

History of the Court Challenges Program

- **1978**

The Court Challenges Program was established in 1978 to provide funding for official minority language cases based on sections 93 and 133 of the *Constitution Act, 1867*. In the period preceding the establishment of the Program, there had been challenges to the Manitoba *Official Languages Act* and Quebec's *Charte de la langue française*. The federal government, then Liberal, decided that it would fund selected language minority cases that challenged the constitutionality of provincial laws through a Court Challenges Program administered by the Human Rights Directorate of the Department of the Secretary of State. Challenges to federal laws were not included in the scope of the Program. Cases funded had to be of substantial importance, have legal merit, and affect more than one person. The federal government decided which cases would be funded.

- **1982**

The mandate of the Court Challenges Program was expanded to include the language rights provisions of the new *Charter of Rights and Freedoms*, namely sections 16 to 23. These sections set out the right of qualified parents to have their children educated in the official minority language of the province in which they live, where numbers warrant; the right to legislative bilingualism; the right to receive services in official minority languages; and the right to use French or English in courts.

- **1985**

In 1985, section 15 of the new *Charter of Rights and Freedoms* came into effect, providing Canada's first constitutional guarantee of equality. A Parliamentary Committee on Equality Rights, chaired by Patrick Boyer, held hearings across Canada and

recommended in its report *Equality For All* that “funds ...be provided to assist those involved in equality litigation.”¹

In the short time since section 15 came into force on April 17, 1985, there have been many lawsuits initiated on the basis of this provision of the Charter. They involve individuals on the one side and, generally speaking, government departments or agencies on the other side. The imbalance in financial, technical and human resources between the opposing parties constitutes a serious impediment to those who might wish to claim the benefit of section 15, thus reducing the effectiveness of resorting to the courts as a means of obtaining redress.

Parliamentary Committee on Equality Rights

At the same time, the Committee noted a major weakness in the existing Court Challenges Program, namely that the federal government could be in a position of a conflict, because it both determined who would receive financial assistance to initiate *Charter* challenges and represented the challenged departments or agencies in that litigation.²

The federal government responded quickly to the recommendations and observations of the Committee. The Program’s mandate was expanded again, this time to include challenges to federal laws, policies or practices based on sections 15 (equality), 27 (multiculturalism) or 28 (sex equality) of the *Charter*. Also, the federal government entered into a five-year contribution agreement with the Canadian Council on Social Development, so that the Program could be administered independently.

- **1989**

As 31 March 1990, the end of the 5 year contribution agreement with CCSD approached, the government reviewed the Program to decide whether to continue it. From June to November 1989 the Standing Committee on Human Rights and the Status of Disabled

Persons carried out an intensive study of the Program, hearing from 62 witnesses. The Committee concluded unanimously that there were “not merely sufficient, but compelling reasons” for continuing the Program.³ The Committee recommended that it be renewed for a ten year period.⁴

Regarding the mandate of the Program, the Committee recommended:

that the bar to funding equality cases that challenge provincial legislation, policies and practices be removed; and

that the federal government consult with minority language groups about the possibility of funding cases based on statutory language rights guarantees, such as the *Official Languages Act*, as well as the *Charter* and other constitutional provisions.⁵

• 1990

In July 1990 the Minister of State for Multiculturalism and Citizenship entered into an agreement with the Human Rights Centre at the University of Ottawa renewing the Program from 1 August 1990 to March 31, 1995. The Minister confirmed that “there are still significant areas of language and equality rights which require clarification.”⁶

However, on the issue of expanding the mandate to include cases of national significance which do not fall within federal jurisdiction, the Government stated in its response to the Standing Committee’s report that this would generate numerous applications in areas such as education, health, housing, welfare, transportation, and social services. As a result, the resources of the Program would be overburdened.⁷

• 1992

In February 1992, in the Budget Estimates, the Government of Canada announced the cancellation of the Court Challenges Program. Two reasons were given. Since the

Program had made it possible for a significant number of cases to be initiated, it was no longer needed. Also, it would be less costly for the Department of Justice to manage the funding of court challenges on an ad hoc basis. The Standing Committee on Human Rights and the Status of Disabled Persons met again in emergency session to study the issue of the Program's survival.

The observations made to the Committee since the Program was cancelled have shown us the importance placed by the people of Canada on the principle of access to the courts. At no time during the 34th session of Parliament has the Standing Committee received so many briefs on a single subject. The comments submitted to us came not only from a former justice of the Supreme Court of Canada and municipalities such as Ottawa, but also from organizations such as Rural Dignity Canada, the Shelter for Abused Women and their Children, the Centre for Spanish-Speaking Peoples and the Inuit Women's Association.

Paying Too Dearly, Standing Committee on Human Rights and the Status of Disabled Persons

In its June 1992 report, *Paying Too Dearly*, the Committee concluded that the Program played an essential role in giving Canadians access to the courts, and that it had become indispensable to the development of constitutional case law. The Committee noted that many experts testified that the courts' interpretation of constitutional rights was in its early stages. The Committee also concluded that the closure of the Program would not save money and that the Program had managed its funds soundly and efficiently. In the Committee's view, a lack of access to justice was too high a price to pay when compared to the modest cost of the Program. Finally, the Committee decided unanimously that the Program should be retained and restructured so that it would be protected from "the vagaries of the fiscal and financial imperatives of any government in the future."⁸

- **1993**

Responding to widespread public concern about the Program's cancellation, Kim Campbell, then Minister of Justice, announced in August 1993, prior to the fall election, that the government would reinstate the Program if elected. The Liberal Party also promised in its election Red Book to reinstate the Program.

- **1994**

In order to decide on a structure for the reinstated Program, a consultation was held under the supervision of Price Waterhouse with participation from groups working in the equality rights field, minority official language communities, academia, and the Canadian Bar Association. With a remarkable unity of purpose, participants agreed on a new structure and mandate. A new not-for-profit organization, completely independent from government, was established, incorporating into its by-laws a collaborative relationship among equality rights and language rights groups, academia, and the bar. The organization was registered under the *Canada Corporations Act* as the Court Challenges Program of Canada/Programme de contestation judiciaire du Canada. The founders of this new organization agreed that its mandate should permit the Program to fund equality rights challenges to provincial laws, policies and practices, and to fund language rights challenges under the *Official Languages Act*. The objects of the new Court Challenges Program Corporation are:

To provide assistance for test cases of national significance (without regard to geographical factors), put forward on behalf of or by groups or individuals, which will promote and enhance the language rights of Canada's official language communities or the equality rights of historically disadvantaged groups and to administer test-case funding according to contribution agreements with the federal government and any other source of funding...

Despite this broad language, the Court Challenges Program's ability to fund cases continues to be circumscribed by the contribution agreements it has signed with its sole funder, the Government of Canada.

The Government of Canada signed a four year contribution agreement with the new Court Challenges Program in October 1994.

1997

The Program was evaluated by an independent agency, which recommended renewal of the contribution agreement. It also noted that there was a consensus among the members of the Program that the mandate restrictions which arise from the terms of the contribution agreements limit the Program's impact.

The contribution agreement was renewed with Canadian Heritage for a five-year term, which ends in March 2003 .

2001

The new Court Challenges Program has been remarkably successful. It has attracted highly skilled and dedicated staff. The Program also benefits from the unwavering support of those who use the Program, and of the many Canadians who are committed to the goal of making rights accessible.

2006

In September 2006, the Government of Canada, cancelled the Court Challenges Program once more, despite an independent evaluation done in 2003 that endorsed the Program's purpose and operation, and despite the renewal of the contribution agreement with Heritage Canada until March 2009.

Endnotes

¹ *Equality For All: Report of the Parliamentary Committee on Equality Rights*, (Ottawa: House of Commons, 1985) at 133

² Ibid.

³ *Court Challenges Program, First Report of the Standing Committee on Human Rights and the Status of Disabled Persons*, (Ottawa: House of Commons, 1989) at 23.

⁴ Ibid. at 28.

⁵ Ibid at 32 and 33.

⁶ *Response to the First Report of the Standing Committee on Human Rights and the Status of Disabled Persons*, in *Paying Too Dearly: Report of the Standing Committee on Human Rights and the Status of Disabled Persons*, Minutes of Proceedings and Evidence of the Standing Committee on Human Rights and the Status of Disabled Persons, House of Commons, Issue No. 23, June 11, 1992, Third Session of the Thirty-fourth Parliament, 1991-92, Appendix A, at 3.

⁷ Response, *ibid.* at 20.

⁸ *Paying Too Dearly: Report of the Standing Committee on Human Rights and the Status of Disabled Persons*, (Ottawa: House of Commons, 1992).