\_forces\\_small\\_charity\\_to\\_translate\\_boxes\\_of\\_documents.html](http://www.thestar.com/news/canada/2014/07/30/audit_forces_small_charity_to_translate_boxes_of_documents.html)>

CoDevelopment stated, “The amount of work is unbelievable... We’re a really small team and this is a huge amount of work.”<sup>68</sup> Yet the work must be done. As CoDevelopment’s executive director put it:

*The newly imposed requirements will drain away scarce resources, yet must be carried out or [CoDevelopment] risks losing its charitable status.*<sup>69</sup>

### **Concerns Raised About Recent “Political Activities Audits”**

It is the responsibility of the CRA to regularly conduct audits of charities to ensure compliance with the law. Charities understand this mandate of the CRA and have worked cooperatively with the agency on audits in the past.<sup>70</sup> The real issue with the recent CRA audits is the perception that the Conservative government may be using these audits to silence particular charities that have criticized Government policies. This perception arises from alleged political motivation for the audits, alleged bias in the auditing programs, and a lack of transparency about the auditing process.

#### ***Apparent Political motivations for Initiating Recent Audits***

In March 2012, Government announced that it was allocating \$8 million to the CRA to audit charities’ compliance with the 10% rule. Ultimately the Minister of Finance approved \$13.4 million for this initiative.<sup>71</sup> While the budget did not explicitly cite the reasons prompting this initiative, in the months prior to this announcement, the Conservative party initiated a series of public allegations against environmental charities regarding the use of foreign donations towards improper political activities.

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nts.html>; Dean Beeby, “Foreign-aid charities join together to challenge Canada Revenue Agency audits”, *Toronto Star* (10 August 2014), online: [http://www.thestar.com/news/canada/2014/08/10/foreignaid\\_charities\\_join\\_together\\_to\\_challenge\\_canada\\_revenue\\_agency\\_audits.html](http://www.thestar.com/news/canada/2014/08/10/foreignaid_charities_join_together_to_challenge_canada_revenue_agency_audits.html).

<sup>68</sup> Dean Beeby, “Small B.C. charity struggles with onerous Canada Revenue Agency demands”, *Toronto Star* (30 July 2014), online: [http://www.thestar.com/news/canada/2014/07/30/audit\\_forces\\_small\\_charity\\_to\\_translate\\_boxes\\_of\\_documents.html](http://www.thestar.com/news/canada/2014/07/30/audit_forces_small_charity_to_translate_boxes_of_documents.html)

<sup>69</sup> Dean Beeby, “Small B.C. charity struggles with onerous Canada Revenue Agency demands,” *Toronto Star* (30 July 2014), online: [http://www.thestar.com/news/canada/2014/07/30/audit\\_forces\\_small\\_charity\\_to\\_translate\\_boxes\\_of\\_documents.html](http://www.thestar.com/news/canada/2014/07/30/audit_forces_small_charity_to_translate_boxes_of_documents.html)

<sup>70</sup> The Current. CBC. “Politics drives ‘political-activity audits’ of think tanks, critics say” broadcasted September 16, 2014, online: <http://www.cbc.ca/thecurrent/episode/2014/09/16/politics-drives-political-activity-audits-of-think-tanks/>

<sup>71</sup> To continue the program through 2017. Carol Linnitt. *DeSmog Canada* “\$13.4 million allocated to carry audit of Canadian charities beyond 2017, documents show” (February 18, 2014). Online: <http://www.desmog.ca/2014/02/16/13-4m-allocated-carry-audit-canadian-charities-beyond-2017-documents-show>

These allegations began in January 2012 with an open letter written by former Natural Resources Minister, the Honourable Joe Oliver, condemning “environmental and other radical groups” blocking the “national interest” in building up the Canadian energy markets and “hijack(ing) our regulatory system to achieve their radical ideological agenda.”<sup>72</sup> In February 2012, environmental organizations were added to Canada’s anti-terrorism strategy’s threat list.<sup>73</sup> Minister Oliver’s allegations were followed up with a Senate inquiry in the same month to investigate “the interference of foreign foundations in Canada’s domestic affairs and their abuse of Canada’s existing Revenue Canada Charitable status.”<sup>74</sup> In remarks denounced by Imagine Canada (the umbrella group for Canadian charities) as a “grave disservice” to all Canadian charities, Environment Minister Peter Kent suggested that charities were “laundering” funds.<sup>75</sup> Senator Nicole Eaton, who initiated the Senate inquiry, alleged that foreign funding of charities in Canada was improperly influencing policy discussion on certain resources projects, such as the Northern Gateway Pipeline. Subsequently, similar allegations were made by Prime Minister Stephen Harper and Conservative cabinet ministers, MPs, and senators.<sup>76</sup>

[These accusations may be questionable. For example, the accusations against US environmental foundations are premised on the dubious concept that US foundations provide funds to Canadian environmental groups not to protect the global environment, but for other nefarious, anti-Canadian purposes. Thus, foundations that have consistently funded protection of Alaskan, Oregon and Washington wilderness areas are suddenly seen to have nefarious ulterior motives when they fund similar protection efforts in Canada. And there is nothing unusual or intrinsically questionable about cross-border charitable donations]<sup>77</sup>

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<sup>72</sup> *Globe and Mail* “An open letter from Natural Resources Minister Joe Oliver” (January 09, 2012) Online: <<http://www.theglobeandmail.com/news/politics/an-open-letter-from-natural-resources-minister-joe-oliver/article4085663/>>

<sup>73</sup> Shawn McCarthy. *Globe and Mail*. “Ottawa’s new anti-terrorism strategy lists eco-extremists as threats” (February 10, 2012) Online: <http://www.theglobeandmail.com/news/politics/ottawas-new-anti-terrorism-strategy-lists-eco-extremists-as-threats/article533522/>

<sup>74</sup> Nicole Eaton’s statement in Senate made on February 28, 2012. Online: <[http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db\\_2012-02-28-e.htm#70](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db_2012-02-28-e.htm#70)>

<sup>75</sup> *Vancouver Observer*, “Imagine Canada Calls Tory Attack on Charities a ‘Grave Diservice’” (May 4, 2012) <http://www.vancouverobserver.com/politics/2012/05/04/charitys-open-letter-hits-back-enviro-ministers-money-laundering-accusations>

<sup>76</sup> Gareth Kirkby (2014) “An Uncharitable Chill” (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 5.

<sup>77</sup> Cross-border charitable donations are nothing new. Government routinely provides Canadians with tax credits for donations to overseas charities. Many segments of the Canadian charitable sector receive funding from foreign sources each year without being accused of interference with domestic affairs. For example, more than 70 per cent of foreign donations to Canadian charities go to international development charities, universities, colleges and education and research. [Terrance Carter and Karen Cooper (2012) “Playing by the rules: political activities fair game for charities” *Carters Charity Law Bulletin* No.286. Online: <http://www.carters.ca/pub/bulletin/charity/2012/chylb286.htm> at p 2. And see *Vancouver Observer*, “Imagine Canada Calls Tory Attack on Charities a ‘Grave Diservice’” (May 4, 2012)

The suspicion that the audits targeted environmental groups has been heightened by reports that staff moved back and forth between the Prime Minister's Office/Minister Jason Kenney's office and Ethical Oil – the private group which filed complaints against a number of environmental groups with the CRA.<sup>78</sup> It has also been pointed out that Government has targeted environmental groups by changing the *Canadian Environmental Assessment Act* to severely limit the legal standing of such groups in environmental assessments and, in some cases, to eliminate their ability to cross-examine industry on proposals; muzzled government scientists to prevent them discussing oil sands development or climate change; and enacted sweeping retrenchment of environmental laws at the direct request of the oil and other resource industries. (See discussion above and [Appendix A](#).)

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<http://www.vancouverobserver.com/politics/2012/05/04/charitys-open-letter-hits-back-enviro-ministers-money-laundering-accusations> ] In 2010, only about \$831 million of foreign funding was received by Canadian charities, out of total charitable funding of \$192 billion dollars. A breakdown of these foreign funds reveals the top recipients to be non-environmental charities, with environmental charities accounting for only a small proportion of foreign funding. [Mark Blumberg. "Total Revenue Received from all sources outside Canada by Canadian Charities in 2010" January 16, 2012. Online: [http://www.globalphilanthropy.ca/images/uploads/Total\\_revenue\\_received\\_from\\_all\\_sources\\_outside\\_Canada\\_by\\_Canadian\\_Charities\\_in\\_2010.pdf](http://www.globalphilanthropy.ca/images/uploads/Total_revenue_received_from_all_sources_outside_Canada_by_Canadian_Charities_in_2010.pdf) See also: Mark Blumberg (2012) "So how much do Canadian charities receive from foreign sources according to the T3010 Returns?" Online: [http://www.canadiancharitylaw.ca/articles/so\\_how\\_much\\_do\\_canadian\\_charities\\_receive\\_from\\_foreign\\_sources\\_according\\_to](http://www.canadiancharitylaw.ca/articles/so_how_much_do_canadian_charities_receive_from_foreign_sources_according_to)] For context, it should be noted that foreign funding of environmental charities is dwarfed by foreign investment in the Canadian natural resource industries that many environmental groups deal with. For example, from 2008-2011, U.S., French, British, Chinese, Thai, Korean, Norwegian and other international companies invested \$20 billion in the oil sands alone. [Alberta Federation of Labour. "Who owns our oil sands? Foreign corporations stake their claims to our resource" (Apr 22, 2011) Online: <http://www.afl.org/index.php/May-2011/who-owns-our-oil-sands-foreign-corporations-stake-their-claims-to-our-resources.html>] Ironically, these resource companies are free to conduct essentially unlimited political advocacy on an issue and deduct such activities as business expenses -- and thus be subsidized by the general taxpayer. This paper will later address how imposing undue limits on environmental groups may tilt the playing field in favour of such large international corporations.

<sup>78</sup> Tim Gray of Environmental Defence has argued that there was an "organized effort" by individuals linked to the Prime Minister's office and Minister Jason Kenney's office to influence the CRA's auditors by spurring tax complaints against environmental organizations. Ethical Oil acknowledges that it filed complaints against Environmental Defence, David Suzuki Foundation and Tides Canada. Ethical Oil was originally headed by Alykhan Velshi, a former senior staffer in Jason Kenney's office who left the lobby group a few months after he started it to take up a senior position in Prime Minister Harper's office. Velshi's successor, Kathryn Marshall, was married to Hamish Marshall, a former manager of strategic planning for the Prime Minister. Former Kenney Executive Assistant Jamie Ellerton has become the Executive Director of Ethical Oil in Toronto. Sources: Althia Raj. Huffington Post. "CRA got few complaints about charities' politics prior to 2012" (May 12, 2014) Online: <[http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities\\_n\\_6279178.html](http://www.huffingtonpost.ca/2014/12/05/canada-revenue-agency-charities_n_6279178.html)>; The Canadian Press "List of charities undergoing tax audits related to political activities" (July 21, 2014) Online: <<http://www.news1130.com/2014/07/21/list-of-charities-undergoing-tax-audits-related-to-political-activities/>>; Ethical Oil "About EthicalOil.org" <http://www.ethicaloil.org/about/> (Accessed December 20, 2014) Also see: Jenny Uechi. *Vancouver Observer*. "CRA smacks PEN Canada with audit in latest of Harper government's attack on charities" (July 22, 2014) Online: <http://www.vancouverobserver.com/news/cra-targets-pen-canada-latest-harper-governments-attack-progressive-charities>

### ***Perceived Bias in the auditing process***

Despite the CRA's insistence that "(charity) audits occur at arm's length from the government and are conducted free of any political interference,"<sup>79</sup> it is commonly believed that the primary targets of the 2012 audits were environmental charities.<sup>80</sup> Beyond this primary focus, the CRA is perceived to target international development, human rights, and poverty relief charities that have also been critical of the Conservative government's policies.<sup>81</sup>

In more recent audits, the CRA appears to have expanded the scope of the "political activities audit." Initially, the purpose of the audits was to ensure charities' compliance with the spending limits of political activities. Internal CRA documents, obtained through *Access of Information* request, have revealed that charities are now being selected for auditing based on the perception that the activities of the charities in general are "partisan" and therefore in complete violation of *ITA* rules.<sup>82</sup>

For example, the Canadian Centre for Policy Alternatives (CCPA), a progressive think-tank whose research often yields conclusions in conflict with policies of the Conservative government, was specifically audited for this perception that it was involved in "one-sided" political research. This decision by the CRA has been highly criticized.<sup>83</sup> Some have questioned whether CRA has similarly audited right-leaning think-tanks. Amongst conservative think-tanks, the C.D. Howe Institute and the Macdonald-Laurier Institute have

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<sup>79</sup> The Current. CBC. "Politics drives 'political-activity audits' of think tanks, critics say" broadcasted September 16, 2014. Online: <http://www.cbc.ca/thecurrent/episode/2014/09/16/politics-drives-political-activity-audits-of-think-tanks/>

<sup>80</sup> Gareth Kirkby (2014) "An Uncharitable Chill" (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 32. See also: *Toronto Star* Editorial. "Canada Revenue audit of green groups raises spectre of intimidation: Editorial" (Feb 10, 2014) Online: [http://www.thestar.com/opinion/editorials/2014/02/10/canada\\_revenue\\_audit\\_of\\_green\\_groups\\_raises\\_spectre\\_of\\_intimidation\\_editorial.html](http://www.thestar.com/opinion/editorials/2014/02/10/canada_revenue_audit_of_green_groups_raises_spectre_of_intimidation_editorial.html).

<sup>81</sup> Broadbent Institute (2014) "Stephen Harper's CRA: Selective Audits, "Political" Activity, and Right-Leaning Charities" Online: [https://www.broadbentinstitute.ca/sites/default/files/documents/harpers-cra-final\\_0.pdf](https://www.broadbentinstitute.ca/sites/default/files/documents/harpers-cra-final_0.pdf) at p 2.

<sup>82</sup> The Current. CBC. "Politics drives 'political-activity audits' of think tanks, critics say" broadcasted September 16, 2014. Online: <http://www.cbc.ca/thecurrent/episode/2014/09/16/politics-drives-political-activity-audits-of-think-tanks/>

<sup>83</sup> In an open letter to the Minister of National Revenue on September 14, 2014, 422 university professors strongly urged that the CRA put a moratorium on its political auditing of think tanks until a "truly neutral criteria and auditing process are implemented to ensure neutrality and fairness." The following is an excerpt of the letter:

"The CCPA is not a political organization, nor does it engage in political or partisan activities. The fact that it has criticized government policy on a number of issues does not make it a partisan organization promoting a narrow agenda. Rather, it is engaging in serious, unbiased academic research. It may reach a different set of conclusions from those of the government, but then, this is allowed in a free-thinking, democratic country. On the contrary, we would argue, that such dissent should be encouraged and not stifled by such actions of the CRA."

Text of letter available online at: <http://www.progressive-economics.ca/2014/09/11/a-petition-of-academics-against-the-ccpa-audit/>

confirmed they are not under audit, and the Fraser Institute and Montreal Economic Institutes have refused comment.<sup>84</sup>

### ***The Lack of Transparency with the “Political Activities” Audits***

The perception of bias is exacerbated by Government’s unwillingness to make the auditing process more transparent. Government has failed to be open about how they decided to initiate these particular audits, and the manner in which they are being conducted.

Yet this is a significant concern. For example, there are allegations that many of the “political activities audits” targeting environmental charities have been triggered by complaints filed by the Ethical Oil Institute, a non-profit private organization that has strong ties with the Conservative government.<sup>85</sup>

The CRA does not publicly name charities that they are auditing, and this practice has been properly followed with the recent “political activity audits.”<sup>86</sup> However, it has been argued that in the circumstances Government needs to be more transparent about the methodology used for selecting and pursuing auditees.

Instead of clearly identifying the reasons prompting these audits and the objectives guiding these audits, the Minister of National Revenue, Kerry-Lynne Findlay, has criticized any allegations of bias in this auditing process as “baseless” and “absolutely reprehensible.”<sup>87</sup> Requests by the NDP opposition party to set up a Parliamentary hearing into these allegations have been refused.<sup>88</sup> The seriousness of the perceived bias and lack of transparency has compelled the Canadian Council of Churches to voice its concerns about this troubling practice directly to the Prime Minister, and Lawyers’ Rights Watch Canada to appeal these concerns to the UN Human Rights Council.<sup>89</sup>

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<sup>84</sup> *The Canadian Press*. CBC News “CRA audits CCPA think-tank due to alleged bias” 02 September 2014. Online: <http://www.cbc.ca/news/business/cra-audits-ccpa-think-tank-due-to-alleged-bias-1.2752966>

<sup>85</sup> See the discussion above and see: Gareth Kirkby (2014) “An Uncharitable Chill” (Royal Roads University) Online: [http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby\\_UncharitableChill\\_ThesisPublicV.pdf](http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf) at p 37.

<sup>86</sup> Broadbent Institute (2014) “Stephen Harper’s CRA: Selective Audits, “Political” Activity, and Right-Leaning Charities” Online: [https://www.broadbentinstitute.ca/sites/default/files/documents/harpers-cra-final\\_0.pdf](https://www.broadbentinstitute.ca/sites/default/files/documents/harpers-cra-final_0.pdf) at p 4.

<sup>87</sup> *TheStar.com* “NDP hopes to put CRA under microscope on charity audits (August 18, 2014) Online: [http://www.thestar.com/news/canada/2014/08/18/ndp\\_hopes\\_to\\_put\\_cra\\_under\\_microscope\\_on\\_charity\\_audit\\_s.html](http://www.thestar.com/news/canada/2014/08/18/ndp_hopes_to_put_cra_under_microscope_on_charity_audit_s.html)

<sup>88</sup> *Times Colonist*. “Comment: Tory audit tactics on charities worrisome” (August 21, 2014) Online: <http://www.timescolonist.com/opinion/op-ed/comment-tory-audit-tactics-on-charities-worrisome-1.1323935>

<sup>89</sup> *Times Colonist*. “Comment: Tory audit tactics on charities worrisome” (August 21, 2014) Online: <http://www.timescolonist.com/opinion/op-ed/comment-tory-audit-tactics-on-charities-worrisome-1.1323935>

## A Key Legal Issue – Current Law Creates the Potential for Political influence over the Charities Directorate

A significant issue with the federal regulation of charities through the CRA is the direct oversight of CRA by Ministers who are politicians. In a speech delivered at the Canadian Bar Association's Charity Law Symposium in May 2014, the Director of the Charities Directorate, the CRA branch that regulates registered charities, made the following remarks:

*We recognize the need to be as transparent and accountable as possible about how we administer our program...As I have made clear in the past, the process for identifying which charities will be audited (for any reason) is handled by the Directorate itself and is not subject to political direction.*<sup>90</sup>

Contrary to these public statements, however, the Minister of National Revenue, a politician, has undeniable oversight over the CRA. Officials of the CRA are answerable to – and accountable to – the Minister of National Revenue. The CRA has long been structured as an agent of the MNR.<sup>91</sup> As a department directly within the CRA, there is great fluidity in the information passed between the Directorate and other departments within the CRA.<sup>92</sup>

The current concern is that the Conservative government is using their direct influence over the CRA to target charitable organizations opposed to their governmental policies. It appears to some that the Conservative government is using the tax authority to fight its policy battles.<sup>93</sup> As much as the Directorate may deny it, the fact remains that there is a direct structural chain of command from an elected politician to the Directorate which audits charities.

If there is political direction to these audits, then we face a situation not unlike the one that triggered the impeachment of President Nixon. However, even if there is no political direction, the mere *appearance* of possible targeting is having a grievous impact. It is silencing organizations – and preventing them from fully carrying out their charitable mission.

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<sup>90</sup> Cathy Hawara in speech delivered at the CBA Charity Law Symposium May 23, 2014 – Text available online: [http://www.canadiancharitylaw.ca/blog/cathy\\_hawaras\\_speech\\_on\\_constitutional\\_framework\\_political\\_activities\\_compl](http://www.canadiancharitylaw.ca/blog/cathy_hawaras_speech_on_constitutional_framework_political_activities_compl)

<sup>91</sup> *Canada Revenue Agency Act*, S.C., 1999, c. 17, s.2, s. 6(2).

<sup>92</sup> For example, in the past, the Charities Directorate has targeted charities that accept donations as part of aggressive tax sheltering. See Adam Aptowitz (2009) "Bringing the Provinces Back In: Creating a Federated Canadian Charities Council" *C.D. Howe Institute Commentary Issue 200*. Online: [http://www.cdhowe.org/pdf/commentary\\_300.pdf](http://www.cdhowe.org/pdf/commentary_300.pdf) at p 4.

<sup>93</sup> Carol Linnitt. *Desmog Canada*, "Charities Bullied Into Muting Their Messages: Researcher" (21 July, 2014), online: <<http://www.desmog.ca/2014/07/21/charities-bullied-muting-their-messages-researcher>>.

Regardless of whether the audits are targeted or not, an obvious way to address this issue would be to reform the law to eliminate the potential for political control over CRA audits. This has been done in other jurisdictions.

### **Why should we care?**

Charities work on social problems and in addressing such problems they gain a unique perspective on the problems – and their possible solutions. With this unique expertise, they can enrich the political process by encouraging debate on issues related to their charitable missions, facilitating citizen participation and engagement, and promoting political pluralism.<sup>94</sup> Charities can improve society’s decision-making by representing under-represented interests – utilizing charities’ expertise and connection with the voiceless.<sup>95</sup>

The public should care about the threat to the political voices of charities because:

### ***Charities are vital to the health of Canadian society – and their political activities are too.***

Canadian charities have been instrumental in making Canadian society safer, healthier, and more technologically advanced by establishing hospitals, educational institutions, and public interest groups. Charities have helped enhance the quality of life and medical treatment of people living with cancer, and of children and youth with physical disabilities. In addition, charities have enhanced the wellbeing of our society by advocating legal and policy reforms related to their charitable mandate – *e.g.*, by politically advocating stronger laws against drunk driving and initiating public campaigns on the dangers of asbestos and smoking.

The “political” work of environmental organizations has benefited society in countless ways; some notable examples are the key role charities played in establishing parks, eliminating the lead in gasoline that was poisoning a generation of children, cleaning up the Great Lakes and the BC pulp industry, and cleaning up the air in Canadian cities and the water that Canadians drink. As previously noted, legal scholars have pointed out:

*“advocacy and engagement with politics are... an essential, and perhaps the most effective, method of achieving charitable purposes.”*

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<sup>94</sup> Parliament of Australia Senate Standing Committee on Economics (2008) “Disclosure Regimes for Charities and Not-for-Profit Organisations” Online: [http://www.aph.gov.au/~media/wopapub/senate/committee/economics\\_ctte/completed\\_inquiries/2008\\_10/charities\\_08/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/charities_08/report/report_pdf.ashx) at p 85. See also: Lynn Lu (2004) ‘Flunking the methodology test: a flawed tax-exemption standard for educational organizations that “advocate a particular position or viewpoint”’ *New York University Review of Law and Social Change*, Vol 29. At p 382. See also: Jonathan Garton (2009) *The Regulation of Organised Civil Society* (Hart Publishing Extent) at pp 71–75.

<sup>95</sup> Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: <[http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf)> at p 366.

Charitable advocacy helps society recognize and respond to the central problems that charities address.<sup>96</sup> The critical importance of this political advocacy role was highlighted in testimony from the St. Vincent de Paul charity before the Australian Senate:

*From the perspective of the St Vincent de Paul Society, we would see advocacy as absolutely non-negotiable. It is integral to our charitable purpose. This is not something we have invented in recent years; it goes to the heart of our founding. In Paris in 1833, our founder made very explicit the principle that we were not simply to give assistance to the poor but to seek out and understand the structures that give rise to poverty and inequality, and to actively advocate to change those structures.<sup>97</sup>*

***The voices of corporate interests could overwhelm the voiceless, if corporate tax breaks for lobbying and political advocacy is not counter-balanced by voices advancing charitable purposes (like protecting health and the environment).***

Charities advocate reform in situations where their constituency does not have a private financial interest to advance – but the opposition to reform often does. For example, cancer societies did not advocate smoking laws for private profit, but to further their charitable goal of preventing cancer. In contrast, cigarette companies fought smoking laws to defend profits. Similarly, Mothers Against Drunk Driving ran campaigns for impaired driving laws – against the opposition of alcohol-related businesses. Environmental groups seek clean air and water when advocating strict pollution regulations – not private profit. However, they are often opposed by powerful corporations who can profit from laxer environmental laws.

Yet, in the case of political activities, there is an inherent inequity between the tax treatment of private businesses and the tax treatment of charities. The *Income Tax Act* gives businesses the ability to deduct political advocacy expenses, without imposing

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<sup>96</sup> Note that charities comprise an important part of Canadian society. Canadian charities and non-profit organizations account for more than 8% of Canada's GDP [Imagine Canada (2014) "Scope of the Sector" Online: <http://sectorsource.ca/sites/default/files/resources/files/narrative-issue-sheet-scope-en.pdf>] As of the end of 2013, there were over 86,000 registered charities in Canada. [Canada Revenue Agency (2014) "Charities facts and figures" Online: <http://www.cra-arc.gc.ca/chrts-gvng/md-kt/fcts-fgrs-eng.html>. Updated 22 April 2014]

<sup>97</sup> Testimony of the St. Vincent de Paul Society to the Parliament of Australia Senate Standing Committee on Economics (2008) "Disclosure Regimes for Charities and Not-for-Profit Organisations" Online: [http://www.aph.gov.au/~media/wopapub/senate/committee/economics\\_ctte/completed\\_inquiries/2008\\_10/charities\\_08/report/report\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/charities_08/report/report_pdf.ashx) at p 84.

arbitrary limits on the amount deductible for advocacy and lobbying.<sup>98</sup> This can lead to the following scenario<sup>99</sup>:

If a charitable organization dedicated to issue Y wants the government to reform the law to alleviate issue Y, they must carefully avoid exceeding the 10% cap on political activities. In contrast, a business opposed to the same reform can spend unlimited amounts of money on research, education, advertising, public advocacy campaigning and lobbying of government. There is no comparable limit on how much the business can spend to oppose the law reform – and the costs of the business’ efforts are tax deductible.

Since businesses can deduct advertising expenses from their income, they can lobby the public through advertising without any imposed statutory restrictions.<sup>100</sup> A recent example has been the omnipresence of the multimillion-dollar<sup>101</sup> Northern Gateway radio, television, internet, and newspaper ad-campaign favouring the project. All of these advertisements would presumably be tax deductible and therefore subsidized by general taxpayers. Another pipeline company, TransCanada, has been using similar advertisement tactics “to define the story,” “frame the discussion to help shape perception,” and “gain trust and inspire active support” for its Energy East export pipeline.<sup>102</sup> Part of this presumably tax-deductible advertising reportedly included hiring a PR firm to target Energy East pipeline opponents.<sup>103</sup>

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<sup>98</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 16. See s. 20 and other sections of the *Income Tax Act* for examples.

<sup>99</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 16-17.

<sup>100</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 16.

<sup>101</sup> Enbridge has stated that the advertisement campaign will cost several million – “but less than \$5 million” (Gordon Hamilton, “Enbridge launches multimillion-dollar ad campaign to combat B.C. pipeline opposition,” *The Vancouver Sun* (30 May 2012), online: <http://www.vancouversun.com/business/2035/Enbridge+launches+multimillion+dollar+campaign+combat+pipeline+opposition/6698138/story.html>

<sup>102</sup> The cost of the TransCanada campaign is unknown, though the advertisements cover the same mediums as the multi-million dollar Enbridge campaign (TransCanada, *Energy East Campaign Organization: Promote, Respond, Pressure*, (05 August, 2014), online: <http://www.greenpeace.org/canada/Global/canada/file/2014/11/eENERGY%20eAST%20CAMPAIGN%20ORG%20PROMOTE%20RESPONSE%20PRESSURE.PDF>, at p 2, 4, 5).

<sup>103</sup> The PR firm behind the Energy East campaign stated that it would “prepare a research profile of key opposition groups by examining public records (including financial disclosures, legal databases and legislative records), traditional sources and social media. All relevant findings will be compiled in a written, fully documented report, to include a summary of findings and assessment of strengths and weaknesses...” (The Council of Canadians, media release: *TransCanada hired world’s largest PR firm to target Council of Canadians’ Energy East campaign*, (17 November 2014), online: <http://canadians.org/media/transcanada-hired-pr-firm>). TransCanada has since allegedly cut ties with this PR firm after public outcry (Marketing Mag, “TransCanada cuts ties with PR firm over campaign

In contrast to companies' tax-deductible political advertising campaigns, charities must carefully ensure that all activities of a political nature are kept within the 10% limit. This contrasting treatment of business and charities under the *Income Tax Act* has the effect of encouraging businesses to take political action in support of commercial and private interests – while hindering the counterbalancing efforts of charities working to protect public interests.

This impairment of charities' pursuit of the public interest has been magnified by the recent spate of audits and their repercussions on the charitable sector.

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concerns", (26 November, 2014), online: <<http://www.marketingmag.ca/advertising/transcanada-cuts-ties-with-pr-firm-over-campaign-concerns-131364>>.

## PART II –Charity Laws and Governance in other Jurisdictions

*Just as promotion of the abolition of slavery has been regarded as charitable, today advocacy for such ends as human rights or protection of the environment and promotion of amenities that make communities pleasant may have come to be regarded as charitable purposes in themselves...*

*Chief Justice Elias (2014) for the New Zealand Supreme Court<sup>104</sup>*

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To address the issues discussed above, it may be helpful to examine charity laws in jurisdictions that manage to avoid such problems.

### ***Continental Europe***

The European approach to political activities of charities stands in stark contrast to Canadian practice. Legal scholars at Melbourne Law School have pointed out that the European position – in contrast to traditional common-law approaches – emphasizes the social benefits of providing non-government organizations with both tax breaks and the full freedom to advocate for legal changes. They write:

*“Outside of the common law world, non-governmental organisations are not generally subject to any sector-specific restrictions...Perhaps the starkest contrast is with the Council of Europe, which has specifically recommended that non-governmental organisations should enjoy ‘the right to freedom of expression’, and in particular:*

- *the right ‘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’; and*
- *the right ‘to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation’ (subject to legislation on the funding of elections and political parties).*

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<sup>104</sup> *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 at para 71.

*The recommendation of the Council of Europe also includes guidance that NGOs should be assisted in the pursuit of their objectives through public funding and other forms of support, such as ...incentives for donations through income tax deductions or credits.*

*Therefore, the European position is that tax benefits should exist alongside charitable advocacy and even promotion of a political candidate or party.”<sup>105</sup>*

We would not go so far as to recommend that charities be allowed to actively take partisan political positions – but the European Council position illustrates the profound value of charities’ role in promoting solutions to social problems.

France and the Netherlands demonstrate the European Council position at work. In the Netherlands, the only limitation for charitable organizations with regard to lobbying, advocacy or other political activities is that charities are forbidden to engage in activities that undermine the “public order.”<sup>106</sup> Lobbying efforts by environmental charitable organizations in the Netherlands have been credited with making environmental concerns mainstream and a priority in politics.<sup>107</sup> Although there is often still disagreement between the environmental charitable sector and government organizations, the two sides have progressed to a cooperative relationship.<sup>108</sup> Government and for-profit organizations commonly solicit environmental charities to give their expertise on consultation procedures, to sit on advisory committees, and to form partnerships for public information campaigns.

In France, non-profit organizations not only receive favourable tax treatment – there are no prohibitions on their political activity.<sup>109</sup>

## **Scotland**

Scottish charity law takes a very liberal approach to charities’ political activities. The Office of the Scottish Charity Regulator describes Scottish law:

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<sup>105</sup> Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at pp 361-362.

<sup>106</sup> Lester Salamon (1997) *The International Guide to Nonprofit Law* (Toronto: John Wiley & Son) at p 194.

<sup>107</sup> Freda Donoghue (2008) “Roles of Nonprofit Organisations in Europe: Comparisons across France, Ireland, and the Netherlands” (Centre for Nonprofit Management, Trinity College Dublin) Online: [http://www.studentcorner.eu/pubs/senior/papers/senior2008\\_001.pdf](http://www.studentcorner.eu/pubs/senior/papers/senior2008_001.pdf) at p 8.

<sup>108</sup> Ary Burger and Paul Dekker (2001) “The nonprofit sector in Netherlands” Online: <http://www.scp.nl/english/dsresource?objectid=22125> at p 78.

<sup>109</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 21.

*The Scottish charity test ... does not prevent charities from campaigning or lobbying to change the law or the policy of public bodies where this is in furtherance of their charitable purposes. Nor would it prevent such campaigning being a charity's main activity.*<sup>110</sup>

That said, Scottish law does disqualify both political parties and organizations with a political purpose from becoming a registered charity.<sup>111</sup>

## ***England and Wales***

While England and Wales, like Canada, defines charitable purposes and public benefit largely in terms of the common law tradition,<sup>112</sup> regulations on political activities are much more lenient. No quantitative limits on political activity are imposed, nor must political activities be “subordinate to charitable activities.”<sup>113</sup> Charities can engage in campaigning and political activity “to further or support its charitable purposes;” in this regard, they are not required to follow a 10% rule, but rather, “may choose to focus most, or all, of its resources on a political activity” for a period of time, given that “this activity is not, and does not become, the reason for the charity’s existence.”<sup>114</sup> In certain situations<sup>115</sup> it is

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<sup>110</sup> Office of the Scottish Charity Regulator (n.d.) “Meeting the Charity Test: Guidance for Applicants and for Existing Charities” Section 5.3. Online: <http://www.oscr.org.uk/media/1568/meeting-the-charity-test-full-guidance.pdf>

Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at p 361).

<sup>111</sup> *Charities and Trustee Investment Act 2005*, s.7(4)(c), available online at: <http://www.legislation.gov.uk/asp/2005/10/section/7>. See also: Joyce Chia et al. (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at p 361.

<sup>112</sup> See the charitable purposes sections (sections 2 and 3) and public benefit requirements (section 4) under their *Charities Act, 2011*, available online at: <http://www.legislation.gov.uk/ukpga/2011/25/section/4/enacted>

<sup>113</sup> Maurice Cullity, QC, *Charity and Politics in Canada – a Legal Analysis* (13 December, 2013), online: <http://www.pemselfoundation.org/sites/default/files/M%20Cullity%20Charity%20and%20Politics%20-%20January%2010%202014.pdf>, at pp 29, 30.

<sup>114</sup> The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)> at pp 9, 13, 15.

<sup>115</sup> “Such a situation could arise where a charity had identified that political activity could bring major benefits to its beneficiaries, and that there was a good chance of success”; these situations must only apply for a period in the overall life of the charity (The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)>, at p 15).

lawful for English and Welsh charities to apply most, or even all, of their resources to political activity, in support of a charitable purpose.<sup>116</sup>

Even when a charity becomes involved in campaigning or political activity that may not be compatible with its charitable status,<sup>117</sup> the Charity Commission for England and Wales (CCEW) operates as a non-draconian regulator.<sup>118</sup> If a charity is found to be carrying out a political or campaign activity that is not sufficiently connected to its purposes, CCEW aims to resolve the situation informally – regulatory action is only taken when there has been misuse of charity resources or misconduct.<sup>119</sup> Regulatory action depends on the scale and nature of the activity in question. The Charity Commission has a much wider range of remedial actions to choose from; the “death penalty” is not the default penalty.<sup>120</sup> When the Charity Commission identifies an institution that is not properly applying its resources to charitable purposes, its approach is not to remove that charity from the register, but to replace or give directions to charity trustees.<sup>121</sup> Only in *exceptionally extreme* cases where it is “clear that [a charity] was established for a political rather than a charitable purpose” will a charity lose its registered charity status in England and Wales.<sup>122</sup>

It is important to note that, unlike Canada, England and Wales insulate the regulation of charities from potential ministerial and political interference. The Charity Commission for England and Wales is responsible for the administrative oversight of charities. The CCEW was initially formed under powers enacted by the *Charitable Trusts Act, 1853* and is a regulatory regime independent of Inland Revenue (the tax collection agency).<sup>123</sup> It is an

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<sup>116</sup> The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)> at p 15.

<sup>117</sup> For example, by engaging in activity that is not sufficiently related to the purpose of the charity, or adopting a political purpose for the charity – either deliberately or by mistake.

<sup>118</sup> Note that the Charity Commission has upheld few complaints against registered charities for undertaking political activity and the Commission has explicitly stated that it does not get involved in complaints that simply disagree with the political stance of a charity. The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)> at p 32.

<sup>119</sup> The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)>, at p 33.

<sup>120</sup> The Charity Commission, *Speaking out: guidance on campaigning and political activity by charities (CC9)*, 01 March, 2008, online:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)>, at p 33.

<sup>121</sup> The Charity Commission, RR6 - *Maintenance of an Accurate Register of Charities* (Nov 2000), [12]-[14]

<sup>122</sup> In Canada the CRA also has a policy on the progressive use of penalties. CRA can impose lesser penalties than revocation, such as suspension of status and monetary penalties. However, critics question whether CRA applies such a progressive use of penalties. In any case, the CRA clearly does not have anywhere near the remedial range of actions available to the Charity Commission.

<sup>123</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf), at p 21.

independent, *non-ministerial* government body comprised of non-elected members responsible for all aspects of charities. It governs charity registration, guides charities to be as effective as possible, and publishes information on each registered charity.<sup>124</sup> The CCEW's priorities include developing public confidence in the charity sector, ensuring compliance and accountability, and fostering the self-reliance of individual charities.<sup>125</sup>

The Charity Commission has manifested a political commitment to the charitable sector's independence from the state.<sup>126</sup> This independent body has been recognized for substantially improving the charitable sector in England and Wales by fostering more amicable and collaborative relationships between charities, the government, and the public. Unlike the CRA, the Charity Commission has been credited with using a consultative, open decision-making process by inviting input from the organization, Inland Revenue, and the affected public.<sup>127</sup> Canada could learn much from this politically independent body that governs the registration and regulation of charities.

In particular, this Commission model greatly reduces the possibility – or even the perception – of political interference with charities.<sup>128</sup> As Professor Kathryn Chan has noted, the Canadian *Income Tax Act* does far less than England and Wales to prevent political influence over the regulator's exercise of discretion:

*First, compared to the [UK] Charities Act 2011 definition of a charitable purpose, the open-ended Income Tax Act definitions provide the CRA with a broad zone of autonomy to determine the parameters of the charitable sphere. Second, the Act does not lay down any charity-specific objectives or duties to guide CRA's application of the statutory terms; the regulator's mandate is simply to support the administration and enforcement of the Income Tax Act, and it has extensive discretion in that regard. Third, the body to which the Directorate's registration decisions are appealed in the first instance is the Charities Redress Section of the Tax and Charities Appeals Directorate; this is an internal division of the CRA whose decisions and policies are not generally available to the public. Finally, unlike the Charity Commission, the CRA is a ministerial government department, which is subject to the direction and control of the Minister of National Revenue. All of these characteristics of the*

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<sup>124</sup> Government of UK. Charity Commission "About us" Online: <https://www.gov.uk/government/organisations/charity-commission/about> (Accessed November 30, 2014).

<sup>125</sup> Government of UK. Charity Commission "About us" Online: <https://www.gov.uk/government/organisations/charity-commission/about> (Accessed November 30, 2014).

<sup>126</sup> Professor Kathryn Chan (2014) "The Co-Optation of Charitable Resources by Threatened Welfare States" *Queen's Law Journal*, Vol 40. Online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516610](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516610), at p 2.

<sup>127</sup> Frances Boyle (1997) "Charitable Activity Under the Canadian Income Tax Act: Definition, Process, and Problems" *Voluntary Sector Roundtable Publications*, at p 17.

<sup>128</sup> Note that there recently has been some criticism that the Commission has been adopting the government's views in its interpretation of public benefits. Professor Kathryn Chan, personal communication.

*registered charity regime serve to expand the ambit of official discretion respecting the definition of charitable purposes in Canada, and to increase the risk of it coming under executive influence.*<sup>129</sup>

## **United States**

US charity regulation is superior to current Canadian law because it is less vague and more respectful of the value that charities bring to public policy debates.<sup>130</sup> The US law is less subject to the unfettered discretion of officials. It allows charities to opt into a rule that allows charitable groups to devote a far higher percentage of their resources to political work linked to their charitable mission. And for those that exceed the limits, US regulations rely primarily on imposing a special tax on the exceedance – with the option of totally forcing the group out of business only available for repeat offenders.

The *Internal Revenue Code* explicitly defines lobbying and measurement of lobbying activity. A charity is regarded as attempting to influence legislation (commonly referred to as lobbying) if it “contacts, or urges the public to contact, members employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.”<sup>131</sup> Similar to CRA policies, the IRS does not consider educational meetings and the distribution of educational materials regarding public policy issues as “lobbying” if there is no direct attempt to influence legislative change.

However, in the US, there are two tests for measuring allowable lobbying activity by a charity:

- The Substantial Part Test (The default regime for measuring lobbying); and
- The Expenditure Test (The alternative progressive regime introduced in 1976, as a regulatory regime charities can opt into).

### **Substantial Part Test**

Prior to 1976, the IRS only used the “substantial part” test to determine the permitted lobbying activity of charities. Under the substantial part test, the determination is whether

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<sup>129</sup> Professor Kathryn Chan (2014) “The Co-Optation of Charitable Resources by Threatened Welfare States” *Queen’s Law Journal*, Vol 40. Online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2516610](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516610) at pp 16-17. Note that the *Charities Act 2011*, UK, s. 13(4) specifically states: “In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another government department.”

<sup>130</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society*” Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf), at p 2.

<sup>131</sup> Internal Revenue Services (IRS). Charities and Non-Profit “Lobbying” Online: <http://www.irs.gov/Charities-&-Non-Profits/Lobbying> (Accessed November 30, 2014).

a charity's lobbying activities constitute a "substantial" part of its overall activities.<sup>132</sup> Similar to the CRA, the IRS has not provided legally binding guidance on how much lobbying is considered "substantial" under this test. Under this longstanding regime, charities that conduct excessive lobbying in any taxable year may lose their tax-exempt status. Like the similar current CRA test, this vague and restrictive test led to a "good deal of anxiety in the charitable community."<sup>133</sup>

### **Expenditure Test – A Modern Progressive Option**

Years of collaborative work between the charity sector and Congress – and recognition of problems similar to those faced under the current Canadian regime – led to the 1976 introduction of a progressive alternative approach to measuring lobbying.<sup>134</sup> Charitable organizations, other than churches and private foundations, may elect to be measured under this new regime.<sup>135</sup> Under this regime, charities are given clear spending limits for lobbying activities – and more lenient penalties with regards to exceeding these spending limits. The spending limits fall on a progressive scale based on the annual operating budget of the organization. The absolute maximum limit that a charity can spend on lobbying is \$1 million, which requires the organization to have an operating budget of over \$17 million.<sup>136</sup> The spending limit regime on non-taxable lobbying is as follows<sup>137</sup>:

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<sup>132</sup> IRS. Charities and Non-Profit "Measuring Lobbying Activity: Substantial Part Test" Online: <http://www.irs.gov/Charities-&Non-Profits/Measuring-Lobbying:-Substantial-Part-Test> (Accessed November 30, 2014)

<sup>133</sup> Richard Bridge (2000) "The Law of Advocacy by Charitable Organizations" *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 19.

<sup>134</sup> Richard Bridge (2000) "The Law of Advocacy by Charitable Organizations" *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 21.

<sup>135</sup> IRS. Charities and Non-Profit "Measuring Lobbying Activity: Expenditure Test" Online: <http://www.irs.gov/Charities-&Non-Profits/Measuring-Lobbying-Activity:-Expenditure-Test> (Accessed November 30, 2014).

<sup>136</sup> Richard Bridge (2000) "The Law of Advocacy by Charitable Organizations" *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 20.

<sup>137</sup> IRS. Charities and Non-Profit "Measuring Lobbying Activity: Expenditure Test" Online: <http://www.irs.gov/Charities-&Non-Profits/Measuring-Lobbying-Activity:-Expenditure-Test> (Accessed November 30, 2014).

If the amount of exempt purpose expenditures (annual operating budget) is:	Lobbying non-taxable amount is:
≤ \$500,000	20% of the exempt purpose expenditures
>\$500,00 but ≤ \$1,000,000	\$100,000 plus 15% of the excess of exempt purpose expenditures over \$500,000
> \$1,000,000 but ≤ \$1,500,000	\$175,000 plus 10% of the excess of exempt purpose expenditures over \$1,000,000
>\$1,500,000	\$225,000 plus 5% of the exempt purpose expenditures over \$1,500,000

Note that these US limits generally exceed 10% by a substantial amount. It is also important to note that under the expenditure test, if a charity exceeds its lobbying expenditure limit in a particular year, it does not generally face the “death penalty.” It must simply pay an excise tax equal to 25% of the excess amount spent. An organization may lose its tax-exempt status only if it engages in excessive lobbying over a four-year period.

### ***Australia and New Zealand***

The evolution of the common law in Australian and New Zealand is highly relevant to the Canadian legal system, because all three legal systems inherited the English common law tradition, including the *Pemsel* case. Significantly, the courts of Australia and New Zealand have recently altered this body of common law, in recognition of the need to do so in a modern state. The top courts in both countries have dramatically expanded the traditional definition of “charitable purpose” by discarding the “political purposes doctrine,” which still dominates Canadian charity Law.

#### **Australia**

In a groundbreaking 2010 decision by the High Court of Australia, *AID/WATCH Inc v*

*Commissioner of Taxation*<sup>138</sup>, the majority of the Court discarded the traditional common law “political purposes doctrine.” It decided that AidWatch – an organization which holds political advocacy as a main charitable purpose – should not be disqualified from receiving charitable status.

Aid/Watch is an activist, member-based association concerned with improving Australia’s foreign aid and trade policies. The purposes listed in its constitution focus on ensuring that such policies accord with environmental principles and empower local communities, especially women and indigenous people. Its activities include monitoring aid and trade policies; producing research reports on Australia’s policies and practices; campaigning for changes to those policies and practices; and participating in conferences, international networks and public awareness campaigns.

Australian tax authorities had stripped the organization of its charitable status, on the basis of its extensive political activities. However, the High Court ruled that in modern Australia, an organization should not be excluded from charitable status (and resulting tax concessions) solely because it had a main or dominant political purpose.

The Court found that the purpose of the political advocacy of AidWatch – to generate *public debate* on the effectiveness of foreign aid – fell into the fourth *Pemsel* category of charitable objectives, *i.e.*, “purposes beneficial to the community.”<sup>139</sup> That is, the Court found that *public debate* concerning government activities falling within the first three *Pemsel* categories (poverty, education, religion) fell within the fourth category of charitable objectives (“other purposes beneficial to the community”).<sup>140</sup>

This decision has two obvious effects: advocacy organisations are now eligible for charitable tax status – and charities can engage more openly and actively in advocacy. The most direct implication of the judgment is that charities in Australia can be established with the *sole* purpose of advancing political change.<sup>141</sup> The implication for existing charities is an increased ability to conduct political activities that are geared towards advancing purposes beneficial to the community.

The *AidWatch* decision has been heralded because it:

*...paves the way for organizations to primarily and wholly engage in advocacy, at least within fields of activity already recognized as charitable...[T]he... effect of the decision is to remove the ‘chilling’ uncertainty caused by the doctrine which had deterred charities from*

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<sup>138</sup> *AID/WATCH Incorporated v Commissioner of Taxation* [2010] HCA 42

<sup>139</sup> *AID/WATCH Incorporated v Commissioner of Taxation* [2010] HCA 42 at para 47.

<sup>140</sup> See above for a discussion of the *Pemsel* categories of (1) relief of poverty, (2) advancement of education, (3) advancement of religion and (4) other purposes beneficial to the community.

<sup>141</sup> At least within fields of activities that are already recognized as charitable.

*engaging in advocacy...The most profound symbolic consequence has been that advocacy has been accepted as a legitimate charitable activity...<sup>142</sup>*

Legal scholars welcomed the *AidWatch* decision, noting that the “political purposes doctrine” was a deeply flawed doctrine to apply to a modern society:

*“...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. The distinction is also anachronistic, because the expansion of government and legislative activity has enlarged the sphere of ‘politics’ dramatically, and because of trends such as devolution in service delivery, decreasing policy development by governments, and increasing consultation...*

*...the idea that charity is not political presupposes a restrictive concept of charity that would exclude, for example, campaigns against slavery or most environmental campaigns, both of which have been recognised as charitable at law... the idea of diversion similarly depends upon a pre-existing distinction between advocacy and charity, and fails to recognise that sometimes the most effective way of addressing a social problem is a change in legislation or policy.”<sup>143</sup>*

## **New Zealand**

Four years after the Australian decision, New Zealand followed Australia’s lead in modernizing its approach to the political activities of charities. In 2014 a majority at the Supreme Court of New Zealand effectively ruled that the political purpose exclusion should no longer be applied in New Zealand either. In *Re Greenpeace of New Zealand Inc*<sup>144</sup> the New Zealand Supreme Court overturned the Court of Appeal’s decision that Greenpeace could not be granted a charitable status because its political purposes were not “ancillary” in nature.

The court adopted the Australian High Court’s view in *AidWatch* that charity law should change in response to social conditions, concluding that strictly imposing the political purpose doctrine “is likely to hinder the responsiveness of this area of law to the changing circumstances of society.” The Court concluded that a general “political purposes exclusion

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<sup>142</sup> Joyce Chia *et al.* (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at pp 377-378.

<sup>143</sup> Joyce Chia *et al.* (2011) “Navigating the politics of charity: Reflections on *AID/WATCH INC v FEDERAL COMMISSIONER OF TAXATION*” *Melbourne University Law Review*, Vol 35. Online: [http://www.law.unimelb.edu.au/files/dmfile/35\\_2\\_2.pdf](http://www.law.unimelb.edu.au/files/dmfile/35_2_2.pdf) at pp 366-367.

<sup>144</sup> *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

should no longer be applied in New Zealand since political and charitable purposes were not necessarily mutually exclusive.<sup>145</sup>

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<sup>145</sup> *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 at paras 3, 69-70.

## PART III – Recommendations for Law Reform

*If it means you have to live in fear of the revenue authorities, and if it means that there are things you want to say, you feel you should say, but you feel you cannot say because of the rules, well then, what price [is] charitable registration?”*

*– President Philip Slayton, Pen Canada<sup>146</sup>*

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It is clear that Canada’s charitable laws and administrative policies are in urgent need of reform. Problems include:

- the lack of respect for the important social benefits that charities’ political activities can offer;
- overly restrictive limits on political activity;
- the lack of clarity in the law and inconsistent application of it;
- the potential for political interference in the auditing of charities;
- the disproportionate and draconian penalties applicable to breaching the 10% Rule; and
- the lack of transparency and of adequate appellate review of CRA decision making.

These shortcomings in federal law and policy hamper the ability of Canadian charities to achieve their charitable missions.<sup>147</sup>

Therefore, we make the following recommendations for reform.

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<sup>146</sup> Note that Pen Canada was recently identified for a CRA audit after protesting the muzzling of government scientists and surveillance of Canadian citizens revealed by the Edward Snowden leaks. See Carol Linnitt. Desmog Canada, “Pen Canada, Freedom of Expression Charity Supported by Margaret Atwood and Yann Martel, to Undergo Political Activity Audit” (23 July, 2014), online: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>.

<sup>147</sup> Carol Linnitt. Desmog Canada, “Pen Canada, Freedom of Expression Charity Supported by Margaret Atwood and Yann Martel, to Undergo Political Activity Audit” (23 July, 2014), online: <http://www.desmog.ca/2014/07/22/pen-canada-freedom-expression-charity-supported-margaret-atwood-and-yann-martel-undergo-political-activity-audit>.

## ***PROVIDE STATUTORY CLARIFICATION OF “POLITICAL ACTIVITIES” – AND THE ESTABLISHMENT OF CLEAR, MORE GENEROUS SPENDING LIMITS***

The Supreme Court of Canada has stated<sup>148</sup>:

*It has been accepted as a cardinal principle of Canadian taxation law that the goal of the Income Tax Act is to ... provide sufficient certainty and predictability to permit taxpayers to intelligently order their affairs.*

This statement of general principle should clearly also apply to charities and their donors.<sup>149</sup> Yet the current state of charity law violates this cardinal principle of certainty and predictability. As discussed above, charitable organizations have to deal with numerous uncertainties arising from ambiguous rules and inconsistent application of the rules.

The vagueness in the definition of permitted political activities – and the ambit of bureaucratic discretion allowed in enforcing the 10% spending rule – have created a confused and anxious charity sector, similar to the one in the United States prior to 1976.<sup>150</sup> A cooperative effort between American charities and their legislators resulted in enactment of clear statutory definitions of “political activities” and a more transparent system for measuring a charity’s permitted limits on lobbying. To render the current and future auditing processes of the CRA fair and transparent to charities, similar changes must be adopted in Canada.

Following the example of the American amendments to their *Internal Revenue Code*, Parliament should distinguish prohibited, charitable, and permissible charitable activities in statute. In addition, the “ancillary and incidental to its charitable activities” test, interpreted by the CRA as the 10% spending limit on permissible charitable activities, should be replaced with a quantifiable “expenditure test” similar to the American model.

**Recommendation: The government should amend the ITA to:**

- **enact a clear statutory definition of “permissible political activities;”**

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<sup>148</sup> *The Queen v. Canada Trustco Mortgage Company*, [2005] 2 S.C.R. 601 at para 75, as referenced in, Maurice Cullity, QC, *Charity and Politics in Canada – a Legal Analysis* (13 December, 2013), online: <http://www.pemselfoundation.org/sites/default/files/M%20Cullity%20Charity%20and%20Politics%20-%20January%2010%202014.pdf>, at p 49.

<sup>149</sup> Maurice Cullity, QC, *Charity and Politics in Canada – a Legal Analysis* (13 December, 2013), online: <http://www.pemselfoundation.org/sites/default/files/M%20Cullity%20Charity%20and%20Politics%20-%20January%2010%202014.pdf>, at p 49.

<sup>150</sup> Richard Bridge (2000) “The Law of Advocacy by Charitable Organizations” *Institute for Media, Policy, and Civil Society* Online: [http://epe.lac-bac.gc.ca/100/200/300/impacs/law\\_advocacy-e/law\\_advocacy-e.pdf](http://epe.lac-bac.gc.ca/100/200/300/impacs/law_advocacy-e/law_advocacy-e.pdf) at p 21.

- clearly distinguish prohibited, charitable, and permissible charitable activities in statute; and
- replace the “ancillary and incidental to its charitable activities” limit for political activities with a quantitative formula similar to that used in the US.

***PROVIDE ALTERNATIVES TO DRACONIAN PENALTIES FOR MINOR, INADVERTENT OR ISOLATED ERRORS***

Revocation of charitable status does not have to be the routine response for disciplining Canadian charities for exceeding limits on political activities.<sup>151</sup> Indeed, under the *Income Tax Act*, the Minister always has a choice whether or not to revoke charitable status.<sup>152</sup> Revocation of registration – with complete destruction of an organization’s funding base and loss of all its assets – is inappropriate in many cases, including cases involving inadvertent, isolated and minor exceedances. The CRA does have the discretion to impose a range of intermediate sanctions. For example, it has the power to levy taxes on any excess amount of political activities it concludes the charity has spent. Unfortunately, there is no current statutory direction on how these alternative sanctions should be used.

Canada should consider following the US model of reserving revocation of charitable status for over-spending on political activities to breaches occurring over a multi-year span. Canada should also learn from England and Wales’ more informal and collaborative approach of working with charities to ensure rule compliance. For example, in many cases the English approach of giving direction to – or replacing – the charity’s board members is superior to terminating the charity’s very existence.<sup>153</sup>

The methods used by the Charity Commission for England and Wales should be emulated, as it aims to bring an errant charity into compliance rather than destroy the charity. This approach recognizes the importance of protecting the country’s tax revenue base – but also the importance of encouraging the numerous positive contributions that charities make to society.

**Recommendation: Government should amend the *Income Tax Act* and policies to provide for less Draconian penalties for inadvertent, non-repetitive or minor exceedances of limits on political activities. The emphasis should be to achieve compliance – not to destroy the charitable organization.**

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<sup>151</sup> Professor Kathryn Chan in personal communications November 26, 2014

<sup>152</sup> Subsection 168(1) of the *Income Tax Act* states “the Minister **may**...give notice...that the Minister proposes to revoke its registration...”

<sup>153</sup> Note that constitutional challenges would have to be addressed in merging regulation of charities with regulation of income tax. The difficulty is that the management of charities falls under provincial – not federal -- jurisdiction, so innovative cooperative federalism might be required for this kind of approach.

## ***ELIMINATE THE POTENTIAL FOR POLITICAL INTERFERENCE WITH AUDITS – ESTABLISH A POLITICALLY INDEPENDENT CANADIAN CHARITIES COMMISSION***

To improve trust and foster cooperative relationships between government and the charitable sector, changes to the governance of the charitable sector are necessary. The formation of a Canadian Charities Commission that is not under ministerial control would greatly reduce the possibility of political influence on the administration of charities and their tax status. A Canadian Commission could include any number of these recommendations put forward by Adam Aptowitzer of the C.D. Howe Institute<sup>154</sup>:

- A registration system;
- Jurisdiction to enact harmonized rules for charities across the country;
- A structure which would address the jurisdictional powers of the federal government over tax and the provincial governments over administration of charities; and
- Decision powers to allow charity regulation to evolve.

Aptowitzer also proposed a joint federal-provincial “Canadian Charities Council” that would include provincial appointees and federal representatives. As with the Charity Commission for England and Wales, the Council would be politically independent. The Council would not report directly to individual politicians, but instead issue annual reports to Parliament and to all provincial legislatures. It would thus prevent backroom political interference.

The Council would be responsible for approving applications of new charities, and would regulate charities with audits and enforcement measures. It would include an internal tribunal to deal with appeals of denial or revocation of charity status. This would be more affordable and accessible than the current appeal process under the Federal Court of Appeal. The proposed Council would work in parallel with the CRA, which would retain the right to register approved charities under the *Income Tax Act*, and would retain its role in maintaining the integrity of the charity receipting system.

**Recommendation: Government should remove the potential for political interference with the tax auditing of charities by establishing a politically independent Canadian Charities Commission.**

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<sup>154</sup> Adam Aptowitzer (2009) “Bringing the Provinces Back In: Creating a Federated Canadian Charities Council” *C.D. Howe Institute Commentary Issue 200*. Online: [http://www.cdhowe.org/pdf/commentary\\_300.pdf](http://www.cdhowe.org/pdf/commentary_300.pdf) at p 10.

## ***REPEAL THE ARCHAIC POLITICAL PURPOSES DOCTRINE AND MODERNIZE THE DEFINITION OF “CHARITABLE PURPOSES”***

Canada should follow the lead of Australia and New Zealand: the legal definition of “charitable purposes” should be changed to include political advocacy. This would permit charities to better respond to the contemporary values and needs of modern societies.<sup>155</sup>

After all, the view of “political activities” has changed dramatically since the reign of Elizabeth I – who was clearly not receptive to subjects challenging her government’s decisions. The context that charities operate in is significantly different than it was centuries ago. In modern society the law should recognize that a poverty-relief organization can often relieve poverty more effectively by lobbying for affordable housing laws than by operating a soup kitchen.

Among other things, the new definition of charitable purposes should allow organizations to pursue political activities for charitable purposes as a charity’s primary objective. Australia and New Zealand have paved the way in modernizing their law in this regard. Canada should follow.

In modernizing the legal definition of “charitable purposes,” other important anomalies should be addressed. For example, the CRA recently advised Oxfam that the organization “can no longer try to *prevent poverty* around the world if it wants to keep its charitable status for tax purposes” – it “can only *alleviate poverty*.”<sup>156</sup> Relieving poverty was deemed a charitable purpose, but preventing poverty was not.<sup>157</sup> This Canadian position runs contrary to the UK *Charities Act* – which now specifically provides that the *prevention* of poverty is indeed a charitable purpose.<sup>158</sup>

**Recommendation: Government should modernize the definition of “charitable purposes”. Among other things, it should repeal the “political purpose” doctrine and allow charitable organizations to pursue, as their primary objective, political activities in support of a charitable purpose. Prevention of poverty should made an acceptable charitable purpose for Canadian charities.**

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<sup>155</sup> Andrew Kitching (2006) “Charitable Purpose, Advocacy and the Income Tax Act” (Ottawa, ON: Library of Parliament – Law and Government Division). Online:

<http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0590-e.htm>

<sup>156</sup> The Canadian Press, “‘Preventing poverty’ not a valid foal for tax purposes, CRA tells Oxfam Canada”, *CBC News*, (25 July, 2014), online: < <http://www.cbc.ca/news/politics/preventing-poverty-not-a-valid-goal-for-tax-purposes-cra-tells-oxfam-canada-1.2717774>>.

<sup>157</sup> The Canadian Press, “‘Preventing poverty’ not a valid goal for tax purposes, CRA tells Oxfam Canada”, *CBC News*, (25 July, 2014), online: < <http://www.cbc.ca/news/politics/preventing-poverty-not-a-valid-goal-for-tax-purposes-cra-tells-oxfam-canada-1.2717774>>. England and Wales also addressed this distinction in the *Charities Act, 2006*.

<sup>158</sup> *Charities Act, 2006*, UK, section 2(2)(a) lists the prevention or relief of poverty as a valid charitable purpose.

## ***ENSURE THE INTERVENTION OF PROVINCIAL ATTORNEYS GENERAL IN APPEALS INVOLVING REVOCATION OF A GROUP'S CHARITABLE STATUS***

When a charity appeals the revocation or denial of its registration as a charitable organization, the appeal procedure is unduly difficult for the charity – because of the restricted factual record allowed, the summary proceeding mandated, and the deference accorded to the Minister's decisions.<sup>159</sup>

Lawyers for the federal government properly appear at such appeals, to advocate on behalf of the protection of the country's revenue stream. They argue in support of the administration and enforcement of the *Income Tax Act*, but do not speak on behalf of charities or the beneficiaries of charities. In contrast, under historic English common law, Attorneys General had a recognized role in appearing before the court in cases involving charities:

- to defend the principle that property dedicated to charity must be devoted to charity forever (which would not occur if the property's value is forfeited to revenue agencies); and
- to advocate for a decision that recognizes and furthers the social good that charities carry out.

In Canada, the provinces have jurisdiction over charities. However, provincial Attorneys General have not been intervening to advocate on behalf of charities – they have not been exercising their prerogative powers to protect charities and their objects in the courts. This has often meant that the case for the charitable sector in general has not been advanced as well as it might have been.<sup>160</sup>

As a result, a whole new charities jurisprudence in Canada has developed without any representation of the potential beneficiaries of charity – or of the public's interest in charity at large.<sup>161</sup> Charitable objects and those who may benefit from them should be better represented in court.

**Recommendation: Law and policy should be amended to encourage the intervention of Provincial Attorneys General in appeals involving charities and federal tax ministers of the Crown. This would help ensure that someone advocates the general public interest in questions regarding the meaning of "charity" and other charitable principles and laws.**

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<sup>159</sup> Professor Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2010) 89 Cdn Bar Rev 373 at 398.

<sup>160</sup> Professor Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2010) 89 Cdn Bar Rev 373 at 399.

<sup>161</sup> Professor Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2010) 89 Cdn Bar Rev 373 at p. 392.,

# Appendix A: Industry-Motivated Environmental Legislation

By Zaria Stoffman, B.A., J.D., Articled Student

## *Introduction*

Over the past five years, a series of changes made to federal environmental legislation have significantly diluted environmental protection in Canada. Evidence has surfaced that, in the case of many of these legislative changes, the resource industry has been directing, if not dictating, the form and content of new and amended environmental legislation.

Major changes to the *Fisheries Act*<sup>162</sup>, the *National Energy Board Act*<sup>163</sup> (*NEBA*), the *Canadian Environmental Assessment Act*<sup>164</sup> (*CEAA*) (replaced by the *CEAA, 2012*), the *Navigable Waters Protection Act* (*NWPA*) (replaced by the *Navigation Protection Act*<sup>165</sup>), and the *Species at Risk Act*<sup>166</sup> (*SARA*) were all requested (and sometimes dictated word for word) by organizations such as the Canadian Petroleum Producers (CAPP), the Canadian Electricity Association (CEA), the Canadian Hydropower Association (CHA), the Energy Policy Institute of Canada (EPIC), the Energy Framework Initiative (EFI), Canadian Natural Resources Limited (CNRL), the Canadian Petroleum Products Institute (CPPI), Enbridge, Encana, Rio Tinto Alcan (RTA), Shell, TransCanada, the Canadian Gas Association (CGA) and the Canadian Energy Pipeline Association (CEPA).

Evidence of the federal government taking specific direction from the resource industry in terms of changes to environmental legislation is outlined below.

## *The Need for Omnibus Legislation*

In December of 2011, the Energy Framework Initiative (EFI) – created and sponsored by D. Collyer (President of CAPP), B. Kenny (President of CEPA), P. Boag (President of CPPI), and M. Cleland (President of the CGA) – sent a letter to then<sup>167</sup> Minister of Environment, the Honourable Peter Kent, and then<sup>168</sup> Minister of Natural Resources, the Honourable Joe

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<sup>162</sup> *Fisheries Act*, R.S.C., 1985, c. F-14.

<sup>163</sup> *National Energy Board Act*, R.S.C., 1985, c. N-7.

<sup>164</sup> *Canadian Environmental Assessment Act*, S.C., 1992, c.37, amended by *Canadian Environmental Assessment Act, 2012*, S.C., 2012, c.19, s. 52.

<sup>165</sup> *Navigation Protection Act*, R.S.C., 1985, c.N-22.

<sup>166</sup> *Species at Risk Act*, S.C., 2002, c.29.

<sup>167</sup> Peter Kent is currently the Member of Parliament for Thornhill, Ontario; the present Minister of Environment is the Honourable Leona Aglukkaq.

<sup>168</sup> Joe Oliver is now the Minister of Finance; the present Minister of Natural Resources is the Honourable Greg Rickford.

Oliver.<sup>169</sup> The letter stressed the need for regulatory reform; it requested that legislative changes be made to the *Fisheries Act*, *NEBA*, *CEAA*, *NWPA*, *SARA*, and *Migratory Birds Convention Act (MBCA)*.<sup>170</sup> The letter critiqued that these particular pieces of environmental legislation were focused on “preventing bad things from happening” as opposed to “enabling responsible outcomes”.<sup>171</sup>

Not only did the resource industry want these pieces of environmental legislation amended, they wanted them amended through an omnibus approach. The Canadian Association of Petroleum Producers (CAPP), had made it known to the Federal Government that they “did not want a series of separate legislative changes, but rather an ‘omnibus’ approach.”<sup>172</sup> Internal briefing documents drafted for Environment Canada’s associate deputy minister, Andrea Lyon, demonstrate CAPP’s preference “for a legislative overhaul, rather than a formal piecemeal examination of environmental laws in Parliament”<sup>173</sup> The notes read:

*“CAPP has raised issues with the ‘one-off’ review of specific legislation such as CEAA and SARA and would rather have a more strategic omnibus legislative approach...”*<sup>174</sup>

Within a mere 10 months of the EFI request, the natural resource industry had almost everything it had requested – and all wrapped up in an omnibus package; 5 of the 6 pieces of environmental legislation referred to by EFI were heavily amended or completely rewritten through two omnibus pieces of legislation.<sup>175</sup> The *Jobs Growth and Long-term*

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<sup>169</sup> Energy Framework Initiative, *Letter to the Honorable Peter Kent and the Honorable Joe Oliver*, 12 December, 2011, online: <<http://s3.documentcloud.org/documents/552378/atip-industry-letter-on-enviro-regs-to-oliver.pdf>>

<sup>170</sup> Energy Framework Initiative, *Letter to the Honorable Peter Kent and the Honorable Joe Oliver*, 12 December, 2011, online: <<http://s3.documentcloud.org/documents/552378/atip-industry-letter-on-enviro-regs-to-oliver.pdf>>, at p 2.

<sup>171</sup> Energy Framework Initiative, *Letter to the Honorable Peter Kent and the Honorable Joe Oliver*, 12 December, 2011, online: <<http://s3.documentcloud.org/documents/552378/atip-industry-letter-on-enviro-regs-to-oliver.pdf>>, at p 2.

<sup>172</sup> Carol Linnitt, “Internal Documents: CAPP Hesitant to Admit Its Request for ‘Holistic’ Overhaul of Environmental Legislation that Influenced Omnibus”, (10 April, 2013), *Desmogblog*, online: <<http://www.desmog.ca/2013/04/10/capp-hesitant-admit-request-holistic-overhaul-environmental-legislation-influenced-omnibus-budget-bill-internal-documents>>.

<sup>173</sup> Carol Linnitt, “Internal Documents: CAPP Hesitant to Admit Its Request for ‘Holistic’ Overhaul of Environmental Legislation that Influenced Omnibus”, (10 April, 2013), *Desmogblog*, online: <<http://www.desmog.ca/2013/04/10/capp-hesitant-admit-request-holistic-overhaul-environmental-legislation-influenced-omnibus-budget-bill-internal-documents>>.

<sup>174</sup> Carol Linnitt, “Internal Documents: CAPP Hesitant to Admit Its Request for ‘Holistic’ Overhaul of Environmental Legislation that Influenced Omnibus”, (10 April, 2013), *Desmogblog*, online: <<http://www.desmog.ca/2013/04/10/capp-hesitant-admit-request-holistic-overhaul-environmental-legislation-influenced-omnibus-budget-bill-internal-documents>>.

<sup>175</sup> Max Paris, “Energy industry letter suggested environmental law changes: Greenpeace says oil and gas companies got what they wanted from Ottawa”, (09 January, 2013), *CBC News*, online: <<http://www.cbc.ca/news/politics/energy-industry-letter-suggested-environmental-law-changes-1.1346258>>.

*Prosperity Act*<sup>176</sup> (a large omnibus legislation) amended the *Fisheries Act*, *NEBA*, *SARA*, and rewrote the *CEAA* (now the *CEAA, 2012*), while the *Jobs and Growth Act*<sup>177</sup> (a second omnibus legislation), replaced the *NWPA* with a much weaker, *Navigation Protection Act*.<sup>178</sup> The *MBCA* was the only piece of legislation EFI requested be reformed that the Federal Government's omnibus legislation did not amend.

Specific changes to the *Fisheries Act* and the *Canadian Environmental Assessment Act* (which were included in the *Jobs Growth and Long-term Prosperity Act*) also reflect specific amendments proposed by the natural resource industry; these are further outlined below.

### *The Fisheries Act*

In 2012, pursuant to s. 142 of the *Jobs Growth and Long-term Prosperity Act* (commonly referred to as the Omnibus Bill, due to its controversially diverse and broad-reaching scope), several amendments were made to the *Fisheries Act*. One such change of note is the amendments<sup>179</sup> made to s. 35.

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<sup>176</sup> Jobs, Growth and Long-term Prosperity Act, S.C., 2012, c.19.

<sup>177</sup> Jobs and Growth Act, 2012, S.C., 2012, c. 31.

<sup>178</sup> Carol Linnitt, "Letter Reveals Harper Government Granted Oil and Gas Industry Requests", (10 January 2013), *Desmogblog*, online: <<http://www.desmogblog.com/2013/01/10/letter-reveals-harper-government-grants-oil-and-gas-industry-requests>>.

<sup>179</sup> Section 35 of the *Fisheries Act* previously read:

**35.** (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(a) the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(d) the harmful alteration or disruption, or the destruction, of fish habitat is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or

(e) the work, undertaking or activity is carried on in accordance with the regulations (*Fisheries Act*, R.S.C., 1985, c. F-14, s. 35 (as of 2013-11-24, amended by SC 2012, c.19, s. 142).

Following the 2012 changes, s. 35 now reads:

**35.** (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

Evidence has recently surfaced that the s. 35 changes may have been the direct result of calls for modification from the resource industry.

In 2006, several British Columbia-based business associations (the Business Council of British Columbia, the British Columbia Chamber of Commerce, the Council of Forest Industries of BC, the Mining Association of British Columbia, The Association for Mineral Exploration BC, and the BC Agriculture Council) made a joint submission regarding amending the *Fisheries Act* – the *Joint BC Industry Position Paper*.<sup>180</sup> The group complained that “issues related to federal government regulatory processes, particularly those involving [Fisheries and Oceans Canada (DFO)], are ... the primary cause of project delays.”<sup>181</sup> Specifically, the BC industry associations were concerned with delays and high costs to industry flowing from the DFO’s requirement for evaluation and authorization of activities that may cause harmful alteration, disruption and destruction of fish habitat (s. 35 of the *Fisheries Act*).<sup>182</sup>

They wished to see reform of the “DFO’s interpretation and application of the *Act*’s provisions concerning the harmful alteration, disruption and destruction of fish habitat (“HADD”); they recommended that the DFO “[e]xpand the manner in which projects which may cause a HADD can proceed, without the need for specific DFO authorization.”<sup>183</sup> One specific recommendation involved incorporating a temporal aspect into the definition of

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(a) the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(d) the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or

(e) the work, undertaking or activity is carried on in accordance with the regulations.

(3) The Minister may, for the purposes of paragraph (2)(a), make regulations prescribing anything that is authorized to be prescribed.

(4) Regulations made under subsection (3) are exempt from section 3 of the *Statutory Instruments Act* (*Fisheries Act*, R.S.C., 1985, c. F-14, s. 35).

<sup>180</sup> Business Council of British Columbia, et al., *Fisheries Act Renewal, 2006: Joint BC Industry Position Paper*, (Vancouver: 2006).

<sup>181</sup> Business Council of British Columbia, et al., *Fisheries Act Renewal, 2006: Joint BC Industry Position Paper*, (Vancouver: 2006), at 5.

<sup>182</sup> Business Council of British Columbia, et al., *Fisheries Act Renewal, 2006: Joint BC Industry Position Paper*, (Vancouver: 2006), at iii.

<sup>183</sup> Business Council of British Columbia, et al., *Fisheries Act Renewal, 2006: Joint BC Industry Position Paper*, (Vancouver: 2006), at ii, 5.

“harmful” – stressing the difference between temporary and permanent disruptions to fish habitat.<sup>184</sup>

A few years later, in 2010, a consulting firm (High Park Group) was commissioned by Fisheries and Oceans Canada (then the Department of Fisheries and Oceans) (DFO), to “gather industry and business observations about the habitat protection provisions of the *Fisheries Act*.”<sup>185</sup> The CEA, CHA, and the Saskatchewan Chamber of Commerce (SKCC) were among the industry and business groups consulted. The various industry and business associations criticized the *Fisheries Act* for causing “considerable barriers to infrastructure investment” and complained that the Act “increased regulatory costs and timelines.”<sup>186</sup>

Regulatory costs and timelines have since been lowered, and barriers broken, due in large part to the s. 35 amendments. As seen above, s. 35 previously prohibited the harmful alteration, disruption, or destruction of fish habitat (this was coupled with the now repealed s. 32, which prohibited unregulated killing of fish). The 2012 amendments lower this threshold to “serious harm”; serious harm is defined as “death of fish or any permanent alteration to, or destruction of, fish habitat” (emphasis added).<sup>187</sup> This amendment allows industry to carry out work and undertakings which harmfully alter or disrupt fish and their habitat – so long as it is not *permanent*.

The 2010 report by High Park Group also noted that “CEA/CHA and SKCC call[ed] for modification of the act’s definition of ‘fishery’ to clarify that it refers to ‘*commercial, recreational, subsistence or aboriginal use of fish as a resource...*’ [emphasis added].<sup>188</sup>

Despite “a dearth of evidence to back industry concern and a ‘lack of cogent and substantive documentation of industry positions on the issue’” according to the consulting group’s report, the wording of s. 35 was swiftly amended by the Federal Government to directly reflect the s. 35 industry request; the term “fish habitat” was narrowed to “fish that

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<sup>184</sup> Business Council of British Columbia, et al., *Fisheries Act Renewal, 2006: Joint BC Industry Position Paper*, (Vancouver: 2006), at 7.

<sup>185</sup> Gloria Galloway, “Controversial changes to Fisheries Act guided by industry demands”, *The Globe and Mail*, (05 August, 2013), online: <<http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>>.

<sup>186</sup> Gloria Galloway, “Controversial changes to Fisheries Act guided by industry demands”, *The Globe and Mail*, (05 August, 2013), online: <<http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>>.

<sup>187</sup> Jobs, Growth and Long-term Prosperity Act, S.C., 2012, c.19, s.132(4).

<sup>188</sup> Gloria Galloway, “Controversial changes to Fisheries Act guided by industry demands”, *The Globe and Mail*, (05 August, 2013), online: <<http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>>; High Park Group, *An Amended Fisheries Act for Canada: Applying the Principles of Sustainable Development to an Historic Industry and a Critical Resource Base – A Report Prepared by the High Park Group for the Canadian Electricity Association and the Canadian Hydropower Association*, (Toronto: High Park Group, 2010), at 9.

are part of a *commercial, recreational or Aboriginal fishery*, or ... fish which support such a fishery” [emphasis added].<sup>189</sup>

Environmental groups were also consulted prior to the 2012 amendment, however, unlike the requests made by CEA, CHA, the SKCC, and other resource industry groups, none of their input (urging the Federal Government to strengthen and enforce the *Fisheries Act*), was incorporated into the amendments.<sup>190</sup> In fact, the 2012 amendments seriously *weakened the Fisheries Act* – making it more industry-friendly.

The amendments to s. 35, which alter the definition of ‘fishery’ using language taken directly from a resource-industry call for modification, do not even attempt to mask the fact that the Federal Government has allowed industry to write this law. Other recent legislative changes have gone even further – allowing industry to directly draft new environmental legislation.

### *The CEAA, 2012*

According to a 2010 letter from Environment Canada officials, to the (at the time) Environmental Minister, the Honourable Peter Kent, the oil and gas industry wanted the Federal Government “to use newly-adopted legislation from 2010 to place limits on the range and powers of an environmental assessment.”<sup>191</sup> The new 2012 environmental assessment legislation, the *CEAA, 2012* did just this – narrowing the range of powers and removing various regulatory triggers. Much of the wording for this new, narrowed legislation was taken directly from oil and gas industry requests – either during private meetings, or through published letters and reports.

Leading up to the summer release of the *CEAA, 2012*, in January 2012, the Honourable Peter Kent (then Environmental Minister), met with the Canadian Energy Pipeline Association (CEPA) to “hear their concerns and views on how to improve regulatory reforms for energy pipeline projects” – particularly those concerning “the federal environmental assessment process.”<sup>192</sup> Kent told CEPA that the Federal Government wished to “increase the predictability and timeliness of the entire review process, from the environmental assessment through to permitting”, letting CEPA know that “pipeline development is

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<sup>189</sup> Gloria Galloway, “Controversial changes to Fisheries Act guided by industry demands”, *The Globe and Mail*, (05 August, 2013), online: < <http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>>.

<sup>190</sup> Gloria Galloway, “Controversial changes to Fisheries Act guided by industry demands”, *The Globe and Mail*, (05 August, 2013), online: < <http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>>.

<sup>191</sup> Mike De Souza, “Bureaucrats told Peter Kent reforms could undermine environmental protection”, (01, December 2012), *O Canada*, online: <<http://o.canada.com/news/bureaucrats-told-peter-kent-reforms-could-undermine-environmental-protection>>.

<sup>192</sup> Government of Canada, “Scenario Brief: Meeting with Canadian Energy Pipeline Association”, 26 January, 2012, online: <<http://www.scribd.com/doc/107088634/Peter-Kent-pipelines-meeting>>.

certainly among the major industrial sectors that are top-of-mind” in considering the modernization of the Canadian environmental regulatory system.<sup>193</sup>

A month later, in February 2012, Michelle Rempel, Parliamentary Secretary to the Minister of the Environment Office, met with Canadian Natural Resources Limited (CNRL) to “hear CNRL concerns and views on how to improve regulatory reforms for resource development projects”, again, particularly concerning “the federal assessment process.”<sup>194</sup> Much as Kent had told CEPA, Rempel let CNRL know that “resource development is certainly among the major industrial sectors that are top-of-mind” in considering the modernization of the Canadian environmental regulatory system.<sup>195</sup> Rempel also acknowledged that “the reforms, when introduced, may be very controversial<sup>196</sup>” and asked to rely on CNRL’s support.<sup>197</sup>

While these meetings alluded to the role of the natural resource and energy industry in the drafting of the new environmental assessment legislation, a report released by the Energy Policy Institute of Canada (EPIC) made this connection even clearer. In August of 2012, EPIC released a report titled “Canadian Energy Strategy Framework: A Guide to Building Canada’s Future as a Global Energy Leader.”<sup>198</sup> EPIC is a conglomerate of the energy industry. Some notable members include CAPP, CEPA, Enbridge, Encanca, RTA, Shell, the Forest Products Association, Imperial Oil, TransCanada, and the Canada Gas Association.<sup>199</sup>

There was no attempt to hide the fact that EPIC, this energy industry conglomerate, intended for their report to directly impact legislative changes to Canada’s environmental statutes; the report states:

*“The purpose of this paper is to identify for government the specific areas of the Canadian regulatory system that require urgent attention, as well*

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<sup>193</sup> Government of Canada, “Scenario Brief: Meeting with Canadian Energy Pipeline Association”, 26 January, 2012, online: <<http://www.scribd.com/doc/107088634/Peter-Kent-pipelines-meeting>>.

<sup>194</sup> Government of Canada, “Scenario Brief: Meeting with Canadian Natural Resources Limited On Regulatory Reform”, 02 February 2012, online: <<http://www.scribd.com/doc/122795755/Controversial-reforms>>.

<sup>195</sup> Government of Canada, “Scenario Brief: Meeting with Canadian Natural Resources Limited On Regulatory Reform”, 02 February 2012, online: <<http://www.scribd.com/doc/122795755/Controversial-reforms>>.

<sup>196</sup> While the Federal Government acknowledged the controversial nature of the amendments to the *CEAA*, and asked the natural resource industry for support, they “took a very different approach when engaging with First Nations”, who were told that “any rumours regarding changes to environmental laws were merely ‘speculative’.” (Carol Linnitt, “Internal Documents: CAPP Hesitant to Admit Its Request for ‘Holistic’ Overhaul of Environmental Legislation that Influenced Omnibus”, (10 April, 2013), *Desmogblog*, online: <<http://www.desmog.ca/2013/04/10/capp-hesitant-admit-request-holistic-overhaul-environmental-legislation-influenced-omnibus-budget-bill-internal-documents>>).

<sup>197</sup> Government of Canada, “Scenario Brief: Meeting with Canadian Natural Resources Limited On Regulatory Reform”, 02 February 2012, online: <<http://www.scribd.com/doc/122795755/Controversial-reforms>>.

<sup>198</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>.

<sup>199</sup> For a full list of members, please refer to: <http://www.canadasenergy.ca/members/>

*as EPIC's recommendations for how these reforms might be carried out. EPIC looks forward to working with government on each of these issues and reforming the Canadian regulatory system" [emphasis added].<sup>200</sup>*

Specifically, EPIC's report makes recommendations for changes to the *Canadian Environmental Assessment Act (CEAA)*; the report's recommendations are reflected in the *CEAA, 2012*, which replaces the *CEAA*.

While EPIC's report was not formally released until August 2012 – a month after the *CEAA, 2012* was released – draft versions were made accessible several years prior. In July 2011, draft recommendations were presented at the Energy and Mines Ministers' Conference in Alberta; at this conference, Canada's (at the time) Minister of Natural Resources, the Honourable Joe Oliver<sup>201</sup>, announced "significant improvements<sup>202</sup> to the country's regulatory framework, much of which was reflective of [EPIC's] regulatory document and recommendations."<sup>203</sup> The release of *CEAA, 2012* in June 2012 revealed that recommendations from the draft versions of the EPIC report were copied *verbatim* into the new environmental assessment legislation (*CEAA, 2012*).

With regard to environmental assessments (and the *CEAA*), the EPIC report recommended:

- Changes to the scope of designated projects;
- Shortened review timelines; and
- Changes to public participation in environmental assessments.

### Scope

Regarding the scope of environmental assessments (EAs), EPIC makes some recommendations regarding factors to be considered. EPIC suggests that the "EA should be directed at whether or not the project will likely result in types of effects that are unique relative to other projects in the past, whether the types of effects associated with the project are capable of being mitigated, and, if the project will likely result in

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<sup>200</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada's future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Document-Aug-1.pdf>>, p 57.

<sup>201</sup> Earlier in 2012, Joe Oliver published an open letter, in which he accused "environmentalists and other radical groups" of "threaten[ing] to hijack our regulatory system" and blocking projects, like, presumably, the Northern Gateway Pipeline (Crawford Kilian, "'Environmentalists, other radical groups,'; threaten pipeline: Joe Oliver", *The Tyee*, (09 January, 2012), online: <[http://thetyee.ca/Blogs/TheHook/Environment/2012/01/09/Environmentalists\\_other\\_radical\\_groups/](http://thetyee.ca/Blogs/TheHook/Environment/2012/01/09/Environmentalists_other_radical_groups/)>).

<sup>202</sup> The changes to the *CEAA* can be seen as "improvements" from the perspective of those involved in the natural resource industry.

<sup>203</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada's future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Document-Aug-1.pdf>>, at p 11.

significant unique effects that cannot be mitigated, whether there are alternative ways of carrying out the project that would reduce these effects.”<sup>204</sup>

In the *CEAA, 2012*, the Federal Government wholly adopted EPIC’s recommendations; “the list of issues that the EA should address is almost identical to what [EPIC] recommends with reference to mitigation, [the significance of] unique effects, and alternative approaches to project development.”<sup>205</sup> Section 19 of the *CEAA, 2012* (“Factors To Be Considered”) includes “the significance of the effects”, “mitigation measures that are technically and economically feasible”, and “alternative means of carrying out the designated project.”<sup>206</sup>

### Shortened Review Timelines

According to EPIC, EAs “unnecessarily” delay projects for “too long”; EPIC’s report recommends that review timelines be shortened.<sup>207</sup> Section 10 of the new *CEAA, 2012* reflects the energy conglomerate’s recommendation; s. 10 requires that a screening of a designated project to decide whether an EA is required must be completed within a mere 45 days.<sup>208</sup> Furthermore, the EA must be completed and a decision made within a mere 365 days (s. 27(2)), or 24 months if referred to a review panel (s. 38(3)).<sup>209</sup> It is unlikely that 45 days will provide sufficient time to gather information on a project’s potential effects in order to determine the potential for adverse environmental effects and the need for an EA, nor that 365 days or 24 months will provide sufficient time for a full and comprehensive assessment; however, the EA review can certainly no longer be deemed “too long”.

EPIC also recommended that, in general, EAs be performed in a “quicker and more streamlined fashion”.<sup>210</sup> One of the major changes from the *CEAA* to the *CEAA, 2012*, is that the Federal Government has streamlined the EA process. This has been accomplished through reducing the number of factors to be considered in an EA (s. 19), limiting the consideration of environmental effects to those that fall within federal jurisdiction (s. 5),

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<sup>204</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>, at p 45.

<sup>205</sup> Forest Ethics, *Who Write the Rules? A Report on Oil Influence, Government Laws, and the Corrosion of Public Process*, (Dec 2013), online: <[http://www.forestethics.org/sites/forestethics.huang.radicaldesigns.org/files/Who\\_writes\\_the\\_rules.pdf](http://www.forestethics.org/sites/forestethics.huang.radicaldesigns.org/files/Who_writes_the_rules.pdf)> at p 3.

<sup>206</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s.52), s.19.

<sup>207</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>, at p 14, 47.

<sup>208</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s.52), s. 10

<sup>209</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s.52), ss. 27(2), 38(3).

<sup>210</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>, at pp 14, 47.

establishing shortened binding timelines (s. 10, and ss. 27(2) and 38(3)), and reducing public participation<sup>211</sup> (s. 2(2) – definition of “interested party”).<sup>212</sup>

### Reduced Public Participation in EAs

EPIC complained in their report that the current public participation process has “increasingly led to extensive involvement by individuals and organizations with no connection the land in question”; EPIC made specific recommendations to change this.<sup>213</sup> The EPIC report states that:

*“The Federal Government must develop regulations that restrict participation in federal EA review to those parties that are directly and adversely affected<sup>214</sup> by proposal in question...The only third parties that should be allowed to participate in these reviews are those parties that have the potential to be directly and adversely affected by the proposed project” [emphasis added].<sup>215</sup>*

The energy conglomerate indicated to the Federal Government that they *must* restrict public participation in EAs to parties which are *directly and adversely affected*, and the Federal Government answered with a new s. 2 definition of “interested party” under the *CEAA, 2012*: persons who are “*directly affected*”. Before the *CEAA, 2012*, any Canadian could comment on projects; now, under s. 2(2) of the *CEAA, 2012*, with respect to a designated project, “a person is an interested party if ... the person is *directly affected* by the carrying out of the designated project.”<sup>216</sup>

### **Conclusion**

The above evidence demonstrates specific instances where the resource industry has apparently directed the precise form and content of new and amended environmental legislation; it is likely that many other examples exist for which evidence has not yet come to light.

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<sup>211</sup> Discussed in further detail below.

<sup>212</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s. 52), ss. 2(2), 5, 10, 19, 27(2), and 38(3).

<sup>213</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>, at p 46.

<sup>214</sup> This statement likely draws from the “directly and adversely affected” test used by the Energy Resources Conservation Board in Alberta (*Energy Resources Conservation Act*, RSA 2000, c. E-10, s.40). This test has historically been used to prevent public participation in decisions affecting Alberta’s environment; for example, see *Kelly v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349, at para 13.

<sup>215</sup> Energy Policy Institute of Canada, *A Canadian Energy Strategy Framework: A guide to building Canada’s future as a global energy leader*, (2012), online: <<http://www.canadasenergy.ca/wp-content/uploads/2012/08/Final-Documents-Aug-1.pdf>>, at p 48.

<sup>216</sup> *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c.19, s. 52), s. 2(2).

Since 2008, the Federal Government has held 2,733 private meetings with oil industry organizations; this figure outstrips meetings with environmental organizations by 463 percent.<sup>217</sup> Using these meetings as lobby operations, the natural resource industry is directly exerting influence on the Canadian government's policy-making.<sup>218</sup> As demonstrated above, not only are they influencing policy, but industry is also apparently writing the legislation.

It could be argued that the examples of legislative changes discussed above are not anomalous occurrences, but rather part of a roadmap of changes to Canada's environmental law landscape. A roadmap is defined as "a plan or strategy intended to achieve a particular goal", and that is exactly what the two omnibus pieces of legislation (the *Jobs Grown and Long-term Prosperity Act*<sup>219</sup> and the *Jobs and Growth Act*<sup>220</sup>) appear to be – plans intended to achieve a more industry-friendly legal landscape, and consequently, a less environmentally protected Canada.<sup>221</sup> In fact, briefing notes recently released under the *Access to Information Act*<sup>222</sup> reveal that in a meeting between the Federal Government and industry (CEPA), then Environmental Minister, the Honourable Peter Kent, referred to the upcoming omnibus legislation as "the Roadmap bill":

*"Overall, the Roadmap bill proposes system-wide modernization of the regulatory system related to development projects, which would include major pipeline developments..."*<sup>223</sup>

Following this roadmap, the legislative landscape of Canada is being redrawn – and it is becoming clear who is holding the pen.

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<sup>217</sup> Carol Linnitt, "'Big Oil's Oily Grasp': Polaris Institute Documents Harper Government Entanglement with Tar Sands Lobby", *Desmogblog*, online: <<http://www.desmog.ca/2012/12/04/big-oil-s-oily-grasp-polaris-institute-documents-government-entanglement-tar-sands-lobby>>

<sup>218</sup> Polaris Institute, *Big Oil's Oily Grasp – The Making of Canada as a Petro-State and How Oil Money is Corrupting Canadian Politics*, (Polaris Institute: 2012), at p 12.

<sup>219</sup> Jobs, Growth and Long-term Prosperity Act, S.C., 2012, c.19.

<sup>220</sup> Jobs and Growth Act, 2012, S.C., 2012, c. 31.

<sup>221</sup> Oxford Dictionary, *Definition of 'roadmap'*, online: <<http://www.oxforddictionaries.com/definition/english/road-map>>.

<sup>222</sup> *Access to Information Act*, R.S.C., 1985, c. A-1.

<sup>223</sup> Government of Canada, "Scenario Brief: Meeting with Canadian Energy Pipeline Association", 26 January, 2012, online: <<http://www.scribd.com/doc/107088634/Peter-Kent-pipelines-meeting>>.

## **Appendix B: Excerpts from the Environmental Law Centre Submission to the Information Commissioner on the Muzzling of Federal Government Scientists**

[See [http://www.elc.uvic.ca/press/documents/2012-03-04-Democracy-Watch\\_OIPLtr\\_Feb20.13-with-attachment.pdf](http://www.elc.uvic.ca/press/documents/2012-03-04-Democracy-Watch_OIPLtr_Feb20.13-with-attachment.pdf) for the entire submission.]



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Our File No. 2012-03-04

February 20, 2013

Ms. Suzanne Legault, Information Commissioner of Canada  
Office of the Information and Privacy  
Place de Ville, Tower B  
112 Kent Street, 7<sup>th</sup> Floor  
Ottawa, Ontario  
K1A 1H3

Dear Commissioner Legault:

**Re: Request, made pursuant to s. 30(1)(f) of the *Access to Information Act*, that you investigate the federal government's policies and actions to obstruct the right of the public and the media to speak to government scientists.**

We request that you initiate an investigation under s. 30(1)(f) of the *Access to Information Act* into the systematic efforts by the Government of Canada to obstruct the right of the media – and through them, the Canadian public – to timely access to government scientists. We ask you to take this step because of the deeply troubling findings in the attached report, *Muzzling Civil Servants: A Threat to Democracy*.

There are few issues more fundamental to democracy than the ability of the public to access scientific information produced by government scientists – information that their tax dollars have paid for. We as a society cannot make informed choices about critical issues if we are not fully informed about the facts.

Yet the attached report shows that the federal government is preventing the media and the Canadian public from speaking to government scientists for news stories – especially when the scientists' research or point of view runs counter to current Government policies on matters such as environmental protection, oil sands development, and climate change.

In sharp contrast to past Canadian practice and current U.S. Government practice, the federal government has recently made concerted efforts to prevent the media – and through them, the general public – from speaking to government scientists, and this, in turn, impoverishes the public debate on issues of significant national concern.

These restrictions may also hamper the ability of the public to know and identify what government information and records actually exist related to issues of public importance. Without such knowledge, the public may not be able to request or obtain relevant records under the *Access to Information Act*.

As noted in the attached report:

- The Professional Institute of the Public Service of Canada, that represents government scientists, has stated:

*Media and public access to federal scientists has become politicized, resulting in an inability to effectively communicate important scientific news to Canadians through mainstream media.*

- A letter to the Prime Minister signed by the Professional Institute of the Public Service of Canada, World Federation of Science Journalists, and Canadian Science Writers Association stated:

*Over the past four years, journalists and scientists alike have exposed the disturbing practices of the Canadian government in denying journalists timely access to government scientists...federal scientists are still not allowed to speak to reporters without the "consent" of media relations officers...Delays in obtaining interviews are often unacceptable and journalists are routinely denied interviews.*

- The internationally respected science journal, *Nature*, echoed such experiences and concerns in an editorial.

- An Environment Canada analysis has found that Environment Canada scientists:

*...are very frustrated with the new process. They feel the intent of the policy is to prevent them from speaking to media.*

- The President of the Professional Institute of the Public Service of Canada has stated:

*This government, by suppressing access to this information, is depriving the Canadian and international communities of significant discoveries.*

- A prominent academic who was a leading scientific member of the Intergovernmental Panel on Climate Change that received the 2007 Nobel Peace Prize has stated:

*There is no question that there is an orchestrated campaign at the federal level to make sure that their scientists can't communicate to the public about what they do.*

- Another prominent academic has stated:

*We have somehow deemed it OK or permissible for an Iron Curtain to be drawn across the communication of science in this country.*

In the past, government scientists could generally share information about their work without such restrictions. This helped citizens become informed, and helped them discover what information – and possibly also what records – Government possessed. This practice educated citizens, enriched public debate, and encouraged sound government decision-making. However, the federal government has developed new policies that undermine the ability of media and the public to obtain information from government scientists. As the report documents:

- The federal government has implemented new policies that routinely require political approval before scientists can speak to the media about their scientific findings. Government scientists are routinely instructed to not speak publicly – or to respond with pre-scripted “approved lines” that have been vetted by public relations specialists.
- For example, under Fisheries and Oceans Canada (DFO) policy, Communications staff now comprehensively control interviews with scientists and “ensure that approved media lines are in place.” No journalist is to be granted an interview until the Minister’s own Director of Communications has been notified.
- Natural Resources Canada has adopted particularly strict rules restricting the ability of scientists to talk to the media about “climate change” and “oil sands.”
- Environment Canada’s policy specifically forbids scientists from speaking to the public on identified issues such as climate change or protection of polar bear and caribou until the Privy Council Office gives approval. Environment Canada has conceded that the Minister and his staff have a say as to whether or not the media will have access to a scientist.

The report goes on to document a number of specific incidents where scientists have been prevented from sharing their taxpayer-funded research with the media and the Canadian public.

Restricting media access cuts off the public’s access to government scientists’ information and viewpoints. The media plays an irreplaceable role in the democratic process – by disseminating information to the public. The role of the media has been formally recognized as critically important by the Supreme Court of Canada:

*The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions.<sup>1</sup>*

Cutting off access to government's best information on an issue damages the quality of public debate.

### **The Commissioner's Jurisdiction to Investigate**

Section 2 of the *Access to Information Act* (the "Act") states that the explicit statutory "Purpose" of the Act is to provide a right of access to government records:

*...in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific...*

[emphasis added]

Unfortunately, the effect of the policies and actions described above (and detailed in the attached report) is to undermine the s. 2 "principle" that government information should be available to the public.

The effect of the federal government's policies and actions may also prevent Canadians from even learning what scientific records the federal government possesses. If this occurs, these policies and actions violate Canadians' s.4 right under the Act to access government records.

Section 30(1)(f) authorizes you to investigate any matter "relating to ...obtaining access to records under this Act." Therefore, pursuant to s. 30(1)(f) of the Act, we ask that you initiate an investigation into the overall effects of the federal government's policies and actions that prevent timely access by the media to government scientists.

We ask you to make this investigation because Canadians cannot make smart choices about critical issues such as climate change, oil sands development and environmental protection if the public does not have full access to the Government's best scientific knowledge on those issues.

Finally, we submit that the issues involved here are of paramount importance to the continuing operation of democracy in Canada. As the Supreme Court of Canada has stated "the overarching purpose of access to information legislation is to facilitate democracy." The Court went on to quote the classic formulation of this issue:

*Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process*

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Commissioner Legault  
Feb 20, 2013

*and contribute their talents to the formation of policy and legislation if that process is hidden from view.*<sup>8</sup>

If you find that, overall, the federal government's policies and actions have the effect of hampering or denying public access to government records, we hope that you will issue a strong public ruling, finding these policies and actions to be in violation of the Act.

In any case, we hope that you will issue a strong public statement that such policies and actions could result in the hampering or denial of public access to government records, and that as a result such policies and actions violate the spirit of the Act.

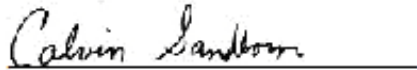
Please let us know if you need any more information by contacting Tyler Sommers, Coordinator of Democracy Watch, at 613-241-5179 or by email at [info@democracywatch.ca](mailto:info@democracywatch.ca).

We look forward to hearing back from you.

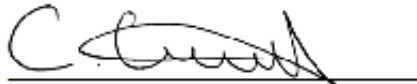
Sincerely,



Tyler Sommers, Coordinator of Democracy Watch



Calvin Sandborn  
Legal Director, Environmental Law Centre



Clayton Greenwood, Law Student



Naomi Kovak, Articling Student

Attached: *Muzzling Civil Servants: A Threat to Democracy*

<sup>1</sup> *R. v. National Post* 2010 SCC 16, at para. 50.

<sup>8</sup> *Dagg v. Canada* 148 D.L.R. (4<sup>th</sup>) 385, [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63 (QL) (cited to QL) at para. 61.