



Legal and Political Considerations Associated with the Cancellation of the Court Challenges Program of Canada

Jonas Kiedrowski¹ and William T. Smale^{2*}

¹*Public Legal Education Association of Saskatchewan, Saskatoon, Saskatchewan, Canada.*

²*School of Education, Trent University, Peterborough, Ontario, Canada.*

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ABSTRACT

Unique in the Western world, the Court Challenges Program was an undertaking funded entirely by the Federal Government of Canada, without regard to jurisdiction, to subsidize legal test cases of national importance regarding the clarification and interpretation of language and equality rights guaranteed under Canada's *Constitution*. This paper reviews the literature on the cancellation of the Court Challenges Program of Canada. Except from 1992 to 1994, when Brian Mulroney's Conservative government withdrew all financial support for the program, it existed in its various institutional forms from 1978 to 2006, until Stephen Harper's Conservative government cancelled it on September 25, 2006. In June 2008, the program was somewhat resurrected under the name of the Language Rights Support Program. This program, despite its questionable aspects, helped change the landscape of Canadian law in regards to access to services for Aboriginals, differently-abled people, the rights of women and sexual minorities, and access to education, health and the

*Corresponding author: E-mail: williamsmale@trentu.ca;

courts for those speaking minority languages. This paper examines the stormy history of the Court Challenges Program, explores criticisms of its administration, and considers the political motivations that led to the program's demise in 2006 and subsequent resurrection in 2019.

Keywords: Access to justice; charter; court challenges program; equality rights; language rights.

1. BACKGROUND OF THE COURT CHALLENGES PROGRAM

The Court Challenges Program can be traced back to November 1976 and the first election of the Parti Québécois (PQ) separatist government led by then Premier René Lévesque. One of the PQ's early moves was the enactment of Bill 101 (The Charter of French Language) on August 26, 1977, a controversial language act which defined French as Quebec's only official language, thereby making it the official language of government, business, schools, and the courts. At this time, Pierre Elliott Trudeau's federal Liberal government was actively promoting bilingualism across Canada, and the PQ's move was viewed as a major affront to Prime Minister Trudeau's efforts. Parts of Bill 101 were constitutionally unsound (e.g., see the Supreme Court of Canada decisions in *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al.*, [1] and *Ford v. Quebec (a. g.)*, [2], but the Trudeau government declined to test the bill in court. Instead, to avoid a political showdown with Quebec City that might only have strengthened the separatist movement, the federal government decided to wait for a private citizen to challenge Bill 101 in court and then join the campaign to present legal arguments in the case [3]. However, by 1978, no challenges to this law had occurred, so the federal government decided to set up the Court Challenges Program to financially sponsor important provincial legal challenges to minority language discrimination anywhere in Canada. Trudeau's government based its decision on sections 93 and 133 of the *Constitution Act, 1867* in addition to section 23 of the *Manitoba Act, 1870*, which, respectively, protect rights and privileges regarding denominational schools and establish English and French as the two languages to be used in Parliament and the Quebec Legislature; and establishes English and French as the two languages to be used in the Manitoba Legislature and in the publications of the laws adopted by the Legislature [4,5]. The Court Challenges Program, however, would not fund court cases that challenged the constitutionality of questionable federal laws.

The creation of the Court Challenges Program of Canada, administered by the Human Rights Directorate of the Department of the Secretary of State, could be considered either an expansion of personal and civil liberties, or an underhanded political move by the federal government. Many citizens in Canada would have disapproved if Ottawa had taken the provinces to court to enforce bilingualism. However, by funding private citizens to do what he could not accomplish without committing political suicide, Trudeau found a very clever -- if not politically disingenuous -- way to accomplish this objective through grass-roots lawsuits that in actuality may have been spurred mainly by the availability of government funds. As Brodie (2001) stated, "The Court Challenges Program had become the legal action branch of the Federal Government's attack on the PQ's language legislation" (p. 365) [3]. However, this program may have been Trudeau's attack on all oppressive provincial language laws, legislation, and policies, and not just an attack on the Parti Québécois, as indicated by three legal test cases sponsored by the Court Challenges Program against the provincial governments of Saskatchewan and Manitoba. As noted above, the Court Challenges Program of Canada would not fund legal challenges to the federal government's handling of language [5,6]. This fact supported the theory that the Court Challenges Program was designed as Prime Minister Trudeau's back-door plan to undermine constitutionally questionable provincial statutes (i.e., laws made by legislative bodies of a province) while raising as little political opposition as possible. While Trudeau's motives may have been well intentioned from a nationalist viewpoint, his methods were debatable. Between 1978 and 1982, the Court Challenges Program "funded six cases, three in Quebec and three in Manitoba and Saskatchewan, with a total annual budget of \$200,000" [7].

When the *Canadian Charter of Rights and Freedoms* [8] became law in 1982, the scope of the Court Challenges Program was broadened to include the official language rights provisions (sections 16 to 23) protected by the new *Charter*, but the program was not massively changed until

section 15 came into effect on April 17, 1985, constitutionally guaranteeing all Canadians equality rights. Section 15 of the *Canadian Charter of Rights and Freedoms* [8] reads as follows:

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Unlike the John Diefenbaker Conservatives, who produced and ushered in Canada's *Bill of Rights* in 1960, Conservatives in 1985 were viewed by several minority groups as being less than progressive in terms of human rights and civil liberties. Many of these groups did not trust the Brian Mulroney government to ensure their protection under section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* [3]. Thus, groups supporting Aboriginals, women, racial and cultural minorities, differently-abled people, and people of diverse sexualities argued that rights on paper are inaccessible without funding to ensure their implementation and enforcement [9]. Meanwhile, the Conservatives were looking to promote a socially progressive image in a way that would not be either a major or costly undertaking for the government [3]. As then Conservative Justice Minister John Crosbie stated, "If we had discontinued the program we would have received very bad publicity reinforcing our image as not being 'with it' on social issues" (p. 7) [7]. Thus, the Conservatives expanded the scope of the Court Challenges Program to include litigation challenging federal legislation, policies, and practices under sections 15 (equality), 22 (multiculturalism), and 28 (sex equality) of the *Charter* [10], "or in which an argument based on section 2 (fundamental freedoms) or section 27 (multicultural heritage) is made in support of arguments based on section 15" (p.1) [11]. Furthermore, the Conservatives hired the Canadian Council on Social Development (a national and non-profit organization) to administer the Program

independently of the Canadian Government, with an annual budget of \$1.8 million a year.

The Court Challenges Program of Canada continued, largely unchanged, until February 1992 when the Mulroney Conservative government discontinued it as part of a deficit reduction effort. Between 1985 and 1992, the Program funded "178 court cases at all levels of the system, including 24 cases in the Supreme Court" (p. 770) [12]. Initially, Multiculturalism and Citizenship Minister Gerry Weiner contended that the Court Challenges Program of Canada had fulfilled its mandate, having supplied the legal system with "a solid body of jurisprudence for future years" (p. A 17) [13]. In the same vein, Conservative MP Michael Cooper added that the Court Challenges Program "had served its purpose by the time of its cancellation, and had become a source of funding for special interest groups" [14]. Immediately, protests were raised from across the legal and political spectrum, with even the Conservative-dominated human rights Commons committee criticizing the cancellation for leaving the poor and marginalized without access to justice in Canada [15,7]. Moreover, former Supreme Court of Canada Justice Bertha Wilson (she served the Court of from 1982-1991) defended the Court Challenges Program, stating that it was both "imaginative and worthwhile" (p. 368) [3]. Nationwide editorial support for the Program was so strong that even the right-leaning *Calgary Herald* newspaper editorial board came out in support of the Court Challenges Program [16]. Echoing this support, Dobbin (1993) noted that no amount of lobbying on the Program's "behalf by the legal profession, politicians of all stripes, editorialists or the groups affected had any impact. There had been virtually no negative press, no group was complaining about the program or even mentioning it – with the single exception of the Reform Party" (p. 56) [17]. In response, the federal government changed its argument from one based on the body of jurisprudence perspective to one based on the issue of affordability, given the budgetary constraints of the early 1990s [18].

In the run-up to the September 8, 1993 federal election, the Jean Chrétien Liberals announced in their election Red Book that if elected, they would reinstate the Court Challenges Program of Canada, and Kim Campbell, then Prime Minister of Canada, followed up with the same election promise to craft a new Charter Law Development Fund [5,6], thus turning the Program "into a

political football” (p. 308) [19]. However, Campbell’s conversion to the Court Challenges Program could be viewed as political opportunism, rather than as a commitment to supporting minority rights litigation. Campbell was trying to sell herself as a feminist to the electorate in Canada [20], but some viewed her effort as insincere and politically driven given her failed attempt, as Minister of Justice, to put certain abortion procedures back into the *Criminal Code of Canada* in 1991, even though the Supreme Court in *Tremblay v. Daigle* [21] had previously struck down the law as unconstitutional in 1989 [22]. Reinstatement of the Court Challenges Program was merely history repeating itself: like the Mulroney government, Campbell’s Conservatives also tried to appear socially progressive with little cost or direct government-induced controversy attached to their efforts. The Conservative hypocrisy was obvious to many, for Campbell was the Justice Minister when the Court Challenges Program had been cancelled in the first place. This inconvenient fact raises questions about the consistency of her legislative actions with fundamental aspects of feminist ideology, such as its emphasis on empowerment of all women, including those belonging to disenfranchised or minority groups. Maude Barlow summarized Campbell’s feminism by stating, “Kim Campbell does fight to have an equal number of women at the table, but she does no class analysis of who is at the table” (p. 11) [20]. Campbell’s actions and legislative history indicated that party politics might have been more important than feminist principles to her, so her newfound support of minority rights litigation and the Court Challenges Program of Canada was suspect to many individuals [20].

When the Chrétien Liberal government finally relaunched the Program in October 1994, its structure was significantly changed from that of its previous incarnation, although its mandate remained the same. Unlike its previous incarnation as a federal government agency that was independently managed, the new Court Challenges Program of Canada/ Programme de Contestation Judiciaire du Canada was founded as a not-for-profit autonomous corporation and registered charity under the *Canadian Corporations Act*, and funded solely by the Government of Canada, with an annual budget of approximately \$2.75 million. This relatively modest funding was contingent on the program’s adherence to certain guidelines agreed to by the Program and the federal government [9]. The

Court Challenges Program, at this time, and in every annual report afterwards, reiterated its desire to be able to fund cases relating to provincial equality rights legislation. However, the funding agreement was never expanded to include this ability. One factor in this reversal was probably the potential backlash from provincial governments facing equality rights litigation funded by federal dollars.

The Court Challenges Program was run until it was cancelled in the Harper Conservative government’s first budget in 2006, even though the Program had a renewal agreement with Heritage Canada until March 2009, in addition to an independent neutral third-party evaluation that approved the program’s purpose and operation [5,10]. Between 1994 and 2006, the Program funded 575 court cases at all levels of the legal system, including those at the intervener status [23]. The Court Challenges Program led to several precedent-setting Supreme Court of Canada decisions, including *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 (equality rights for medically necessary treatments for children) [24]; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 (the right for parents and teachers to use reasonable force against children) [25]; *Harper v. Canada (Attorney General)*, 2004 (third-party spending limits on voting) [26]; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 (inmates’ right to vote) [27]; *Gosselin v. Quebec (Attorney General)*, 2002 (constitutionality of receiving social assistance) [28]; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 (physical fitness standards for female firefighters) [29]; *M. v. H.*, 1999 (equality rights for same-sex partners) [30]; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 (the right to a state-funded lawyer when the government seeks to remove a child from his or her parent’s custody) [31]; *Vriend v. Alberta*, 1998 (discrimination based on sexual orientation) [32]; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 1997 (the rights of a pregnant woman versus the rights of her fetus) [33]; and *Egan v. Canada*, 1995 (equality rights for same-sex couples) [34]. In 2008, following a formal out-of-court settlement with the Fédération des communautés francophones et acadienne du Canada and other groups, the federal government agreed to reinstate the Program in December 2009 under the new name of the Language Rights Support Program [35] with a budget of \$1.5 million

annually, but with a reduced mandate and scope. This new program, which funded only language-related test cases and mediation issues, continued, largely unchanged, until 2017 when the Justin Trudeau Liberal government discontinued it.

In the run-up to the 2015 federal election, the Justin Trudeau Liberal Party announced that if elected, it would reinstate the Court Challenges Program to subsidize and litigate test cases of national importance regarding the clarification and interpretation of official language and equality rights guaranteed under Canada's *Constitution*. In January 2019, the new Court Challenges Program was relaunched and modernized by the Department of Canadian Heritage in collaboration with the Department of Justice, and independently administered by the University of Ottawa. When the advisory committees were formed, two panels were created to reflect the two different funding streams of the Program: the seven-member Expert Panel on Human Rights and the seven-member Expert Panel on Official Languages [36,37].

The Program, with its \$5 million a year budget, offered a minimum of \$1.5 million annually to support and defend official language rights protected by section 93 and 133 of the *Constitution Act, 1867*; section 23 of the *Manitoba Act, 1870*; sections 16 to 23 of the *Charter*; any parallel constitutional provisions; and the linguistic aspects of freedom of expression in section 2 of the *Charter* when invoked in an official language minority case. The new Program also financially supported rights under the *Official Language Act* including section 4 of Part 1 (proceedings of parliament); section 5 to 15 and 10 and 13 of Part II (legislative and other instruments); Part IV (communications with and services to the public); Part V (language of work); Part VII (advancement of English and French); and section 91 (staffing) [38]. The Program would also distribute the remaining federal government money to human rights test cases including section 2 of the *Charter* (fundamental freedoms, including freedom of religion, expression, assembly and association); section 3 of the *Charter* (democratic rights); section 7 of the *Charter* (life, liberty and the security of the person); section 15 of the *Charter* (equality rights); section 27 of the *Charter* (Multiculturalism), when raised in support of an argument based on equality rights; and section 28 of the *Charter* (gender equality) [38].

According to Mathen and Kirup (2018), the new Court Challenges Program will face complex and "controversial choices, including possible applications related to medical aid in dying; the practice of solitary confinement in Canada's federal prisons; and religious freedom" (p. 307) [39]. For instance in 2020, the English Montreal School Board (EMSB) filed a lawsuit against the Quebec government, challenging the constitutionality of Bill 21 (Quebec's religious symbols law), which restricts public sector employees, including teachers and administrators, from wearing hijabs and other religious symbols in school. The case was based on both section 23 (minority education language rights) and section 15 (equality rights) under the *Canadian Charter of Rights and Freedoms* [40,41].

2. CRITICISMS OF THE COURT CHALLENGES PROGRAM OF CANADA

The structural changes made in the 1994 relaunching led to harsh and widespread criticism of the Court Challenges Program. The pre-1992 Program was a government operation managed by an independent agency (The Canadian Council on Social Development) to avoid any real or perceived conflict of interest allegations. In October 1994, the Program was re-launched as a not-for-profit corporation and registered charity funded solely by the Government of Canada. This change gave rise to a justifiably contentious issue. By operating as an agency independent of the Government of Canada, the Court Challenges Program did not report to Parliament and was also exempt from Access to Information requests (i.e., requests for information from government institutions). As well, its claim of solicitor-client privileges and confidentiality relating to all applications for funding, and all case development funds dispersed, increased the perception that a veil of secrecy surrounded the new Court Challenges Program. This change was implemented in order to eliminate the need to reveal confidential and private information to parties with interests in ongoing cases that were in the process of development [42]. The confidentiality around funding was dramatically expanded in 2000 when the scope of solicitor-client privilege was deemed to include all litigants funded in *Charter* cases [43]. This legal restriction to protect information was recognized and affirmed by the 2000 Federal Court decision in *L'Hirondelle v. The Queen* [44]. Social activist

groups such as R.E.A.L. (Realistic, Equal, Active, for Life) Women Canada protested that the Program “won’t say who got what and how much.... Court Challenges is only one of many in which the public has no idea, and neither does the government” (para. 6) [45]. However, the Program’s case funding was not distributed behind a veil of total secrecy, for many litigants agreed to have their identities revealed openly. The Court Challenges Program had legal opinion to back its solicitor-client privilege policy [43], but the legal argument was debatable: as R.E.A.L. Women (2001) pointed out, the Court Challenges Program was “neither a client nor a solicitor in its funding arrangements” (p. 2) [46]. Thus, the confidentiality policy made the Court Challenges Program an easy target for a knee-jerk political reaction.

The make-up of the Program’s management and advisory committees led to further criticism. When the resurrection of the Program began after the 1993 federal election, equality-seeking groups expressed in initial meetings their desire to have an active role in the organization. Thus, when the advisory committees were formed, certain guidelines and rules were put in place. Two panels were created to review applications: the five-member Language Rights Panel and the seven-member Equality Rights Panel. At least one member of this panel had to be of a racial minority, and one had to be differently-abled [9]. Furthermore, the Court Challenges Program was directed under the belief that “the Program must belong to those groups that were likely to use it” (p. 9) [9], and in its composition, the 12-member Advisory Committee lived up to this commitment, as this committee appeared to include what could have been construed by many as less-than-neutral individuals. In 2001, of the total 12 members of its advisory panels, five had links to causes or groups that received funding from the federal government’s Court Challenges Program. The Women’s Legal Education and Action Fund (LEAF); the National Association for Women and the Law (NAWL); the Elizabeth Fry Society (efry); Equality for Gays and Lesbians Everywhere (EGALE); and the Vancouver gay group, the December 9th Coalition, all had representation on the Advisory Committee [46].

However, because the Court Challenges Program distributed federal government money through a non-government organization, the government could not directly be held responsible for any conflict of interest. As well, R.E.A.L. Women’s (2001) analysis of the

program was able to take issue with the organizational links of only one of the twelve members of the Advisory Panels that made the actual decisions on funding requests [46]. However, non-neutrality can be an inherent problem in attempts to address minority oppression. How can such groups dedicated to the elimination of ingrained societal imbalances be structured as a composite of a society that, in general, may hold discriminatory views? The status quo may have brought about the oppression in the first place, and, with the inclusion of section 15(2), even the *Canadian Charter of Rights and Freedoms* [8] acknowledged the need to tilt the balance in favour of minorities. Thus, Brodie’s (2002) assertion that “when the [Program] decides that a case merits federal funding, then federal funding should be available to both sides of the case equally” (p. 16) [43] could be considered by some individuals as an over-simplistic argument contrary to the principles of section 15(2) of the *Charter* [8].

Political commentator and broadcaster Ezra Levant (2006) also waded into the controversy involving the perceived lack of neutrality in the administration of the Court Challenges Program when funding minority groups. Applauding the Program’s cancellation, he concluded that “groups that have to rely on government handouts lack public support” (p. 66) [47]. Viewed in this broader political context, Levant’s statements arguably served to expose the belief that free-market economic principles should be applied to access to human rights. In a system where availability of justice can often depend on purchasing power for legal services, Levant’s statement, ironically, furthered the justification for a program to help ensure constitutional rights for historically disadvantaged, vulnerable, and marginalized groups.

Social conservatives denied funding by the Court Challenges Program complained that what they perceived as a left-wing tilt to the Program was hindering their efforts to obtain funding. Dr. Rainier Knopff, a political scientist and scholar with the University of Calgary, called the Court Challenges Program a “biased boondoggle that had gone well past its best-before date” and argued that “socially conservative groups never got money. Not a penny, as far as I know” (p. A 20) [48]. Kheiriddin (2007) supported this criticism, contending that Court Challenges Program funding appeared “to have had little to do with financial need, and more to do with

connections and ideology” (p. 2) [7]. Echoing these comments, Carpay (2007) noted that equality “demands that the governments refrain from spending tax dollars to favour one side of a controversial issue, especially where there are several sides which should be heard, and not merely two” (p. 122) [49]. It is difficult to verify which groups were denied funding, as the Court Challenges Program of Canada released no information on denied applications. However, according to the *Sixteenth Report of the Standing Committee on the Status of Women* (2007), some groups were “consistently being denied funding” [50]. The most vocal of those organizations was the pro-family group R.E.A.L. Women. However, its position papers revealed that this group was opposed to abortion and affirmative action, and called for the tightening of divorce legislation and the abolition of same-sex marriage [51]. Naturally, a program dedicated to expanding the constitutional rights of minorities may not fund litigation requests based on positions contrary to the program’s mandate. R.E.A.L. Women Canada did, however, apply for funding on three separate occasions. All three funding requests were rejected “on the grounds that REAL Women does not promote “equal” rights for woman” (p. 3) [52]. The court cases in which this organization was denied funding were *Borowski v. Canada*, 1989 (fetal rights) [53], *Tremblay v. Daigle*, 1989 (fetal rights) [21], and *R v. Sullivan*, 1991 (definition of a human being) [54].

In an argument virtually parroting then Treasury Board president John Baird’s justification for cancelling the Court Challenges Program, Levant (2006) complained that it did nothing but line the pockets of lawyers [47]. Admittedly, the program did distribute up to \$60,000 for a case and \$35,000 for each appeal or intervention, including all pre-trial funding [55], but this broken-down figure is less than than the “up to \$130,000” (p. 30) claimed by some of the Program’s opponents [56]. Furthermore, the Canadian Bar Association pointed out in an open letter to the Canadian Heritage Committee that given the high cost of litigation against governments, most cases taken on by Bar Association members with funding from the Court Challenges Program still required lawyers and legal experts to work *pro-bono* or for reduced fees to make the cases affordable for the plaintiffs [57]; thus, lawyers did not benefit greatly from the Program. Joe Comartin, the former NDP justice critic and Windsor lawyer, corroborated the Bar Association’s stand through independent

research into *pro bono* work on cases funded by the Court Challenges Program [58]. Nevertheless, cases brought against the government needed to be defended by government lawyers and legal professionals, thus creating work on both sides of the litigation.

Most complaints about the Court Challenges Program can be countered with the organization’s 2003 independent audit, which concluded that the program was being soundly run and was addressing the needs for which it had been created. However, the audit also suggested that more accountability and transparency about whom the Program funded would be desirable, and recommended that it follow disclosure guidelines similar to those in the *Access to Information Act* [59]. The Program never did fulfill this request, presumably due to the previously cited legal opinion that the Program operated under solicitor-client privilege.

3. POLITICAL MOTIVATIONS FOR CANCELLING THE COURT CHALLENGES PROGRAM

The September 25, 2006 cancellation of the Court Challenges Program revealed how partisan politics often work in conjunction with governance. The cancellation, Redford (2011) averred, was believed “to be part of a broader political agenda because the announcement was made alongside sweeping changes” (p. 30) to a number of government programs [60]. The Program was cut as part of a \$1 billion effort to, as then Treasury Board Chair John Baird claimed, “trim the fat” in federal government spending [61]. At that time, the federal Conservative government also made cuts to social and equity-seeking programs such as the Status of Women office, adult literacy programs, youth employment and internship programs, and Indigenous anti-smoking strategies, to name just a few of the programs cut [62]. These cuts, which primarily targeted the non-profit sector, came on the same day the government announced a \$13.2 billion dollar surplus, which eliminated arguments of fiscal necessity for these cuts and reinforced the argument that they were made because the Court Challenges Program may have been a poor ideological fit with the federal Conservative government. Even so, the federal government, while claiming to be “trimming the fat,” did not make a strong cost-based case for eliminating the Court Challenges Program and cited only its \$2.75 million dollar annual cost. Thus, Canadian Heritage (2007) stated: “Of this

amount, up to 20% is for program administration, 20% is for activities related to language rights, and 60% is for activities related to equality rights” (p. 9) [63]. In reality, the program’s indirect costs to the federal government were far more. Not only was the government subsidizing the costs of lawsuits against itself, but it also shouldered the costs of defending against these suits and of rewriting laws and legislation in response to successful legal claims.

John Baird’s most-quoted justification for the cuts may have been nothing more than political posturing. He stated that the federal government should not “subsidize lawyers to challenge the government’s own laws in court” [61]. As lawyers may be a far more politically saleable target than minority groups, Baird’s argument came as no surprise. However, minority groups -- not lawyers -- determined and initiated legal challenges under the Court Challenges Program, and many lawyers worked *pro bono* or at reduced fees on these cases. Because this program and its operation were not commonly known to the general public, Canadians were likely to take Baird’s statement at face value.

In a manner reminiscent of the cancellation of the Court Challenges Program in 1992, Conservatives also cited the large volume of case law precedent that had already been established through the Program as rationalization for axing it [64]. In essence, Conservatives claimed that minority constitutional rights were now well entrenched in the Canadian legal system and that the Court Challenges Program was, therefore, unnecessary [64]. This argument is suspect at best, as it relies on the premise that systemic discrimination and inequality no longer exist in Canadian society. While there is no question that the Court Challenges Program was a valuable tool in remedying injustices done to historically disadvantaged groups, it would be unwise to presume that *Canadian Charter of Rights and Freedoms* case law had now become a panacea for disadvantaged Canadians facing discrimination by the government. Furthermore, as governments and societal values change and evolve over time, disadvantaged minorities not only need to have avenues to clarify and protect their constitutional rights, but also need these avenues of protection to be accessible. The Supreme Court of Canada, in the case of *B.C.G.E.U. v. British Columbia* (1988) described accessibility to the courts as follows: “It would be inconceivable that Parliament and the provinces

should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court” (para. 24) [65]. Judging from the 142 applications for funding for constitutional equality rights and language rights that the Court Challenges Program received in 2005 to 2006 [66], a demand for its services would appear to have existed in Canada.

Peculiarly, the federal government did not emphasize the most politically legitimate and ideologically neutral justification for cancelling the Court Challenges Program: its lack of accountability under the *Access to Information Act* [67]. This argument was brought up, but it was clearly not the main argument that the government was pursuing. The Conservatives did, however, pick up on this issue in government committee meetings [50], but the accountability argument may have been disingenuous for the government to make, because if it truly believed in both accountability and minority rights, a simple solution could have been to restructure the Court Challenges Program under direct government control with a contracted-out management agreement to avoid conflicts of interest, much like the Program had prior to 1992. This restructuring could have facilitated applying access to information laws to the Court Challenges Program.

Given these facts, the reasons for cancelling the Court Challenges Program appeared to have been ideologically driven by the federal Conservatives. MacDonald (2007) was more precise, suggesting that “the Conservatives are the BNA party. The Liberals are the Charter Party” (p. 95) [68]. Indeed, several important test cases and legal interventions funded by the Program drew the ire of many Conservatives and right-leaning social conservative groups, on largely ideological grounds. For example, the Court Challenges Program funded an unsuccessful attempt by the Council of Canadians to abrogate Canada’s commitments to NAFTA because the agreement violated the *Constitution Act*, the reversal of a conviction of a man running a gay “bawdry house,” a successful *Charter* challenge to obtain voting rights for federal inmates who were Canadian citizens, an unsuccessful attempt by the Little Sister Book Store to challenge the constitutionality of the obscenity law, an unsuccessful attempt by the Canadian Foundation for Children, Youth and the Law to challenge the constitutionality of section

43 of the Criminal Code of Canada, and a decision reaffirming the unconstitutionality of the traditional definition of marriage [49,66,69,70].

Moreover, for right-leaning social conservative groups, another irritating case funded by the Court Challenges Program was probably the intervener status funding granted to Democracy Watch on behalf of the National Anti-Poverty Association in the case of *Harper v. Canada* (2004) [26]. While head of the conservative National Citizens' Coalition, Stephen Harper (who later became prime minister in 2006) brought forth a case challenging the constitutionality of Canada's third-party spending limits on election advertising by advocacy groups. The National Citizens' Coalition argued that placing limits on third-party spending during election campaigns restricts free speech and expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* [8]. Section 2, which addresses fundamental freedoms, reads as follows:

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including, freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Democracy Watch, amongst other groups, argued in this case that limiting spending by third parties is essential to ensure that wealth does not unduly influence election campaigns. Democracy Watch contended that lack of wealth creates a barrier for the disadvantaged, which, in turn, disallows equal opportunity to express opinions. The Supreme Court of Canada agreed, and Stephen Harper lost his case [69], in part due to funding from the federal government's Court Challenges Program. In summing up the Supreme Court decision in *Harper v. Canada*, Justice Bastarache (2004), speaking for the majority, asserted that "In promoting the equal dissemination of points of view by limiting the election advertising of third parties who are influential participants in the electoral process, the overarching objective of the spending limits is electoral fairness" (p. 828) [26]. The Court further stated that the law should "create a level playing field for those who wish to engage in the electoral discourse, enabling voters to be better informed" (p. 828) [26].

However, the Court Challenges Program's funding of special interest groups, equality-seeking groups, and non-conservative political opponents was likely just as detrimental to the Program as was Harper's selection for his Chief of Staff, Dr. Ian Brodie. Before joining Harper in February 2006, Brodie spent part of his academic career researching the Court Challenges Program. His writings on the topic referred to the courts as "having all the fun of making political decisions under the guise of interpreting constitutional law" (p. 664) [71] and labelled government-funded interest group litigation as "a complex dance of federal social animators and their favoured activists" (p. 16) [43]. His scholarly works analyzing the Court Challenges Program included *Friends of the court: The privilege of interest group litigants in Canada*, a book that grew out of his 1997 doctoral dissertation, "Interest groups and the Supreme Court of Canada" [72]. Brodie's dissertation was supervised by former Alberta Conservative Cabinet Minister Dr. Ted Morton. In a peculiar twist, in Morton's 2006 bid for the Conservative leadership in Alberta, one of his policies was the revocation of Métis hunting and fishing rights [73] -- rights upheld the previous year in the Saskatchewan case of *R. v. Laviolette* (2005), a case supported by the Court Challenges Program [69]. In this 2005 case, Ron Laviolette, a Métis person, was 'unlawfully' ice fishing during closed season and was charged contrary to the Saskatchewan *Fisheries Act*. Applying the *Powley* test, established by the Supreme Court of Canada, the trial judge, Kalenith, held that Laviolette had a "Métis Aboriginal right to fish for food" out of season (para. 57) [74]. A similar conclusion was reached by the Supreme Court of Canada in, *R. v. Powley* (2003) [75], and by the provincial courts in *R. v. Belhumeur* (2007) [76] and *R. v. Goodon* (2008) [77]. Morton's opposition to these constitutional rights provided yet more evidence that Conservatives' support of the *Canadian Charter of Rights and Freedoms* may be far from absolute. Furthermore, had Morton become Alberta's premier, his government may have faced a *Charter* challenge to this policy, and that challenge may have had a good chance of receiving Court Challenges Program funding. Given the poor ideological fit between the Conservatives' platform and the Court Challenges Program, as well as the criticisms that it engendered among many Conservatives, their cancellation of it in 2006 was hardly surprising.

4. CONCLUSION

This paper presented an overview of the Court Challenges Program of Canada and examined its evolution in a legal and political context. The Court Challenges Program aims to provide financial assistance to Canadian individuals and groups in order to bring equality rights and language rights cases of national importance before the courts. This paper looked at the political implications of federal government support for the Program and the considerable change, controversy, and scrutiny it has withstood since its establishment in 1978. In announcing the return to the modernized Court Challenges Program, then Justice Minister Jody Wilson-Raybould stated that the Liberal government “was seeking to give voice to Canadians. The program does just that. It demonstrates the value of a robust constitutional culture. Inclusive and optimistic, the Court Challenges Program is a powerful symbol of Canadians’ commitment to our Constitution, and to each other” [39]. Ultimately, in funding cases of national importance regarding language and equality rights guaranteed under Canada’s *Charter of Rights and Freedoms*, the Court Challenges Program supports the rights of all Canadians from coast to coast.

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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