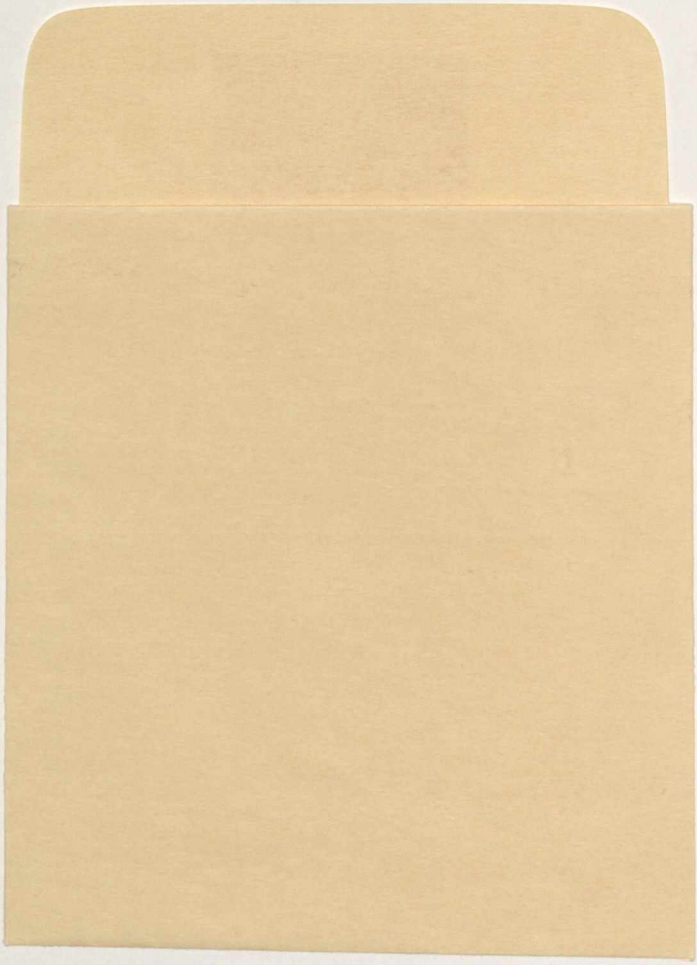
CANADA

Court Challenges Program

First Report of the Standing Committee on Human Rights and the Status of Disabled Persons

Bruce Halliday, M.P.
Chairman

December 1989



Court Challenges Program

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The First Report is available on audio–cassettes from:

The Clerk
Standing Committee on
Human Rights
and the Status
of Disabled Persons
House of Commons
Ottawa, Ontario
K1A 0A6

HOUSE OF COMMONS

Issue No. 15

Tuesday, October 31, 1989
Thursday, November 2, 1989
Tuesday, November 7, 1989
Wednesday, November 22, 1989

Chairman: Bruce Halliday

CHAMBRE DES COMMUNES

Fascicule nº 15

Le mardi 31 octobre 1989
Le jeudi 2 novembre 1989
Le mardi 7 novembre 1989
Le mercredi 22 novembre 1989

Président: Bruce Halliday

Minutes of Proceedings and Evidence of the Standing Committee on

Human Rights and the Status of Disabled Persons

Procès-verbaux et témoignages du Comité permanent des

Droits de la personne et de la condition des Personnes handicapées

RESPECTING:

Pursuant to Standing Order 108(3)(c) Consideration of the Court Challenges Program

INCLUDING:

The First Report to the House

CONCERNANT:

Conformément à l'article 108(3)c), étude du programme de contestations judiciaires

Y COMPRIS:

Le premier rapport à la Chambre

Second Session of the Thirty-Fourth Parliament, 1989

Deuxième session de la trente-quatrième législature, 1989

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ADDENDUM

At page *iv* in the English and French version at the end of the Members' list add:

OTHER MEMBERS WHO PARTICIPATED:

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David Bjornson
Dawn Black
Ethel Blondin
John F. Brewin
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Fernand Robichaud
Scott Thorkelson
Stan Wilbee

ERRATA

At page 6, in the English version only, in the last sentence of the third paragraph the words "Canadian Assistance Plan" should read Canada Assistance Plan.

At page 7, in the English version only, the second sentence of the last paragraph should read: "The Sub-committee commended..."

At page 8, in the English version only, in the second line of the first paragraph should read: "... the Secretary of State and the Minister of Justice of Canada,..."

At page 14, in the English version only, in the fourth line of the second paragraph, the word "and" should be deleted following "28" and the fifth line of the last paragraph, in the English version only, should read: "... to practice disadvantageous to women."

At page 16, in the English version only, the third sentence of the first paragraph of Section "B", should begin: "A 1988 Federal Court decision..."

At page 20, in the English version only, the fifth line of the second paragraph of Section 2 should read: "...Commissioner-in-Council of the Territory....." and the sixth line of the same paragraph, in the English version only, should read: "...Parliament and Government of Canada....."

At page 24, in the English version only, the fourth line of the first paragraph should read: "..... when the mechanism for doing this is a judicial process in which it can often take more than five...."

At page 30, in the English version only, the last line should read: "...expressed dissatisfaction..."

At page 32, in the English version only, the sixth line of the third paragraph should read: "... the funding panels become more rigorous..."

At page 41, in the English version only, recommendation #12 should begin: "That a new contribution..."

At page 53, in the English version only, the first line of recommendation 19-4 should read: "The Department of Justice should conduct a review of its approach to litigation under....."

REPORT TO THE HOUSE

The Standing Committee on Human Rights and the Status of Disabled Persons has the honour to present its

FIRST REPORT

In accordance with its mandate under Standing Order 108(3)(c), your Committee has examined the major alternative recommendations relating to the Court Challenges Program and its forecast termination on 31st March 1990. Your Committee has heard evidence from a range of expert witnesses and reports its findings and recommendations.

ACKNOWLEDGEMENTS

The Committee could not have completed its study on Court Challenges Program, without the co-operation and support of numerous people. The Chairman and Members of the Committee extend their thanks to all the witnesses who shared with them their insights and their knowledge on this subject, as well as the organizations and individuals that submitted briefs.

Our thanks go, as well, to the staff of the committee. Dr. Jack Stilborn and Dr. William Young of the Library of Parliament established and coordinated our research program. Mr. Howard Mirsky, also of the Library, assisted with legal research. Marie Louise Paradis, the Clerk of the Committee, organized our activities and managed the production of this report.

The Members of the Committee also wish to express their appreciation to Ms. Kathryn J. Randle and Mr. Georges Royer, respectively the English and French language editors of this report, and to the staff of the Committees Directorate, the Translation Bureau of the Secretary of State and the support services of the House of Commons, which provided logistical and administrative support in the development of this report.

Finally, the Chairman wishes to thank the Members of the Committee for the numerous hours they dedicated to studying this question and preparing this report.

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INTRODUCTION

On 25 September 1985, the Minister of Justice, the Hon. John Crosbie, and the Secretary of State, the Hon. Benoît Bouchard, announced a major revitalization and expansion of the Court Challenges Program. The Program had been in existence since 1978, when it was established in the Department of the Secretary of State to assist linguistic minorities in clarifying and asserting their language rights through the courts and, in 1982, had been given increased funding to support litigation clarifying a broadened range of language rights, including those set out in section 23 of the *Canadian Charter of Rights and Freedoms*.

The 1985 program, to be administered by the Canadian Council on Social Development at arm's length from the government, was broadened to enable support for individuals and groups challenging federal legislation, practices and policies in test cases based on section 15 of the *Charter*, dealing with equality rights, which had just come into effect. Since its inception, the program has remained unique to Canada. It recognizes that codified rights do not, by themselves, guarantee very much unless a means is available to ensure that they will be put into practice on behalf of those they are intended to protect.

The expanded Court Challenges Program of 1985 was given a five–year funding commitment by the government, thus ensuring its life until 31 March 1990. The program is currently under review by the government, and a decision on its renewal is expected early in the new year.

Our awareness of these facts is the central reason for this study. We wanted to give Canadians an opportunity to make their views about the Court Challenges Program known, at a date early enough to be taken into consideration in a decision about its future. We wanted, as well, to look closely at what the program has achieved and at whether improvements might be recommended for the future, assuming the program warranted continuation.

Thus, on 8 June 1989, we instructed our research staff to compile information and analyses during the summer, and we agreed unanimously to proceed with intensive study in the fall. Following the return of Parliament, two days of intensive hearings were held, on 28 September and 3 October. Additional witnesses were heard on 5 October and, as required, during ensuing weeks. In all, we heard 62 witnesses formally and various departmental officials informally and received written briefs from groups from British Columbia to Atlantic Canada. We would like to thank all the contributors to this study for their valuable advice and assistance, a great deal of which they will see reflected in what follows.

This report begins with a short history of the Court Challenges Program, tracing the evolution of the program as it was adapted to changing social, political and constitutional

circumstances, and identifies longstanding issues concerning its operation. A second section provides an overview of the results achieved thus far by the program's core activity — the funding of test cases — both in terms of legal decisions and in terms of issues that have been sent to the courts. The third section reviews the advice and suggested recommendations provided to us by our witnesses and sets out the Committee's responses. It also contains our recommendations to which, with the tabling of this report, we request a formal response from the government. We hope, with our witnesses, that this effort is not in vain and that it helps to bring about a Court Challenges Program that is not only continued, but in all senses renewed.

CHAPTER 1

COURT CHALLENGES: HISTORY OF THE PROGRAM

I. ESTABLISHMENT

The original Court Challenges Program began on 10 March 1978 when the Secretary of State, the Hon. John Roberts, and the Minister of Justice, the Hon. Ron Basford, announced the establishment of a fund to provide financial assistance for the legal expenses of certain litigants. The program was to aid those who sought court rulings to clarify the scope of protection afforded official language minorities under either section 93 or section 133 of the *British North America Act* (now the *Constitution Act, 1867*). Section 93 of the *Act* provides protection for minorities in the area of education and denominational schools, and section 133 relates to the use of English and French at the federal level and in the courts and legislatures of Quebec.[1]

When the original court challenge funding program was established, the protection of linguistic minorities was being questioned. The Quebec Superior Court had recently held that the the Quebec Charter of the French Language was in conflict with section 133, and that decision was under appeal. In Manitoba, the courts were considering a case, *Forest* v. *Attorney General of Manitoba* which dealt with the issue of whether the restrictions on French language rights imposed in 1890 infringed on rights constitutionally protected by section 23 of the *Manitoba Act,* the counterpart of section 133 of the *British North America Act* for that province.[2]

Although the courts had decided sixty years earlier with regard to education in Ontario, that Section 93 provides denominational rights but no language guarantees, the highest courts had not determined the same issue for Quebec. Some members of Quebec's English–speaking minority claimed that their rights under section 93 respecting denominational schools were infringed by Bill 101.

The federal government established its litigation fund in 1978 because it considered it was very important to obtain legal definitions of the extent to which the Constitution protected official language minorities. It decided to offer assistance to Mr. Georges Forest to enable him to continue the litigation that he had begun in Manitoba and to provide assistance in the future to an individual or group that decided to commence an action challenging the education provisions of Quebec's Bill 101 on the grounds that these infringed on section 93 of the *B.N.A. Act*.

In part, the government made this money available because of a decision in October 1977 not to proceed by means of a direct reference of these items to the Supreme Court. As a result, the government decided to recognize that this litigation by private individuals or groups

imposed major financial burdens on them. Such court cases were motivated by strongly held principles and were unlikely to provide any material gain to successful litigants.

In essence, the original Court Challenges Program operated within the constraints imposed by the government, and Department of Justice determined the scope of its legal aid. The original criteria established that the government would provide money for cases where *the government* considered that a ruling would have implications for "a number of members of an official language minority community." The government itself, i.e., the Department of Justice, considered the legal merit of each case before offering money to the litigants. The two ministers made the point explicitly that the funding of challenges to the *British North America Act* would not alter the policy that the Attorney General of Canada would intervene in appropriate cases involving the interpretation of language rights under the Constitution.

Initially, the government relied on a form of joint administration for the Court Challenges Program: the legal evaluation of applications was handled by the Department of Justice, and the administration and decision–making aspects fell under the Department of the Secretary of State. In the case of the Justice department, the government's involvement could entail a real or potential conflict of interest. This might arise, for example, when an application for funding was related to a court challenge to federal legislation. Not only would the department's lawyers be deciding on funding for the challenge, but they would also be charged with the government's defence in court.

From 1978 to 1982, the Court Challenges Program funded six cases. Three of these involved challenges to Bill 101, the Quebec Charter of the French Language. The program also funded three other cases where French language minorities in Manitoba and Saskatchewan sought to clarify their rights in those two provinces.

II. INITIAL IMPACT OF THE CHARTER OF RIGHTS AND FREEDOMS

Following proclamation of the *Charter of Rights and Freedoms* in 1982, the Secretary of State, the Hon. Serge Joyal, and the Minister of Justice, the Hon. Mark MacGuigan, reaffirmed and updated the Court Challenges Program. In their announcement on 21 December 1982, the ministers included in the mandate of the Court Challenges Program the right to fund cases involving the equal status of official languages in Canada and minority language education rights under the *Charter*. Specifically, the program's mandate was enlarged to include sections 16 to 23 of the *Charter of Rights and Freedoms*. The ministers also reaffirmed the other parts of the original mandate. (See Appendix A for the full text of the *Charter*.)

In this announcement, the government set out criteria, many of which pertain to the current program. These include the conditions that the issue should be one of substantial

importance and have legal merit; the issue should have consequences for a number of people; duplication should be avoided (two individuals espousing the same cause in the same or another case should not receive financial assistance).

It is important to note two conditions that have been modified since 1982. The first of these, pertaining to interventions in court cases by third parties, stipulated that interveners should *not* be funded, especially when the Attorney General of Canada is an intervener in a case. The second postulated that assistance should not be given when the authorities concerned had given an appropriate assurance of action that would modify the legislation or action under the challenge so as to ensure full compliance with the Constitution.

Attempted modifications in 1982 recognized the potential conflict of interest when the federal government makes decisions about which outside groups might receive assistance to challenge federal legislation. The government proposed to establish an advisory committee to the Secretary of State to assist in decisions regarding applications for money. There is no indication that this committee was ever established, and the Department of Justice continued to advise on whether an application met the program's criteria. (It is interesting to note that by August 1984, the Attorney General of Canada had intervened in five cases that had also received funding from the Court Challenges Program.) The Department had to approve all accounts for legal expenses before payment.

At the end of August 1985, the Court Challenges Program had given funds to, or approved support of, 18 cases (including the six cases funded in the period from 1978 to 1982). The program was considering applications for funding in four other cases (including one case in New Brunswick with four separate applicants). The program's administrators also appeared to find the funding criteria somewhat restrictive because they were seriously considering providing money through the Court Challenges Program to *La Chaussure Brown's Inc. et al.* v. *the Attorney General of Quebec*. Although this application did not meet the criteria for funding, the case dealt with the issue of freedom of expression (the Quebec sign law).

Although the Court Challenges Program had a 1984–1985 budget of only $200,000 to support the cost of litigation, some of the applicants also received very substantial supplementary funds for research and documentation from the Official Languages Program at the Department of the Secretary of State. In August 1985, the Program reported that out of 22 cases which had received or applied for funding since 1978, five had also been assisted by the Official Languages Community Program[3] up to a total amount of $98,009.

III. EQUALITY RIGHTS AND THE COURT CHALLENGES PROGRAM

On 17 April 1985, section 15 of the *Charter of Rights and Freedoms* came into effect (see Appendix A). This circumstance provoked considerable public interest and led ultimately to the expansion of the Court Challenges Program. In September 1984, the Canadian Council on Social Development proposed that both the Department of the Secretary of State and the Department of Justice grant funds to conduct a survey and to consult with non-governmental organizations on the impact of the *Charter*. The specific aims of this study included developing awareness, understanding and commitment to action regarding *Charter*-related actions in social development. The Council indicated that although certain groups were developing a "legal" capability and increasingly developing interests in the *Charter,* progress was uneven. Also, the Council identified a widespread lack of understanding among concerned organizations as to the positive and negative consequences related to employing the *Charter* for either litigative or non-litigative action.

There was considerable confusion about the future scope and form of public support for *Charter*-related court action. Given the existence of a Court Challenges Program to test language rights as well as litigation funds available in other departments, the obvious question became, if public support is available for *Charter* challenges (beyond the language matters already supported), what would be the vehicle providing support — legal aid programs, an expanded Court Challenges Program, or other alternatives?

In early 1985, the House of Commons set up a forum for discussing these issues when the Parliamentary Committee on Equality Rights (a Sub-committee of the Standing Committee on Justice and Legal Affairs) was established to study federal practices and statutes to ensure their conformity with the letter and spirit of equality and non-discrimination guarantees in the *Charter*. During its sittings, this Sub-committee heard testimony urging that appropriate steps be taken to ensure that the Constitution and the *Charter of Rights and Freedoms* should be known by, and accessible to, the public. In addition, witnesses voiced concern that governmental actions were dependent on the anticipated interpretation that the courts would provide. Some argued that a legalistic interpretation of the *Charter* based on prohibitions against discrimination needed to be supplemented by a broader approach that emphasized the development of rights that needed to be protected by the judicial system. Others noted that the federal government needed to assume responsibilities for specific action assumed by the provinces in designing or implementing actions arising from joint federal/provincial efforts (e.g., provincial eligibility criteria, levels of service, etc. in the Vocational Rehabilitation of Disabled Persons Program, the Canada Assistance Plan and other federal/provincial instruments).

The Sub-committee on Equality Rights also heard testimony that the idea of public access to the Constitution was limited to public support for an individual in meeting the costs involved in litigation. The obverse of this coin was evidence that little emphasis or

consideration was directed to public education or policy development related to *Charter* rights, in part because of the limited resources devoted to this end. Furthermore, the question of the provision of public funds for disadvantaged groups to begin *Charter* challenges remained unclear and tied to such questions as the government's practice of allowing companies that had violated tax laws to write off legal costs. Were the remedies provided for in the *Charter* to be available only to those who could afford expensive court action?

IV. COURT CHALLENGES – AT ARM'S LENGTH

Prior to the tabling of the report of the Sub-committee, the Secretary of State, the Hon. Benoît Bouchard, and the Minister of Justice, the Hon. John Crosbie, announced on 25 September 1985 that the Court Challenges Program would be expanded. In addition to its support to language rights cases, the program would provide financial assistance to cases under section 15, as well as section 27 (which deals with Canada's multicultural heritage) and section 28 (which reinforces equality of the sexes). In his statement in the House of Commons, the Secretary of State expressed the hope that the provinces would experiment with similar programs.

The federal government removed the Court Challenges Program from direct control by government departments and placed its administration under the auspices of the Canadian Council on Social Development (CCSD), which in turn was required to set up an independent panel to make decisions regarding the funding of each case. The Council was chosen because of its previous interest in equality rights, because it had provided informal consultative advice to the voluntary sector and to government regarding the *Charter,* and because it had committed itself to a continuing process of sharing information and experience. Planned initiatives included workshops on the Constitution and social development; development of educational courses involving contacts between legal and social development practitioners; development of an information clearinghouse on constitutional/social development issues; and research initiatives (with the Human Rights Centre at the University of Ottawa) to set up a study to assist those involved in interpreting the Constitution.

In its report, *Equality For All*, tabled in the House in October 1985, the Sub-committee on Equality Rights supported the government's decision to expand the Court Challenges Program to cover challenges to the *Charter* based on equality rights. The Sub-committee commended the establishment of a program operating at arm's length from the government. Some members of the Sub-committee voiced concerns, however, about the limitations, financial and otherwise, that were imposed on the expanded program. The government had restricted the program to sections 15, 27 and 28 of the *Charter* and had not made provisions for

either a legal information and research centre or outreach mechanisms for the disadvantaged groups that the program was designed to assist.

The functioning of the Court Challenges Program since the 25 September 1985 has been governed by an agreement between the Secretary of State and Minister of Justice of Canada, as the funding agencies, and the Canadian Council on Social Development as the administrator. The agreement was to run to 31 March 1990. Its main elements specified the government's financial contribution to the program, which was separated into two parts. The first of these sets out an ascending scale of yearly amounts for administration. The second established the fund to pay for the legal costs of approved applicants ($1 million for 1985–1986 and $2 million for subsequent years). Of this fund, not less than $300,000 per year was for court challenges concerning language rights. Schedule I of the agreement set out the means for appointing the chairperson and members of the panel that would decide on applications for assistance. The agreement provided that the panel would, in essence, function as two separate entities — one for equality rights and one for language rights. The agreement also set out criteria for the selection of cases and set the limit for assistance at $35,000 each for the trial, appeal and Supreme Court levels. (For the full text of the agreement see Appendix B.)

A few items in this agreement are particularly noteworthy. First, the arm's length nature of the operation of the Court Challenges Program was modified by a condition in Schedule I that CCSD's appointments to the panel were "subject to the approval of the Secretary of State and the Minister of Justice". Second, there was a condition that "In general, because interveners do not have carriage of the action, they should not be funded." Third, there was a condition that "funding should normally be denied where a case raises an issue that falls within the jurisdiction of the Canadian Human Rights Commission. Only where existing procedures for redress before the Commission have been exhausted, and no final determination of the issue has taken place, will funding be considered." Finally, in setting out the financial terms of the contribution agreement, no provision was made for the establishment of a legal research centre specifically to collect information pertinent to the program's mandate or for outreach to the groups targeted for funding from the program.

V. COURT CHALLENGES – THE ADMINISTRATIVE PROCESS

From October 1985 to March 1986, the CCSD designed and implemented the program and consulted with national organizations concerned with equality and language rights. Two panels were established: an eight–person panel to deal with equality rights applications and a five–member group to assess language rights requests. The panel members were appointed for two–year terms, renewable by decision of the CCSD Board of Governors. The CCSD expected panel membership to be a voluntary effort but did undertake to ensure that no suitable individual was excluded from the panel on the basis of financial hardship. In addition,

eligibility criteria were developed and conflict of interest guidelines set out. The choice of the Language Rights Panel involved consideration of a small number of candidates proposed by organizations concerned with official languages. For the Equality Rights Panel, the CCSD considered more than 120 candidates proposed by various interested organizations. Regional representation was taken into account in selecting both panels. They also contained a majority of members without formal legal training, although some members on each panel had a legal background.

Administrative staff hired by the Canadian Council on Social Development assist in the functioning of the panels. Initially, this consisted of a senior co–ordinator, three legal policy analysts and two support staff. These employees screen the applications and filter out those that do not meet the criteria set out in CCSD's agreement with the government. When an application is deemed to meet the initial criteria, the staff investigate and analyze the issues raised in the application with a view to assisting the panel to assess the legal merit and social impact of a potential court challenge.

This staff process involves reviewing case law and consulting with the government to track developments in policy, practice or legislation. It also means consulting with community leaders and experts to assess the potential social impact of a case as well as its legal merits. These consultations involve a considerable subsidy to the program in terms of voluntary effort and *pro bono* work on the part of those contacted by the staff. If the program had to pay for these services, its costs would increase substantially.

Once the case assessments have been compiled, the program staff send them to panel members in advance of a meeting where a decision is taken on whether funding is merited. The program staff then inform applicants of decisions and make summaries of each application available to the public. Once a case is approved, the program stays in contact with lawyers working on it and monitors progress.

VI. THE CURRENT SITUATION

In its initial annual report for 1986–1987, the Equality Rights Panel raised concerns about the restrictions on the program that prevented financial assistance to important equality rights cases. The Panel reported that many applications had to be rejected as a result of the procedural barrier prohibiting assistance to cases concerning provincial legislation, policies or practices, regardless of their potential importance or their impact on disadvantaged groups. The Panel noted that many cases falling in areas within provincial jurisdiction took on national significance, particularly where the issues are similar in many provinces or where issues are related to provincial law or practice that is analogous to parallel provisions in federal law. The Panel also commented that the restriction of funding to cases based on sections 15, 27 and 28 of the *Charter* meant that requests for assistance for cases

based on other sections had to be rejected even if the proposed cases tested federal law, policy or practice.

The Equality Rights Panel also noted that many *Charter* challenges under section 15 have been brought by members of traditionally advantaged groups -- people used to the litigation process -- and have either attacked the equality rights of disadvantaged groups or excluded them from the action. In the first years of the Court Challenges Program, equality-seeking groups were not very often the litigants, even through the rights at issue in a case were rights that directly affected them. The Panel therefore felt that it was essential for equality-seeking groups to become interveners in order to ensure that their perspective on how rights that directly affect them should be interpreted is heard and considered by the courts.

In light of these assertions and of the need for this report to assess the history of *Charter* litigation and particularly the use of section 15 since its proclamation in 1985, the Committee heard from Gwen Brodsky and Shelagh Day who summarized the findings of their 1989 study, *Canadian Charter Equality Rights for Women* (published by the Canadian Advisory Council on the Status of Women). They reported that of the 591 court decisions relating to section 15 up to 17 April 1988, only 189 dealt with grounds relating to disadvantage. When criminal matters in which section 15 was argued defensively are excluded, as well as decisions in which arguments concerning disadvantaged persons were made in their absence or contrary to their interests, 91 decisions remain where disadvantaged persons can be said to have initiated litigation. When interlocutory proceedings and appeals of the same case are removed, the number is reduced to 66. Finally, of those 66 cases, only 17 were actually initiated by members of major disadvantaged groups (women, aboriginal peoples, disabled persons and members of national, ethnic or racial minorities). To assess these findings, which essentially demonstrate the difficulty of *Charter* litigation for disadvantaged groups in the period before the Court Challenges Program became fully effective, we will also evaluate the nature of the program's legal impact.

NOTES

1. The relevant sections of the *Constitution Act, 1867* state:

   93. In and for each Province, the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

   1. Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Demoninational Schools which any Class of Persons have by Law in the Province at the Union:

   2. All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

   3. Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

   4. In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section.

   133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act and in or from all or any of the Courts of Quebec.

   The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

2. This section of the *Manitoba Act, 1870* states:

   23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person or in any Pleading or Process, in or issuing from any Court of Canada estabished under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

3. The amounts were: $4638 to le Comité de parents pour une éducation française à Summerside for a court action against Regional Administrative Unit #2; $50,000 to l'Association canadienne-française de l'Ontario for an action against the Attorney General of Ontario; $15,371 to les Parents francophones de la région de Penetanguishene for a case against the Simcoe County Board of Education; $10,000 to l'Association culturelle franco-canadienne for a case contesting the validity of the Highway Traffic Act of Saskatchewan; $18,000 to l'école Georges-et-Julia Bugnet for a case against the Attorney General of Alberta.

CHAPTER 2

COURT CHALLENGES: AN OVERVIEW OF RESULTS

The ultimate purpose of the Court Challenges Program is to enable disadvantaged groups and linguistic minorities to benefit fully from Canada's Constitution by funding test cases that clarify language rights or equality rights. The central measures of the impact of the program derive from this fundamental mission. What aspects of the *Charter* rights of Canadians have been clarified? What disadvantaged groups have benefited from such clarifications?

To focus solely on legal decisions responding to cases funded by the program would, however, be misleading for several reasons. First, only a fraction of the cases funded by the program have resulted in definitive judicial decisions, because of the length of time absorbed by the litigation process. The Supreme Court of Canada has made a handful of decisions on language rights cases funded by the program, but no Supreme Court decision interpreting section 23 of the *Charter* has yet emerged (although, as this is written, a decision in the *Mahé* case is imminent). Nor has any case funded by the program yet resulted in a Supreme Court decision interpreting section 15 of the *Charter*, on equality rights. (Significantly, the mandate of the program precluded the funding of interventions in the recent *Andrews* case, which yielded the first Supreme Court decision on section 15.)

Indeed, only about 8% of the equality rights cases funded since the current program's inception in 1985 have resulted to date in decisions at any level by the courts, or by the quasi-judicial governmental boards providing an appropriate first recourse in some cases, and many of these decisions remain subject to appeal. In the case of the language rights component of the program, a higher percentage of funding decisions — just under 40% — have resulted in court decisions, but many of these, like the equality rights decisions, remain subject to appeal and further decisions.

It is important to note, as well, that many of the equality rights funding decisions have not been for the purpose of funding actual cases, but to enable research to explore the applicability of the *Charter* to issues of concern to disadvantaged groups. A number of the groups receiving case development funding have proceeded with legal actions. To our knowledge, however, the addition of a case development phase to the time involved in proceeding with litigation has prevented any of these cases from resulting in decisions.

It is thus impossible to provide a final verdict on the Court Challenges Program based on legal decisions reached thus far. It is possible, however, to provide a broad overview of the use of the program by client groups and individuals, as well as an appreciation of the kinds of issues in relation to which funding has been provided. Where legal decisions have resulted, they belong within this overview as well.

The equality rights funding process and the language rights funding process are two quite distinct components of the Court Challenges Program, each operating through its own decision–making panel to fund challenges based on separate provisions of rights–conferring legislation. It is appropriate, therefore, to consider equality rights and language rights challenges separately with respect to their impacts and potential impacts.

I. EQUALITY RIGHTS CHALLENGES

The equality rights component of the Court Challenges Program was entirely new in 1985, providing for the funding of challenges based on the equality rights section of the *Charter*, which had just come into effect. The equality rights component was given a mandate not merely to support challenges based on sections 15, 27 and 28 and of the *Charter*, but to give priority in its selection of challenges to those "having national importance to disadvantaged groups" referred to in subsection 2 of section 15. Subsection 2 refers to disadvantaged groups "including" those disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is noteworthy that the wording of this mandate confers substantial discretion on the program's equality rights funding panel. Cases of interest to groups seen by the Panel to be disadvantaged, but not among the groups specifically enumerated, may be awarded funding on a priority basis. Cases of interest to groups that are not seen to be disadvantaged are not precluded from receiving funding, although the funding of such cases must not impede the provision of assistance to priority groups.

A. The Distribution of Funds

A review of data supplied to the Committee by officials of the program suggests that the discretion established by its terms of reference has been amply exercised by the Equality Rights Panel over the past three years. Funding has been provided to a range of groups and individuals extending beyond those enumerated specifically in section 15 (2) in support of litigation concerning a wide range of equality rights issues.

1. Case Funding

Women's issues and issues relating to disabled persons have figured most prominently among the issues involved in cases funded. Some 21% of the equality rights cases funded since 1985 have related to sex discrimination and a further 9% have related to issues involving discrimination on grounds of marital status, with both of these categories being devoted, with only a few exceptions, to practices disadvantageous to women. About 21% of the cases funded have dealt with discrimination on grounds of mental or physical disability. Other significant categories of cases were those dealing with issues of discrimination on grounds of age (9% of

cases funded); discrimination on grounds of sexual orientation (7% of cases funded); and the rights of aboriginal peoples (also 7% of cases funded). (A review of these cases suggests that about half have a substantial focus on sex discrimination in aboriginal communities, rather than discrimination against aboriginals *per se.*)

The remaining 26% of cases related to a diversity of issues, many of them involving multiple types of discrimination. Among these were a 1986 challenge to a Department of National Defence policy excluding Jews and Moslems from serving in Middle East peace-keeping forces. During the same year funding was awarded to challenge provisions of the *Nuclear Liability Act* restricting nuclear accident victims in seeking compensation through civil actions. In 1987, prisoners' rights were at issue in two cases funded, one of which concerned prisoners and the right to vote. More recently, funding was given to a challenge to the administration of veterans' pensions. Another recently funded challenge relates to the impact on seasonal workers of methods of calculating eligibility set out in the *Unemployment Insurance Act*.

2. *Interventions and Case Development*

The program mandate established in 1985 indicates that, in general, funding should not normally be given to interventions in cases brought before the courts by other parties. The discretionary power to provide funding to interveners thus placed in the hands of the funding panel has been used in the area of equality rights, although relatively sparingly. Our review of funding decisions indicates that funding has been provided to 11 interventions (among the 132 decisions to fund as of the close of fiscal year 1988–1989). Of these, six addressed women's issues and three addressed issues related to disability. Interventions also occurred in a case focused on native people's issues and in a case involving perceived discrimination on grounds of marital status.

Although case development funding is not mentioned specifically in the program's 1985 terms of reference, the unexplored nature of the legal terrain involved in equality rights and the needs of client groups have resulted in an important role for exploratory research intended to identify and develop cases that could be taken to court. As of the close of fiscal year 1988–1989, 58 case development projects (representing about 44% of the 132 funding decisions made by the Equality Rights Panel since its inception) had been funded.

Case development funding, like funding for actual cases, has focused on concerns of women and disabled persons, with an estimated 57% of decisions being directed to issues of primary concern to these groups. Women's issues were addressed in 16% of funding decisions, while issues concerning the rights of disabled persons were addressed in 41% of the case development funding decisions (the bulk of which gave funding to several groups receiving funding for work on multiple, separately tabulated, issues.) Other areas receiving

significant case development funding were discrimination based on sexual orientation (10% of funding decisions); native people's issues (8% of funding decisions); prisoners' rights (8% of funding decisions); and issues invelving discrimination based on place of origin (4% of funding decisions).

As was evident with case funding, the remainder of case development funding was distributed over a considerable range of issue areas. In 1986, for example, case development funding was awarded for research on the extent to which the *Charter* may apply to foreign students. The following year, research was funded on the possibility that equality rights may be violated by differences in restrictions on foreign diplomats, which were alleged to leave those of South Africa free to promote apartheid. More recently, case development research has been funded to examine the possibility that residence requirements in the *Canada Elections Act* deny the vote to the homeless and the possibility that the poor may be seen as a disadvantaged group entitled to claim equality rights.

B. Decisions of the Courts

The diversity of the equality-seeking groups receiving case funding is reflected in the disparate nature of judicial decisions thus far obtained. (For a supplement to the following, see Appendix C.) A 1988 federal Court decision in *Schachter* v. *The Queen et al.* declared contrary to section 15 provisions of the *Unemployment Insurance Act* entitling adoptive fathers to benefits denied natural fathers. This decision has, however, been appealed by the government on the grounds that the courts do not have the power to extend benefits as a remedy under the *Charter*.

In October of 1988, the Canadian Disability Rights Council was successful in its challenge of a provision of the *Canada Elections Act,* which denied the right to vote to persons in institutions or deprived of the management of their property because of mental illness (*C.D.R.C. et al.* v. *Her Majesty The Queen in Right of Canada*, 1988). This Federal Court decision resulted directly in the recognition of the right of many people labelled mentally disabled to vote in the 1988 federal election and, more broadly, challenged negative attitudes towards mentally disabled persons.

In May of this year, in *Elizabeth Symes* v. *Her Majesty The Queen*, the Federal Court of Canada (Trial Division) accepted the validity of a section 15 challenge to policies precluding a parent from deducting child care costs as a business expense and specifically recognized the need to promote the equality of women.

Section 15 of the *Charter* came into effect on 17 April 1985. The Equality Rights Panel of the Court Challenges Program was not named until July 1986. It must therefore be emphasized, in view of the length of time involved in *Charter*-related litigation, that only a bare beginning has been made in the use of section 15 by disadvantaged groups to achieve

legal remedies. It seems clear, however, that the process envisioned in 1985 is proceeding, and that the Court Challenges Program is providing important assistance to disadvantaged groups in gaining access to *Charter* rights.

II. LANGUAGE RIGHTS

The language rights component of the Court Challenges Program predates the current program, having been created in 1978 as a program administered by the Department of the Secretary of State. The terms of reference established for the Court Challenges Program in 1985 specified that funding would be continued for language rights cases approved for funding by the previous program and stipulated that not less than $300,000 per year should be provided for challenges in the area of language rights.

A. Language of Education Rights Funding

The minority language education rights set out in section 23 of the *Charter* are a major focus of litigation funded by the program. Section 23 establishes, for qualified parents, a constitutional right to have their children educated in the language of the official language minority in the province where they live, where the number of children of qualified parents is deemed to be sufficient. Qualified parents must have either English or French as their first language, or have received their primary school instruction in Canada in one of these languages . Section 23 has been a major source of language rights litigation both because it addresses central concerns of linguistic minorities and because it applies across Canada.

Cases funded by the program have raised issues such as the precise identification of those entitled to the rights established in section 23; the content of these rights and their implementation, including permissible restrictions; and appropriate forms of redress for those whose rights have been infringed.

In 1988, for example, the Fédération Provinciale des Comités de Parents du Manitoba received funding to challenge provisions of the *Manitoba Public Schools Act* requiring a minimum enrollment of 23 pupils within an existing school division before French–language instruction will be provided and restricting minority language of education rights to those residing within a given school division by making the admission of children of those residing outside a school division subject to the discretion of the school board. Included in the challenge are complaints that existing legislation does not address issues such as the need for equality between majority and minority language educational services, the autonomy of French–language schools, and the right of the minority to administer its own educational institutions.

The issue of how many students constitutes a number sufficient to warrant minority language education was involved as well in a 1988 case in Nova Scotia. The Comité pour l'éducation au Cap–Breton received funding to appeal several aspects of a Supreme Court of

Nova Scotia decision, including the finding that the registration of 50 students did not warrant the establishment of either a French–language education program or a French–language school, and that French–language immersion programs were acceptable substitutes for French–language education programs.

Legislative provisions requiring minority language parents to take steps not required of majority language parents in order to be recognized have also been the subject of funded challenges. The Association Française des Conseils Scolaires de l'Ontario received funding to challenge a 1988 amendment to provincial education legislation that requires francophones to declare their intention to vote for francophone trustees in order to be included within the francophone voters' group, the size of which determines the proportion of school trustees allotted to each language group. A case funded the following year addresses the related issue of the constitutionality of provisions of Ontario legislation requiring written notice to the property assessment commissioner of a desire to direct education taxes to the minority language school system.

Other issues addressed in cases funded by the Court Challenges Program involve minority language community concerns about sharing school facilities with the majority language group, which is argued to have an assimilative effect; delays by school boards in implementing minority language education in communities where it is controversial; accessibility of minority language education to children of qualified parents, even when these children are unfamiliar with the language or, alternatively, are familiar but whose parents are unqualified; and equality of control by minority and majority language groups over their respective school systems.

B. Other Language Rights Funding

Language rights cases funded by the program have, in lesser numbers, addressed issues of legal rights, fundamental rights, rights to bilingual legislation, and language rights in the area of work and services. Illustrative of cases in the legal language rights area is *Pacquette* v. *La Reine*, in which the plaintiff was funded by the program in 1988 to contest the constitutionality of his having been denied a trial, relating to a charge under the *Narcotics Control Act*, in the official language of his choice. An example of case funding in the area of fundamental rights is funding of Alliance Quebec, at various court levels between 1985 and 1988, for action objecting to the prohibition of bilingual commercial signs in Quebec on grounds of equality rights, freedom of conscience, and freedom of expression. As well, cases challenging unilingual laws (and/or unilingual summonses issued under such laws) have been funded in several provinces, as have challenges to processes such as land expropriation when they have not been conducted in the official language of those affected.

C. Language Rights Decisions

As of 5 June 1989, the language rights component of the Court Challenges Program had funded 51 cases, which had resulted in 20 judicial decisions. Among these are a number of decisions establishing principles of major importance in clarifying the meaning of the legislation set out in the language rights mandate of the program, and thus of evident significance in the evolution of language rights for Canadians.

1. Language of Education Rights

Cases funded by the Court Challenges Program, both before and after its transfer to the Canadian Council on Social Development, were instrumental in establishing the principle that section 23 of the *Charter* must be given a broad and liberal interpretation by the courts, given that it was framed for the purpose of remedying historical injustices. (See, for example, *Mahé* v. *The Queen* (1985).)

The *Mahé* (1985) decision also provided an expression of the doctrine that section 23 of the *Charter* represents a compromise between the national protection of minority language groups and the exclusive jurisdiction of the provinces over education. This doctrine has found expression, in some cases, in a reluctance on the part of the courts to employ judicial means to hasten legislative action. (See, for example, *Commission des Ecoles Fransaskoises Inc. et al.* v. *Government of Saskatchewan* (1988).) Other cases funded by the program have resulted in decisions of a more interventionist bent. In *Marchand* v. *The Simcoe County Board of Education* (1987) the court ordered education authorities and the Ontario government to construct enhanced facilities at a minority language secondary school in order to equalize the quality of educational services.

Another area of continuing litigation concerns the interpretation of the "where numbers warrant" provision of section 23 and its application to the provision of minority language educational programs, minority language schools, and participation (or control) by minority language groups in such schools. Cases funded by the Court Challenges Program have resulted in a series of decisions in this area. These decisions have contributed to both the emergence of the interpretation of section 23 that recognizes that management of an educational facility, as well as access to a facility or minority language instruction, can be an entitlement and the development of precedents that may provide guidance to future decisions. Since a judgement about the adequacy of numbers varies according to local conditions, it is foreseeable that the development of a consistent regime of judicial decision making on this question will emerge only by gradual degrees in the course of continuing litigation.

A second basic principle that has received unambiguous affirmation in response to cases funded by the program was that instruction in the minority language must be of comparable quality to that provided in the majority language and must not subject the minority language

group to assimilative pressures (see, for example, *Marchand* v. *The Simcoe County Board of Education*, 1986). This principle has also been elaborated in *Commission des Ecoles Fransaskoises* v. *Government of Saskatchewan* (see above), in which the Saskatchewan Court of Queen's Bench held that comparability of minority and majority language education does not mean that the former must duplicate the latter, but rather that minority language education must be full and complete, and that its overall quality must not be inferior to that of majority language education.

2. *Other Language Rights*

Outside the area of language of education rights, the Court Challenges Program has funded a number of cases with significant effects in the areas of legal rights, legislative bilingualism, the language of work and services, and fundamental rights. In the area of legal rights, the program funded the case of *Forest v. Attorney General of Manitoba* which had been launched in the mid–1970s. Ultimately, the entitlement of Mr. Georges Forest to defend himself in the language of his choice after receiving a uniligual parking ticket was upheld, in part on the grounds that Manitoba's *Official Language Act* of 1890 (which established English uniligualism in the province) was unconstitutional. More recently, in *Mercure* v. *Attorney General of Saskatchewan* (1988), the Supreme Court ruled on similar issues (and upheld the right to plead a case in either official language) in a case testing the validity of the *North–West Territories Act* with respect to language practices in Saskatchewan courts.

In the area of legislative bilingualism, cases have been funded to test practices in various jurisdictions in the light of section 133 of the *Constitution Act, 1867* and the requirement that provincial statutes be printed and published in both official languages. In *St–Jean* v. *The Queen* (1986) the Supreme Court of the Yukon Territory ruled that the Commissioner–in–Council of the Territory could not be considered an institution of the Parliament and Government of Canada and was therefore not subject to bilingualism requirements on this ground. On a related issue, case funding provided by the program has enabled decisions concerning the validity of a mandatorily bilingual statute incorporating a validly enacted unilingual regulation or unilingual document (*Massia* v. *The Queen*, 1987).

While relatively few of the applications received by the program concerned language of work and services issues, a case funded by the program has resulted in the decision that the entitlement to make inquiries in the official language of one's choice at federal government offices (or New Brunswick government offices) implies the right to be heard and understood, and to receive a reply, in the official language of one's choice (*S.A.N.B.*, 1986). Cases sponsored by the program have also spurred important decisions in the area of fundamental rights, such as the recent decision (in *Ford* v. *Attorney General of Québec* 1988) clearly stating that "the freedom to express oneself in the language of one's choice" is included in the

"freedom of expression" guaranteed by section 2(b) of the *Charter*, thus tying minority language rights to fundamental human rights.

It may be concluded, in general terms at least, that the Court Challenges Program has been doing what it was intended to do, in the manner in which it was intended that it be done. Whether it has, in a more specific way, met the needs of its intended users and met more general efficiency and effectiveness objectives can be determined only in the light of comments from those with direct experience of the program or specialized knowledge of the processes the program was intended to foster. The following section reviews the evidence provided to us by our witnesses, whom we thank for their assistance in carrying out this study, and sets out our specific recommendations made in the light of this information.

CHAPTER 3

FINDINGS AND RECOMMENDATIONS

I. THE FUTURE OF THE COURT CHALLENGES PROGRAM

The central reason for this study is the approaching end of the five–year period for which the government undertook to fund the Court Challenges Program in 1985. Unless a new commitment of funds is made before 31 March 1990, the Court Challenges Program will terminate on that date. It was in response to this, and to our awareness that a process of review was under way within the government, that we undertook to review the program. Our initial purpose was to determine whether there were sufficient reasons for the continued existence of the program beyond its scheduled termination date.

The virtually unanimous verdict of witnesses who appeared before the Committee during its hearings is that the reasons for continuation are not merely sufficient, but compelling. This judgement, it is important to note, does not simply express the biases of program beneficiaries. It comes, as well, from non–users with special knowledge of the processes that the program was intended to advance.

A. Renewal: Views of Expert Observers

In this latter group is the Chief Commissioner of the Canadian Human Rights Commission, who in an appearance before this Committee last spring declared that "I think it would be folly . . . not to extend it. . . . I hope very strongly that the government will agree to continue it at least for another five years." This view was affirmed by the Commissioner of Official Languages, who described the program as "an integral component of the measures designed to ensure respect for human rights" and called for the indefinite continuation of the language rights component of the program, which was the subject of his remarks. Representatives of the Canadian Bar Association advised the Committee that the Association, at its annual meeting in August 1989, passed a resolution calling on the federal government to extend the program to ensure that access to the Canadian court system by disadvantaged groups will continue.

Human rights specialists from the Human Rights Research and Education Centre at the University of Ottawa argued that recent judicial decisions declared that the primary focus of section 15 of the *Charter* is to assist disadvantaged people, rather than merely to foster uniform treatment in isolated instances. This interpretation raises the stake that disadvantaged groups have in equality litigation outcomes and, in so doing, makes it critically important that they retain access to the courts. Unless adequate financial resources are

available, disadvantaged groups in Canada could suffer the same fate that has befallen their peers in the United States where, for example, virtually all successful sex discrimination cases before the U.S. Supreme Court have been initiated by men.

Even in the absence of recent trends in interpretation, it was argued, five years would have been much too short a time for the courts to determine the meaning of equality rights provisions with the complexity of those incorporated in the Canadian *Charter*, particularly when the mechanism for doing this is a judicial process ~~where~~ in which it can often take more than five years to complete a single case.

Interestingly, it was also argued that termination of the program at this juncture would itself have a discriminatory effect. While some groups were ready to begin litigation as soon as section 15 came into effect, the less organized groups and those with more modest resources -- which is to say the most severely disadvantaged groups, which are often those most desperately in need of assistance -- have taken much longer even to arrive at a position where the program, much less the courts, can be used. In the words of our witness: "It would be ironic if early termination meant that assistance was cut off just when the groups most deserving of an equality remedy were in a position to begin litigation." (Human Rights Research and Education Centre, University of Ottawa, brief, p. 4)

B. Renewal: Views of Users and Potential Users

With only one exception, the minority language rights and equality-seeking groups that appeared before the Committee or submitted written briefs applauded the Court Challenges Program. It was seen as an innovative mechanism that is working to help the *Canadian Charter of Rights and Freedoms* become more than an expression of unfulfilled aspirations and play a central role in ensuring that its benefits are accessible to all Canadians. It was emphasized consistently, however, that the larger process of using the *Charter* is still only in its preliminary stages, that the contribution of the program to this larger process is likewise only beginning to be discernible, and that termination of the program at this juncture would have disastrous consequences for access to justice by Canadians.

User groups supported their general position with several arguments. First, it was argued that the original purposes of the program remain as valid today as they were at its inception, and that these purposes require continuation of the program. In the words of the Community Advisory Committee, an umbrella organization representing 40 equality-seeking groups:

> The federal government took an excellent step when it established the Program, because it recognized that rights only have meaning when they are used, and that guarantees of equality, if they are to be effective, cannot be beyond the reach of those who are disadvantaged. The importance of the continuation of the program cannot be overstated. . . (supplementary brief, pp. 3–4)

Second and more specifically, it was argued that constitutional cases are distinctive in their complexity and in the resources required for their effective pursuit in the courts. A program designed to assist disadvantaged groups in such litigation is thus specially warranted and remains as necessary today as it was at its inception:

> Cases of this type require considerable preparation and raise very complex questions, and this takes a great deal of money. By providing financial and other types of assistance, the program makes it possible to build important cases of this nature and to bring them before the highest courts in the land. (Société des Acadiens et Acadiennes du Nouveau-Brunswick, brief, p. 3)

The implication here that the Court Challenges Program does not merely facilitate actions that would happen anyway, but rather makes the difference between action and no action, was stated more explicitly by a representative of the Advisory Resource Centre for the Handicapped. Referring to cases on behalf of disabled persons that ARCH has launched, he declared:

> . . . cases such as these will not be able to come forward if there is not a Charter litigation fund. . . . Charter litigation is qualitatively different from other forms of litigation in which we are involved in that the amount of social and other forms of research and the expertise and expert witnesses one requires in order to adequately bring forward this kind of case is tremendously expensive and it is not something that an organization such as ours could sustain without the support of the Charter litigation fund. (*Minutes*, 11:49)

A substantial number of witnesses, in both the equality rights and the language rights area, echoed this latter point, that the Court Challenges Program makes the critical difference between access and no access. The dependence of disadvantaged groups on this program is demonstrated, indeed, by the fact that a number are already deferring plans for *Charter* challenges because of their uncertainty about whether the program will be continued after 31 March 1990. This concern was confirmed by officials of the program in an appearance before the Committee in June, when they referred to the "chilling effect on community groups" of uncertainty about the future of the program.

The late September 1989 announcement by the Secretary of State, the Hon. Gerry Weiner, that $2.4 million of the funds thus far unspent by the program would be held over to pay bills coming in after 31 March 1990 provides some assurance that commitments already made by the funding panels will not be defaulted on when the bills actually come in. It does little to resolve the planning problem now faced by groups involved in decision making about new applications, however, and according to program officials it leaves only $175,000 available to be committed to new cases during the period from now until 31 March 1990. In the words of program officials appearing before the Committee : "In other words, the program will almost have to close down if that figure is the one." (*Minutes*, 11:111)

In the Committee's unanimous view, the Court Challenges Program ranks as a distinctive Canadian achievement in the area of human rights. To our knowledge it remains unique to Canada, although it has attracted interest from other countries. In its recognition that access to the courts is integral to the effective implementation of constitutional rights, it carries the global progress of human rights a vitally important step beyond the mere codification of such rights.

If the value of public access to *Charter* rights that underlay the launching of the Court Challenges Program is accepted, then there are really only two arguments that could justify termination of the program on 31 March 1990. It could be argued that the program has achieved what it was intended to achieve and is now dispensable, or that it has not (and cannot) fulfill the intentions of its originators and should be allowed to lapse because of ineffectiveness.

Neither of these arguments is persuasive. Since the program has demonstrably succeeded in assisting applicants in the development and financing of cases, the only basis on which it could be seen as ineffective would be the limited number of judicial decisions that have so far occurred, or the frequently limited implications or inconclusive character of these decisions. To accept this argument, however, would entail accepting the view that the *Charter* itself, or at least the judicial process upon which it relies, be seen as ineffective for the same reasons, and that Canadians in their quest for effective human rights turn away from the Constitution and the courts.

Nor can it be argued that the program has achieved what it was intended to achieve and thus become dispensable, unless it is argued that the rights set out in the Constitution in 1982 and 1985 are now fully clarified and established by a substantial body of judicial decisions. No observer of the current status of *Charter* litigation would, we believe, make this argument. It is rather the case that the process of giving practical meaning, through litigation and judicial decisions, to the rights set forth in the Constitution has barely begun. This process is likely to continue for years to come, as judicial decisions identify areas of potential litigation now unrecognized, and as judicial decision making evolves to reflect changes in the way of life of Canadians.

No witness appearing before this Committee actually offered the above arguments. The only opponent of the program (an unsuccessful funding applicant) argued, instead, that funding decisions have been swayed by ideological biases, and that the program should therefore be either terminated or transferred back to the direct administration of a government department, as was the case before 1985. We would argue, in response, that ideological bias (if it were present) would not warrant the victimization of all Canadians by termination of the only program that gives disadvantaged persons access to the *Charter* process. Nor would returning to the hands of government administration of a program

supporting challenges to government practices and legislation hold much promise as a potential solution to problems of biased funding decisions.

Our reflection upon the evidence given to us convinces us that there are two questions involved in the renewal issue. The first concerns the viability of the program for the remaining six months of its currently scheduled life. Unless the government is prepared to tolerate its immediate termination, in practical terms, arrangements must be made that will allow the program to continue to select cases for funding until the date of its scheduled official termination.

While we welcome the recent commitment by the Secretary of State that $2.4 million will be made available for the payment of bills arriving after 31 March 1990, we believe that more has to be done if the program is to be prevented from coming to halt prematurely. If the program were to continue to commit funds at the rate prevailing during the first six months of this year (and during 1988–1989), it would be expected to commit approximately $800,000 during the last six months of the current fiscal year. We believe that the $2.4 million already committed by the government needs to be increased by $600,000 which, when added to the $175,000 not yet allocated by the program as this is written, would make available the amount needed to allow the program to conduct business as usual until 31 March 1990.

We therefore recommend:

(1) That the Government of Canada increase the $2.4 million recently committed to meet Court Challenges Program billings arriving after 31 March 1990 to the amount of $3 million, and that this increase be announced as soon as possible or, in any event, by 30 December 1989.

The second renewal issue, whose resolution is urgently necessary if litigation planning by disadvantaged groups is not to be disrupted further (with attendant costs, which they can ill afford) is whether the program is to be renewed for a period beyond 31 March 1990.

We have argued, in concert with the preponderant number of witnesses who provided us with evidence, that renewal is essential. This leaves only the question of the period for which the program should be renewed. Several of our witnesses proposed renewal for another five–year period, while one proposed renewal for a ten–year period with review by this Committee after five years, and one proposed renewal for an indefinite period with review by this Committee every five years. Most witnesses who addressed the matter, however, simply proposed renewal for an indefinite period.

We believe, with our witnesses, that the Court Challenges Program should be continued for a substantial period of time. The evidence is now abundant that, in the realm of constitutional litigation, clarification is achieved by slow and time–consuming degrees,

making it likely that the program will be needed for some time to come. As well, we think that the dislocation imposed on the program's clients by an early termination date (even one involving a strong possibility of further continuation) should be avoided. At the same time, we think it is important that arrangements governing this program continue to reflect the reality that it may not be needed indefinitely. The major task of clarifying the constitutional rights established for Canadians in 1982 and 1985 should be seen as a distinct phase in their realization. Following this phase, judicial interpretation of these rights will continue to evolve, but it is likely to focus on specific applications rather than the basic questions of substance that are currently in the process of being resolved.

We think, as well, that a periodic review of the program and of trends in the litigation process it supports is desirable. Such reviews could assess the impact of past revisions to the program and propose further revisions without raising traumatic issues of program survival. They could also, if conducted by future parliamentary committees with a mandate in the area of human rights, carry forward the perspectives that underlie this report.

We therefore recommend:

(2) That the Court Challenges Program be renewed for a period extending from 1 April 1990 to 31 March 2000, and that reviews by a parliamentary committee with a mandate in the area of human rights be conducted in 1993–1994 and in 1998–1999. The issue of the program's renewal should be resolved by 31 March 1999 in order to facilitate litigation planning by clients of the program.

II. THE ARM'S LENGTH PRINCIPLE

The consensus among our witnesses on the value of the Court Challenges Program did not result in any inattention to possible improvements. Indeed, the range of suggestions for improvement that we received is a further indication of the importance attached to the program by its users, and of their recognition of the significance that full access to the rights set out in the *Charter* holds for disadvantaged groups.

Before considering possible improvements, however, we would like to draw attention to one feature of the current program that our witnesses emphasized should not be modified. This is the arm's length principle adopted in 1985, when the program ceased to be administered directly by the Department of the Secretary of State and was transferred to the Canadian Council on Social Development. This view was expressed, for example, by representatives of the Canadian Bar Association, who referred the Committee to a resolution passed by the Association in August 1989 calling for the renewal of the program, specifying that "such Program and its funds [to] be administered by a body independent of government." (brief, p. 9)

For the reasons set out above (which gained wide acceptance before the 1985 implementation of an arm's length administrative regime) we concur with our witnesses on this question.

We therefore recommend:

(3) That any modifications made to the Court Challenges Program upon its renewal maintain administrative independence from government.

III. PROGRAM OBJECTIVES

One brief which the Committee found extremely helpful argued that the fundamental mission of assisting disadvantaged groups should be incorporated clearly in the funding criteria employed by the program. At present it remains implicit in the requirement that priority be given to cases having national importance to disadvantaged groups as per section 15(2) of the *Charter*.

It was argued that public funding should not be available to individuals or groups that are not historically or systemically disadvantaged, much less to those whose cases would undermine the rights of disadvantaged people. This argument was based on recent interpretations of the equality rights provisions of the *Charter*. In the *Andrews* decision, for example, the Supreme Court of Canada views section 15 as having been designed specifically to protect historically disadvantaged groups. Our witnesses argued that the equality rights component of the program should reflect the focus of section 15 by channelling funding to such groups.

We accept the general thrust of this argument, but have several concerns about its particulars. First, we feel that a distinction must be recognized between funding court cases that assert the rights of disadvantaged groups and funding court cases initiated by disadvantaged groups. While, in practice, disadvantaged groups are likely to be the primary source of cases asserting the rights of disadvantaged groups, they need not be the only source. The purpose of the program, we feel, is to ensure that cases asserting rights of disadvantaged people are taken to court, rather than specifically to provide funds to disadvantaged groups (or, more accurately, to lawyers employed by such groups).

Our second concern is more problematic. Section 15 (2) does not define disadvantage, but rather sets out an open–ended description of disadvantaged persons by referring to "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." Recent court decisions, such as *Andrews,* do not precisely define disadvantage either, although the treatment of equality in these decisions provides useful insights. It has been recognized, for example, that the category of disadvantaged groups may include both those enumerated in

section 15 and other groups whose situation is analogous to that of enumerated groups. It is implied, also, that disadvantage is associated with longstanding historical inequalities, recurring discrimination and negative stereotyping whose existence is reflected across the social, political and legal landscape. It is recognized, as well, that the identification of disadvantaged groups will be a continuing process, reflecting changing cultural perceptions.

All of this still leaves a great deal of discretionary power in the hands of anyone authorized to select cases asserting the rights of disadvantaged groups. We can only suggest that the interpretation of this restriction be large and generous, since one function of the program is to fund cases that lead the courts to reach decisions concerning which groups and individuals qualify for special protection under section 15. Only in very exceptional situations, we feel, should cases asserting the rights of a group that sees itself as historically disadvantaged be denied funding. Future decisions of the courts may, however, provide a basis for the more restrictive interpretation of this language.

Finally, we feel that the mission of funding cases asserting the rights of disadvantaged groups, along with the missions of other components of the program, should be included in a statement of objectives immediately preceding the funding criteria, rather than being stated within the funding criteria. The fundamental mission of the program should provide a basis on which to ensure the overall coherence of the funding criteria and a guide to the funding panels, which increasingly will have to set priorities and make choices among competing applications if the general thrust of this report is followed. The purpose of the program should not be merely one consideration among others to be used in selecting cases. It should be the dominant consideration and should be recognized as such.

We therefore recommend:

(4) That a statement of program objectives be included, immediately preceding the case funding criteria, in the contribution agreement for a renewed Court Challenges Program. Such a statement could read as follows: "The objective of the Court Challenges Program is to provide financial assistance related to significant test cases asserting minority language rights, equality rights of disadvantaged groups, and aboriginal rights in order to ensure that the needs of linguistic minorities, disadvantaged groups and aboriginal peoples are taken fully into account by the courts as they clarify the constitutional rights of Canadians." (*For a discussion of aboriginal rights, see Section VI.*)

IV. PROGRAM SCOPE

A. More Flexible Equality Rights Funding

Equality-seeking groups as well as several other witnesses appearing before the Committee, expressed dissatisfaction with present restrictions on the *Charter* grounds that can

be employed if a case is to qualify for funding. It was argued that cases may raise important equality issues but, for technical reasons, be pursued most effectively on grounds other than section 15 or the other *Charter* provisions on which the program has a mandate to fund cases.

The consequences of this restriction were summarized succinctly by representatives of the University of Ottawa's Human Rights Research and Education Centre : "The present formula might mean that a meritorious equality case could not be funded. Alternatively, litigants might be tempted to incorporate section 15 into the argument simply for the purpose of obtaining funding." (brief, p. 6)

We feel that the funding criteria of the program should not be so inflexible as to undermine its mission, which is what occurs when groups weaken cases in order to base them on section 15, or when cases with significant equality rights implications are not funded at all because they are not based on that section.

We therefore recommend:

(5) That the funding criteria be amended so as to permit the acceptance of applications relating to cases that centrally concern the amelioration of a disadvantage experienced by a group characterized by one of the grounds set out in section 15(2) (or by analogous grounds), where for valid technical reasons the case is based on a section of the *Charter* other than sections 15, 27 or 28.

B. Funding of Provincial Equality Rights Cases

All the equality–seeking groups appearing before the Committee called for amendment of the funding criterion that currently restricts case funding to cases testing federal legislation, policies and practices. It was argued by many of our witnesses that the *Charter* is national in its application, and that its use by disadvantaged groups should not, therefore, be confined to the federal level.

It was argued, secondly, that provincial and territorial legislation has critical implications for many disadvantaged groups, because of provincial jurisdiction in areas such as community and social services, health care, and education. In the words of a representative of the Canadian Association for Community Living, Canada's national advocacy organization for the mentally handicapped : "This is of particular importance in the case of individuals who have a mental handicap. Many of the troublesome aspects of their lives are directly impacted by provincial/territorial laws which at present they cannot challenge because they cannot afford the legal costs." (brief, p. 6)

It was argued, finally, that the Court Challenges Program is able, under its current mandate, to fund minority language rights cases challenging provincial legislation. This

capacity, indeed, has been vital to its impact in areas such as minority language education rights. Equality–seeking groups argued that consistency requires that the capability to fund challenges to provincial legislation be given to the equality rights funding panel as well.

We find these arguments convincing, particularly when we recall that the mandate of the current program prevented it from funding interventions in the recent *Andrews* case, in which the Supreme Court, responding to a challenge to provincial legislation, developed an immensely significant first decision on the meaning of equality rights.

Having agreed that challenges to provincial legislation should not be entirely outside the mandate of the program, we were left with the task of determining what limits, if any, should apply to such challenges. Witnesses suggested a number of possible restrictions, for example that the costs of widening the program mandate might be minimized if the funding of provincial cases occurred only in respect of provinces with which the federal government successfully negotiated cost–sharing agreements, or that funding be restricted to cases challenging a law, program or activity partly funded by the federal government.

We feel that restrictions of the kind just suggested are open to much the same objections as apply to the current mandate: they are inconsistent with the objective of the program and arbitrarily limit equality rights funding in comparison to language rights funding. It is our opinion, as well, that a broadened mandate need not entail vastly higher costs. It will likely produce a significant increase in the volume of applications, but cost increases can be minimized if the funding panels become more rigorous than they have so far had to be in setting priorities.

We therefore recommend:

(6) That the current restriction to "federal legislation, policies and practices" in the equality rights funding panel mandate be removed, and that the panel be given a mandate to fund equality rights cases having national importance for disadvantaged groups.

C. Funding of Cases Based on Non–constitutional Language Laws

The minority language rights groups appearing before the Committee urged unanimously that the Court Challenges Program be allowed to fund challenges based on non–constitutional language legislation, including the new *Official Languages Act* and provincial laws dealing with minority education and services in the language of the minority.

It was argued by, for example, representatives of the Fédération des Francophones hors Québec that more and more governments are passing language legislation within their jurisdictions, and that legislation such as Canada's *Official Languages Act* is closely linked to

the *Charter*. Such legislation is having powerful implications for minority language communities by assuring them of minority language services, and access to its benefits was therefore seen to be a corollary of access to the benefits of constitutional language rights. In the words of these witnesses:

> If the CCP (Court Challenges Program) is to be true to its original mandate, which was first and foremost to stem the possible erosion of certain rights guaranteed our communities, it now must not only be renewed, but must also include court proceedings based on legislation other than constitutional laws. (brief, p. 6)

We fully share the commitment to minority language rights that underlies the argument presented to us by minority language rights groups. We have concerns, however, about several particulars. The broadening of the program's language rights mandate to include cases based on non-constitutional legislation would re-introduce the imbalance between the language rights and equality rights funding panel mandates which, we have argued above, is inequitable.

As well, the step from federal funding for cases grounded on constitutionally recognized national rights to federal funding of cases based on provincial (as well as federal) legislation is a considerable one. It would take the Court Challenges Program well beyond its original purposes of constitutional access and clarification. It could, in so doing, raise extremely sensitive federal-provincial issues, particularly where federal funding might support cases challenging provincial practices on the basis of provincial legislation.

We believe that the consistency with which minority language rights groups called for an extension of the program into the area of non-constitutional language legislation clearly indicates the existence of needs that have not been met fully by existing arrangements. Given that minority language rights issues have a significant national dimension, we feel that it is appropriate for the federal government to play a lead role in addressing persisting dissatisfaction within official language minority groups.

We therefore recommend:

(7) That the Government of Canada, in consultation with minority language rights groups, explore options (including that of a broadened Court Challenges Program) relating to the enhanced recognition and implementation of minority language rights across Canada.

We recognize that, taken together, the three recommendations set forth above would bring a substantial broadening of the scope of the program and would bring a corresponding increase in the number of applications for funding. Increases in the number of applications may not, however, require similar increases in the size of the litigation fund if the funding panels become more active in setting priorities and awarding funding to cases with the greatest potential to benefit client groups. If the changes we are proposing encourage this

development they may, as a direct result, increase the value Canadians obtain for the money they invest in the Court Challenges Program.

V. OTHER FUNDING CRITERIA

Witnesses presented the Committee with a series of recommendations concerning the remaining funding criteria now employed by the Court Challenges Program. We believe that, at this juncture in the development of the program, it is not premature to subject existing funding criteria to a general review, drawing on experience gained thus far and directed to ensuring their consistency with the overall mission of the program. Also, if our preceding recommendations are adopted, the funding panels will face new challenges in assigning priorities to cases, and the funding criteria should provide as much assistance as possible to the panels as they discharge this task.

The requirement that cases duplicating cases already before the courts not be funded would undoubtedly be appropriate in a program designed only to foster the systematic clarification of the law. In a program whose fundamental objective is to provide access to disadvantaged groups and linguistic minorities, however, it is not so obvious that this requirement should be unconditional. While the optimal use of resources would normally require that multiple cases on the same issue not be funded, there may be cases where the fundamental mission of the program would be best served by funding cases that duplicate one another. We think the panels should be given discretion on this matter.

We therefore recommend:

(8) That the funding criterion precluding duplication be amended to read: "The funding of duplicate cases should be avoided, but panels may fund duplicate cases in exceptional circumstances where it is believed that this will maximize the benefits to disadvantaged minorities from program funding."

A number of witnesses emphasized to the Committee the critical importance of interventions in constitutional rights litigation. Judicial consideration of these issues is heavily dependent upon the quality and completeness of evidence presented, and the potential impact of well–researched interventions is correspondingly great. In the words of the Community Advisory Committee:

> Experience over the last four years has shown that for disadvantaged groups the ability to intervene is essential. In many cases, the content of equality rights will be determined in the absence of the disadvantaged groups they are designed to assist, if interventions are impossible because of lack of funds.
>
> Initiating cases is a slow process for disadvantaged groups. If the disadvantaged groups cannot intervene in cases initiated by others now, the central issues of interpretation may be decided before their cases come to court. (supplementary brief, pp. 12–13)

We concur fully with this argument. While the evidence we have seen does not demonstrate conclusively that the funding panels have refused applications for intervention funding solely because of the somewhat loosely worded provision in the current funding agreement, the provision nevertheless discourages such applications to begin with. As it is now worded, it is also an invitation to arbitrary decision making.

Our only concern, in removing the current restriction on funding interventions, is that some limit should still apply to the number of interventions the program will fund in any individual case. We suggest that where large numbers of groups seek funding to intervene in a case, a limit on the number of interventions funded could be maintained by organizing joint interventions. In this manner, the amount spent on a case through the funding of interventions can be prevented from exceeding the amount spent on a case funded directly by the program at successive levels of litigation.

We therefore recommend:

(9) That the funding criterion relating to interventions be amended to read: "Up to three interventions may be funded where the rights of a disadvantaged group or linguistic minority will be affected significantly by the outcome of a case or by the interpretations of *Charter* provisions raised by it."

The final current funding criterion stipulates that funding be denied where cases fall within the jurisdiction of the Canadian Human Rights Commission, unless procedures for redress under the Commission have been exhausted. The Community Advisory Committee argued that this criterion has the practical effect of barring complainants whose complaints fall under the Commission's jurisdiction from even commencing *Charter* litigation for as much as five years, since that amount of time is sometimes required by the Commission's process. In their view, this is an unacceptable restriction on the exercise of *Charter* rights and should be removed.

A memorandum we received from the Secretary General of the Canadian Human Rights Commission recognized, as well, that it may sometimes be appropriate for the program to fund cases falling within the jurisdiction of the Commission. It was suggested that such cases be dealt with on an individual basis, taking into account the nature of the issue and its importance as a test case; the possible existence of a need for more immediate relief than the Commission may be able to provide; and a comparison of remedies available under the *Canadian Human Rights Act* and the *Charter*.

We recognize the merit of the argument for greater flexibility. At the same time we believe that recourse to the courts should in general be viewed as a last resort, and we feel that it would be a backward step if the Court Challenges Program should come to operate as a publicly funded mechanism for channelling human rights cases away from the Canadian Human Rights Commission. In particular, we feel that the time absorbed by the

Commission's process is not, by itself, a valid reason for funding recourse to the courts. The appropriate response to problems of delay within the Commission's process is the resolution of these problems rather than the use of public money in ways that may erode the Commission's role.

We thus believe that the first consideration raised by the Secretary General of the Commission should be decisive, and that cases falling within the jurisdiction of the Commission should be funded only if they are significant constitutional test cases. In other words, what is needed is a degree of flexibility sufficient to allow the Court Challenges Program to fulfill its purposes, while not duplicating tasks more properly performed by the Commission.

We therefore recommend:

(10) That applications that qualify for Court Challenges Program funding, but that also fall under the jurisdiction of the Canadian Human Rights Commission, receive Court Challenges Program funding only after consultation with the Canadian Human Rights Commission.

VI. ABORIGINAL RIGHTS

Representatives of the Assembly of First Nations, in their presentation to the Committee, suggested that *Charter* rights, language rights and aboriginal rights are the three major developments emerging from recent constitutional reform. They went on to remark that "The Court Challenges Program is an excellent program for equality and language rights seekers. However, the application of the criteria quietly closed the door for the most disadvantaged people in Canada; the First Nations." (brief, p. 1)

They went on to argue that the Native Test Case Funding Program, administered by the Department of Indian and Northern Affairs, is an inadequate substitute for the Court Challenges Program. Applications for funding relating to important cases, it was claimed, are reviewed directly by the Minister. In support of their opinion that this arrangement cannot be assumed to give first priority to native interests, they quoted a 1988 Canadian Bar Association resolution asserting "the apparent conflict of interest. . . when [the Department] funds the aboriginal party to litigation in which it is an adversary. The result is a situation that may violate the Crown's fiduciary obligation to aboriginal peoples and which clearly creates unwanted images of unfairness." (brief, p. 2)

Our witnesses went on to call for an independent fund, which could assist aboriginal groups in the pursuit of section 25 and section 35 cases. The absence of these sections in the program's current mandate was cited as the central reason for low rates of aboriginal interest and participation in the program. Its current focus on equality and language rights does not match aboriginal priorities. In the words of the witnesses:

> The Court Challenges Program as is, does not meet the needs of our people, or we would see many First Nations applying for funding to take their cases to court. Until such a time that the Court Challenges mandate will allow the flexibility to address Section 35 of the Constitution justice only depends on the monetary significance of a First Nation who wished to pursue the road of justice through the legal system in Canada. (*Minutes*, 11:57)

In addition to calling for the establishment of a separate aboriginal rights litigation fund, our witnesses expressed concerns about possible conflicts between *Charter* equality rights and aboriginal rights. As a possible means of avoiding the erosion of aboriginal rights by program-funded equality rights cases, our witnesses suggested the establishment of a review committee that would consult native groups about the implications of equality rights applications.

In our view, the fundamental values underlying the Court Challenges Program demand that Canada's most severely disadvantaged peoples not be excluded from access to the *Charter* merely because of the distinctiveness of their priorities. Indeed, our affirmation of these values will be deeply tainted with hypocrisy as long as this situation is allowed to persist.

The concerns expressed to us about tensions between equality rights and language rights lead us to believe, however, that there may be more effective ways of incorporating an aboriginal rights mandate within the program than the creation of a separate litigation fund. If an aboriginal rights mandate were added to that of the equality rights fund, and representatives of the aboriginal community were included on the related funding panel, then possible tensions between the two varieties of rights could be addressed directly in the course of decision making on applications. If direct conflict were to arise, the funding panel might consider providing a combination of case and intervention funding, which would allow both sides to be aired in the courts.

With these considerations in mind, we recommend:

(11) That the mandate of the existing equality rights panel be broadened to create an equality and aboriginal rights panel, authorized to fund challenges based on sections 25 and 35 of the Constitution in addition to those proposed elsewhere in this report, and

-1- that an annual amount of $500,000, additional to amounts provided for the renewal of other elements of the Court Challenges Program, be provided by the government for the funding of aboriginal rights litigation;

-2- that the government review the mandate of the Native Test Case Funding Program, administered by the Department of Indian and Northern Affairs, to ensure that it does not overlap with the mandate of the proposed equality and aboriginal rights funding panel and reallocate funds accordingly; and

–3– that at least two members of the proposed equality and aboriginal rights funding panel (assuming it remains an eight–member panel) be representatives of Canada's aboriginal peoples.

It should be noted here that our recommendation that representatives of Canada's aboriginal peoples sit on the equality and aboriginal rights funding panel is not intended to suggest that other panelists also be representatives of specific groups. We argue to the contrary elsewhere in this report. We believe, however, that the status of seekers of aboriginal rights as a distinctive minority within the clientele of the proposed panel requires that special provision be made to ensure that the concerns of aboriginal peoples are taken into account in funding panel decisions.

VII. MANDATE OF THE PROGRAM: CASE DEVELOPMENT

During our hearings, the Committee received several submissions arguing that the Court Challenges Program mandate should be expanded to state explicitly the ability of the program to provide funds for case development and pre–litigation research. In essence, this involves the initial process of identifying and reviewing jurisprudence that could be used to support litigation. It also includes a review of possible remedies that will be sought from a court of law, preparation of the 'facts' of the case and a search for expert witnesses. It is probably axiomatic to say that better research leads to better cases and results in better court decisions.

Those who argued in favour of such funds couched their presentations in terms of the overall importance of the program. For example, the Société des Acadiens et Acadiennes du Nouveau–Brunswick commented that the cases funded by the Court Challenges Program would have a determining effect on the definition and application of the rights set out in the new Constitution and the *Charter of Rights and Freedoms*. Court cases of this type require considerable preparation and raise very complex questions. The Canadian Advisory Council on the Status of Women submitted that *Charter* equality litigation requires educating the courts as fully as possible about the scope and nature of each inequality issue; to be done well, this work must be based on extensive research, knowledgeable counsel, access to experts and well–informed litigants.

In its brief, the Community Advisory Committee (CAC) related this requirement to the current mandate of the program. The CAC pointed out that many expenses incurred in litigation are not recognized in this mandate. In order to initiate cases or interventions, groups must both gather and disseminate information about issues, other cases, fact patterns, interpretive questions and current decisions. They must undertake research to determine whether problems experienced by their group can be addressed through legal means. They must also make internal decisions, consult with lawyers, and provide support and information to plaintiffs. The CAC argued that this was a *sine qua non* in defining and exercising equality

rights. Neither is the time and money spent on it recognized formally in the Court Challenges Program funding structure. Case development is not recognized as a legitimate expense in the contribution agreement.

The language and equality panels themselves recommended the legitimization of case development -- a practice they had been following almost from their inception. In their first annual report for 1986–1987, the panels reported that they had decided to extend funding for "case development". The panels have been judging applications for case development on the same criteria applied to applications for test cases. The maximum amount for case development was set at $5,000 and is deducted from funds granted for the cost of actual legal proceedings should the case proceed to court (i.e., for cases that had received prior funds for case development, the program would deduct this from further money for legal expenses). As pointed out in Chapter 2, 58 case development projects (44% of the funding decisions) were given support by the Equality Rights Panel from 1985 to 1988.

In its 1987–1988 annual report, the Language Rights Panel noted that most applications submitted to the Panel that deal with education rights under section 23 of the *Charter* raise the issue of identifying those who are entitled to these rights. Because it must be established that there are a sufficient number of children before such rights can be exercised, the parents must organize themselves before undertaking legal proceedings. This factor increases the cost and complexity of such proceedings, especially since it is often necessary to challenge the existing boundaries of school districts.

With regard to case development, it is important to note that prior to the CCSD's taking over the program, certain groups received amounts far in excess of $5000 to conduct research for case development (see above). In fact, the Association canadienne–française de l'Ontario received $50,000 from the Official Languages Community Program of the Department of the Secretary of State to research and document its case arguing the rights of the French linguistic minority to have French instruction in schools and to manage French–language instruction and institutions where numbers warrant.

Were such funding to be authorized specifically in the mandate of a renewed Court Challenges Program, this Committee feels that an appropriate magnitude of scale ought to be established. In total, the Equality Rights Panel has devoted $396,300 to case development (approximately 10% of funds committed by the Court Challenges Program). From the point of view of comparison, the Department of Secretary of State has spent more than 10% of the cost of a case to provide funds for research. The Department paid $25,000 to bring the Bugnet case to court at the trial level, and granted $18,000 from the Official Languages Community Program for research. In the Marchand case, $23,035.22 was spent for court costs at the trial level, as well as $7,371 for research and

documentation. It would be reasonable, therefore, to suggest that up to one–third of the money granted to the program should be available for case development.

Obviously, some cases will require more extensive and complicated research than others, and we feel that the panels should be allowed a considerable amount of discretion in setting the level of assistance. Given that the aim of the Court Challenges Program is to assist disadvantaged groups, this case development funding should be easily accessible. With the imbalances in the level of sophistication of the equality–seeking groups served by the program, it seems appropriate that guidelines for case development should perhaps have an affirmative action aspect. The panel might actively solicit case development proposals from, and give priority approval to, disadvantaged groups that have not yet received funding for cases. When deciding on an application for small amounts, under $2,500 for instance, the panels should be satisfied that a proposal has merit and has serious possibilities of leading to litigation. But application procedures should be as simple as possible: the receipt of a letter requesting funds, for example. Program staff should monitor the use of the funds, once granted. In addition, applicants should also be allowed to submit proposals for relatively sophisticated and more costly research; these applications should be accompanied by detailed research plans, including time–lines and budgetary breakdowns. The program should require progress reports at regular intervals.

We are also aware that there are other sources for funding legal research within the federal government. The Department of Justice currently administers a Human Rights Law Fund of $212,000 in 1989–1990. Funding is available to individuals, groups or non–profit organizations. The terms of a successful application to this fund include the stipulations that a project must have strong legal content in the area of human rights and not include general public education seminars usually funded elsewhere. Legal research projects and other activities are eligible if they add to the body of law or legal information on Canadian human rights law, particularly the *Charter*. The findings from projects funded by the Human Rights Law Fund may well be used to initiate litigation.

In essence, then, we feel that what is currently called "case development" ought to be considered as two inter–related but separate processes. The first of these –– the initial stages of considering the possibility of a court challenge –– is tentative and exploratory, involving research work that may or may not lead to an application for funds to proceed to court. This type is analogous to funding research that may or may not lead to the production of a book. Given the following recommendation, some of the funding for this type of research could be taken from the Human Rights Law Fund of the Department of Justice and perhaps from the Official Languages Community Program at the Department of the Secretary of State (the source of some previous funding of this type, as described above) and transferred to the Court Challenges Program.

The second type of application for case funding would apply to situations where the applicant is proceeding to court, at whatever level, and needs funding assistance for preparation. The comparison in publishing would be the submission of a manuscript to a publisher with a request for an advance on royalties should the publisher agree to produce the book.

The Committee therefore recommends:

(12) That[a] new contribution agreement explicitly set up a separate fund to pay for case development proposals approved by the panels in order that the funds available for litigation not be reduced. This case development fund should constitute up to 30 per cent of the possible annual amount in the litigation fund. This case development fund should be administered on two levels: funding granted for exploratory research, and funding granted to assist preparation for a specific case. In granting funds for any application to finance litigation under the Court Challenges Program, the panel should decide what prior case development work funded by the program applies to an application being considered and deduct this from subsequent litigation funding.

VIII. MANDATE OF THE PROGRAM: A LEGAL INFORMATION CENTRE

Related to the need for additional funds to gather information for case development is the issue of a resource centre with a specific mandate to collect, analyze and disseminate information of use to disadvantaged groups, linguistic minorities and aboriginal groups interested in pursuing challenges based on either the *Charter* or the *Constitution Act, 1867*.

Throughout the history of the Court Challenges Program, there has been a recognition that a legal research centre would greatly facilitate the preparation of challenges to the relevant constitutional provisions. In its initial submission for a study of the impact of the *Charter*, the Canadian Council on Social Development noted in 1984 that "the extent of available resouces to pursue litigative or non-litigative strategies may be a major factor in organizations selecting their specific social-action strategies". The Council also urged consultations to develop the means for collaboration, including the sharing of expert resources, written materials, and the support available from human rights centres and universities. In its submission to the Parliamentary Committee on Equality Rights, the CCSD reported that its task force on section 15 had recommended education and information support to social development and legal professionals, and the Council announced an action plan to develop an information clearinghouse on constitution/social development-related materials as well as a research proposal for a study of the policy implications of the expansion of resources for constitutional interpretation. This overall strategy and support for research

was one of the reasons that the Secretary of State gave in 1985 for selecting the Canadian Council on Social Development as the home for the expanded Court Challenges Program.

The Department of the Secretary of State has also been providing money for research in the area of human rights. The Department's estimates for 1988–1989 noted that the Human Rights Program was providing advice on the human rights aspects of policies, programs and other measures and supporting the preparation of human rights studies, research, trends analysis, issue and policy papers.

It appears as though the research support for groups seeking access to the *Charter* has not been met during the first five years of the Court Challenges Program. Our Committee heard many groups argue forcefully that a separate research centre on *Charter*–related issues was needed. In setting the context of an argument for a resource centre, the Association des juristes d'expression française du Nouveau–Brunswick commented that:

> One of the fundamental concerns of groups involved in court challenges regarding language rights is without a doubt the collection of data. A test case that will eventually be ruled upon by the Supreme Court of Canada requires the collection of a huge amount of often widely scattered evidence. At the beginning of the process, the position of the parties is unequal because governments named in such cases are well–armed with statistics and experts and have all the funds they require at their disposal. That is not the case for individuals or groups seeking to have their constitutional rights respected. (brief, p. 15)

Only part of the solution to this problem of inequality of resources can be satisfied by our recommendation on funding for case development. At the same time, almost every equality–seeking or language rights group that appeared before the Committee recommended that the Court Challenges Program provide greater resources for information gathering by the program's users. The Société des Acadiens et Acadiennes du Nouveau–Brunswick repeated the recommendation that the various language rights groups had reached during their March 1989 conference in Moncton:

> That the Court Challenges Program be given the resources needed to establish a research and legal resources centre from which data, statistics and rulings on education rights in Canada could be obtained. *(Minutes*, 10:19)

In addition, the Société noted that such a research centre could begin studies on the history of French–language education; demographics; expert witnesses and their areas of expertise and other subjects. This recommendation was repeated by the Association canadienne–française de l'Ontario; the Association des juristes d'expression française du Nouveau–Brunswick. They all made the point that language rights are, by their very nature, socio–cultural rights and, therefore, socio–cultural, socio–economic and socio–political studies are needed if a test case is to be taken to the Supreme Court of Canada.

The briefs of the equality–seeking groups also reflected their need for some type of accessible information centre. The Charter Committee on Poverty Issues emphasized its

need for assistance in studying the laws that discriminate against the poor to identify the changes that are needed and to identify remedies reflecting the actual needs of poor people.

The Human Rights Research and Education Centre at the University of Ottawa made the point that there is a need for the efficient use of available resources and a need to avoid duplicating research. The Centre offered its documentation services as a means of providing assistance in facilitating the transfer of information between the various applicants to the program.

In light of this evidence, we therefore recommend:

(13) That the government consider how to provide funds to establish one or more legal resource centres to serve minority language, equality-seeking and aboriginal groups. This funding could come from the appropriate programs in the Department of the Secretary of State and the Department of Justice. Once the centre is established with appropriate data bases of case law, etc., it could assist in, among other things, legal research and case development for successful applicants to the Court Challenges Program. It could recover part of its expenses by charging fees for its services.

IX. COMMUNITY OUTREACH

In anticipation of the proclamation of section 15 of the *Charter of Rights and Freedoms*, both the government and certain voluntary agencies identified the pressing need to educate minorities about their rights. In its submission to the Parliamentary Committee on Equality Rights, the Canadian Council on Social Development set out the development of educational courses in its action plan, together with a network that would involve voluntary organizations. The CCSD's task force of the time suggested that considerable efforts were needed to develop the roles, responsibilities and capabilities of organizations in the voluntary sector in order to employ the Constitution effectively to realize their goals. The success of the CCSD in carrying out its strategy remains unevaluated.

The estimates of the Human Rights Program in the Department of the Secretary of State also reflect increases in the number of activities funded in 1984–1985 as a result of public education activities. The greatest impact was in terms of seminars, conferences, workshops and publications that anticipated the coming into effect of section 15 and the need for public discussion on the subject. (*Estimates* 1986–87, p. 93) Funding breakdowns in the Department's estimates for subsequent years indicate that such funding has fallen off.

In light of this decline, it is hardly surprising that the equality and language rights panels both identified community outreach as one of their major activities for 1987–1988. This activity, although not mentioned specifically in the mandate of the program, was

deemed to be important to make community organizations more familiar with the potential of the Court Challenges Program. The Equality Rights Panel sponsored two community meetings, one in Vancouver and one in Toronto. The Language Rights Panel met with minority language groups, including representatives of the Acadian communities of Nova Scotia and New Brunswick. These meetings were designed to gain information that could make the program more accessible and effective. As a result, the Court Challenges Program began to undertake such activities as accepting collect telephone calls and preparing a series of issue papers on specific *Charter* subjects related to the program and of interest to the community.

By way of explaining these activities, the Equality Rights Panel noted that it was not attempting to set the agenda for disadvantaged groups, which must articulate their own concerns and develop their own litigation strategies. But the Panel felt that it should be able to respond to the needs of the groups, and this meant taking into account and responding to the fact that different groups are differently situated with regard to their ability to assert their rights under the *Charter*. Some groups, for example, did not have well–funded national organizations with staff and resources available to prepare litigation. Other groups had organizations but were without resources or experience in developing a strategy for preparing court cases. On the other side was the Women's Legal Education and Action Fund (LEAF), which had both a strategy and an organization in place. In the Panel's view, affirmative action measures and outreach are needed to assist disadvantaged groups, and these measures should be at the behest and under the control of the particular group.

In 1989, the language and equality panels both sponsored conferences to bring together their major users with legal experts and other interested parties. The first of these, a national meeting of equality–seeking groups, took place in January 1989 and resulted in the formation of a Community Advisory Committee (CAC) to the Court Challenges Program. The groups felt that the CAC might make the program more accountable to the equality–seeking community. The CAC has since made presentations to the Equality Rights Panel with regard to the aspects of the program of concern to the groups and made recommendations regarding improvements. (These are dealt with throughout this report.) The participants in the January meeting also recommended bi–annual meetings to maintain connections with each other and with the panel. The meeting also discussed, but failed to resolve, the issue of service needs, i.e., whether service delivery systems should remain within CCSD or whether resources should be built up within the equality–seeking groups themselves and shared via a network.

A meeting of language rights groups took place in Moncton, New Brunswick in March 1989. This conference came up with a series of recommendations, including strategies for the renewal of the program. At the same time, the participants made recommendations regarding the program's mandate and recommended that the program

allocate funds for outreach, public education and a research centre. The groups present at Moncton urged the Language Rights Panel to develop a global plan for action that would not only deal with the legal issues but also address the implications for the community of a court challenge. They also urged the Language Rights Panel to communicate more effectively with other national organizations interested in francophone issues, in part by accepting representatives of national organizations as members of the panel. The meeting appeared to dismiss the Canadian Council on Social Development as an appropriate vehicle for outreach because of what was believed to be the high cost of administering a program through the CCSD. The groups expressed their conclusion that the CCSD had not sufficiently supported the cause of language rights and was perceived as an organization that was not interested in these rights.

During our hearings on the Court Challenges Program, the Committee listened to many groups repeating the conclusions reached at the national meetings in January and March. The Community Advisory Committee put forward perhaps the most cogent argument for the program to carry on outreach activities. The Advisory Committee pointed out that various disadvantaged groups are forming coalitions and networks in their various sectors to ensure that there is a means for consulting and working together. Prior to using the *Charter*, these coalitions require consultation with each other to ensure a coherent approach. The Advisory Committee also noted that:

> It has become clear over the last four years that equality rights litigation for disadvantaged people will not be conducted principally by individuals, but rather by groups. To date, disadvantaged groups in Canada have shown a real interest in ensuring that litigation is conducted in a manner that is responsible to groups as a whole, and to the larger interests of all disadvantaged groups. (brief, p. 4)

Given this, the 41 groups that set up the Community Advisory Panel argued that every equality case can affect the lives of a whole group, and perhaps all disadvantaged groups. Equality cases, therefore, can be developed best through groups that can communicate effectively both internally to their members and externally with other groups.

The groups therefore argued for explicit recognition of the need for funds for education and outreach in the mandate of the Court Challenges Program. The groups argued that for this work to be most effective and most supportive of the exercise of rights, it must be tied directly to the actual development of cases. It should not be an abstract exercise. At the same time, no other body has the expertise or information about developments in the community with respect to equality rights litigation that is available to the Court Challenges Program by virtue of its role in approving the funding of cases. This allows the program to make the most informed decisions about which education and consultation activities will be most effective and useful.

This Committee considers that in the interests of promoting court cases that are cost-effective and make the best use of the courts' time and public funds, specific

allocations for outreach and education should be included in the budget of the renewed Court Challenges Program.

We therefore recommend that:

(14) The mandate of the Court Challenges Program be altered to allow the program to sponsor national meetings of, and consultations with, its client groups by inserting "national meetings" under the list of approved budgetary expenses in the contribution agreement. These funds should be tied specifically to the exchange of information regarding litigation that falls within the mandate of the Court Challenges Program. If this entails an increase in the administrative budget of the Court Challenges Program, these funds should be provided from the appropriate programs in the Department of the Secretary of State and the Department of Justice that carry out funding of information activities.

X. ADMINISTRATIVE CONSIDERATIONS

A. The Funding Panels

The Committee heard a number of interesting suggestions for administrative changes to the Court Challenges Program. Common among these was the suggestion that members of the funding panels, who currently serve on a volunteer basis, should be paid at a per diem rate for their time. Cases are becoming progressively complex, it was argued, and the volume of applications is now substantially greater than it was even two years ago. At present, the Equality Rights Panel must make decisions on approximately 40 applications at its quarterly weekend meetings. The Language Rights Panel, while faced with a substantially lower number of applications, still faces the problems attendant on newly complex issues. These considerations, our witnesses argued, require adoption of a per diem payment arrangement. Otherwise panelists will be unable increasingly to devote the required amount of time to the panels, and the danger that qualified panelists will be unable to afford to participate will grow.

A second suggestion was that panelists, who are now appointed by the Canadian Council on Social Development on the approval of the Secretary of State, be appointed by the Council from lists drawn up by, respectively, equality-seeking groups and minority language rights groups. It was argued that these groups have critical interests at stake in the appointment of panelists and are also well equipped to identify individuals with the required forms of expertise.

We find the suggestion regarding compensation for panel members persuasive. We have concerns about the second suggestion, however, since in our view it would empower funding recipients (or, worse still, those in the process of seeking funding) to influence the

composition of the panel that will adjudicate their applications. This seems to us to be a conflict of interest at least as clear as the one in which the government was involved before 1985, when it administered a program supporting challenges to its own legislation and practices. Furthermore, if the government is to be required to pay panelists, we do not think the appointments should be left in the hands of a non-governmental organization not directly accountable to the government.

At the same time, we feel that the institution of a ministerially directed order-in-council appointment process is also unacceptable, since it would erode the arm's length administration principle established in 1985. We therefore suggest that the experimental nature of the Court Challenges Program makes it an appropriate venue for an experiment in appointment arrangements. We are aware that, in Great Britain and elsewhere, an attempt has been made to achieve non-partisanship in certain government appointments by establishing appointments committees consisting of representatives of the major political parties and, in some cases, requiring unanimous agreement before such committees can recommend appointments. We think that a committee established along these lines, but including the chairperson of the funding panel in its jurisdiction to serve as a source of suggestions and advice, could be a source of disinterested and non-partisan recommendations concerning appointments.

We therefore recommend:

(15) That a Court Challenges Funding Panel Appointments Committee be established, such committee to consist of nominees of each of the three major political parties and the chairperson of the funding panel for which an appointment is being considered; and that this committee be entitled to recommend funding panel appointments to the Secretary of State whenever agreement is achieved among 3 of its 4 members.

With respect to the terms and remuneration of panel members, we recommend:

(16) That panel members be appointed for three-year terms renewable once. The terms should be structured so that one-third of the appointments to each panel lapse in each year. Members should be remunerated at a rate of $250 per diem.

B. Administrative Independence

Several witnesses appearing before the Committee expressed less than unqualified enthusiasm about existing arrangements under which the Canadian Council on Social Development administers the program. The most bluntly worded expression of dissatisfaction came from representatives of a minority language rights group, the Association canadienne-francaise de l'Ontario, which included the following comment in their brief to the Committee:

> Since 1985, the Program has been administered by the Canadian Social Development Council (sic). This organization has not shown, either before or since it was made responsible for the Program, a marked interest in language rights issues. In addition, the administrative costs charged to Program management appear to us to be excessive. (brief, p. 8)

Other groups, such as la Fédération des Francophones hors Québec, took the position that the adequacy of the Canadian Council on Social Development as a home for the program should be reviewed, but refrained from endorsing the critical views just quoted.

In the case of equality rights groups, some concern was expressed about the administrative costs of the program. In particular, the amount absorbed by overhead costs (approximately 25% of the total administrative budget) was perceived to be excessive.

Given these expressions of concern, our Committee felt that it would be appropriate to investigate a range of administrative issues and also to comment on these separately from our views on the validity of continuing the program itself. In our eyes, the merits of our recommendations about renewal (that the Court Challenges Program be renewed for a ten–year period and that it should be administered at arm's length from the government) are not affected by any conclusions suggested by the discussion that follows.

In 1985, the Canadian Council on Social Development (CCSD) elaborated a very substantial action plan in its submission to the Parliamentary Committee on Equality Rights, outlining its proposed activities to deal with issues that would arise following the proclamation of section 15 of the *Charter of Rights and Freedoms*. This included such matters as providing formal and informal consultative advice to the voluntary sector and to government organizations, developing workshops on the Constitution and social development; the preparation of relevant publications; development of educational courses; development of an information clearinghouse on constitution/social development–related materials; and setting up (in conjunction with the Human Rights Centre at the University of Ottawa) a study of the social policy implications of the expansion of resources for constitutional interpretation.

The annual report of the Court Challenges Program for 1986–1987 shows that the Council took an active role prior to, and immediately following, the transfer of the program to the Canadian Council on Social Development. This involved setting up the panels and establishing the process to adjudicate applications and to administer case funding arrangements.

Almost five years have elapsed since the Court Challenges Program was given to the CCSD to administer. It seems appropriate for this report to assess the Council in light not only of the program's evolving administration but also of the promises made in 1985. Our previous recommendations (13 and 14) provide, in part, our assessment of the manner in which the Council has fulfilled its action plan. We feel that the witnesses who came before us have made a case that, despite the promises of the CCSD, there is still not an adequate

arrangement for research. Indeed, our testimony shows that most language rights and equality rights groups feel that arrangements have become steadily less adequate when judged in the light of the growing complexity of cases and the heightened importance of supporting research. Complex cases involving systemic disadvantage require an increasing amount of social research rather than less. Our Committee cannot understand, therefore, why CCSD eliminated the social research component of its budget ($44,000) in 1988. Furthermore, the information and outreach activities that are necessary to incorporate the concerns of certain disadvantaged groups have not been separately provided for and have been paid for by the program's administrative budget.

It was in this light that we undertook to assess the Council's financial arrangement with the government as established in the contribution agreement dated 25 September 1985. First of all, our Committee is concerned that the agreement does not follow more closely the May 1985 directive (4005) established by the Department of Supply and Services (DSS) for Canadian universities and colleges. The guideline specifies that a university can negotiate up to 65% of the contracted amount in salaries and benefits to cover overhead costs associated with administering a program. CCSD is currently charging 25% of the full administrative allocation of the Court Challenges Program. By our calculation this is a larger amount than would be allowed by the DSS directive.

We also feel that further justification is necessary for such expenses as CCSD's charges for the rental of space and for computer rentals, in light of the Supply and Services directive, which requires universities to include these costs in overhead charges. We also note that Department of Supply and Services directive 4006, which sets out permissible costs for specialized contracts that are not paid on a flat rate basis of 65%, requires a contractor to provide a breakdown of actual time spent if he wants to collect money for an overhead expense. If this model were in place, the managers at CCSD not directly associated with the Court Challenges Program would be required to provide a more thorough breakdown of the actual time spent dealing with the program by themselves, their board and their advisory committees.

Another practice of CCSD that might be challenged by a government auditor is the charging of staff salaries for legal research against the fund intended by the government to pay for litigation expenses. To us, it would appear that the division between the administrative fund and the litigation fund was intended as a split between internal and external expenses. For the administrative budget, certain categories of allowable expenditures are specified, including salaries and benefits, and charges against the litigation fund budget are limited to support for litigation and legal research. Common sense would appear to indicate that this means that internal legal research should be charged against the administrative budget. The agreement does not specify, however, that legal research funded from the litigation fund should be for litigation purposes only. This

has permitted CCSD to charge internal legal research expenses against the litigation fund. We feel that this should be addressed in the next memorandum of agreement.

In light of these findings, and given our concern that the government should make every effort to gain the best value for its money, we recommend:

(17) That the next memorandum of agreement should prohibit the use of money from the litigation fund for the internal legal research costs of the Court Challenges program.

(18) That the Secretary of State for Canada seek proposals to administer the Court Challenges Program. These proposals should be evaluated by a committee composed of outside experts, representatives of the panels of the Court Challenges Program, and the government. When a selection has been agreed upon, the Secretary of State and representatives of the selected organization should appear before this Committee no later than 31 March 1990.

XI. OPERATIONAL ISSUES

Any program that has functioned for five years is bound to run into various problems and glitches that were unforeseen by those who framed its original operating structure and rules. The Court Challenges Program is no exception. Throughout our investigation of the program, several of these problems have been brought to our attention, and we think that the opportunity to recommend useful alterations should not be allowed to pass.

First of all, we feel that it is important to comment on the level of funding permitted for legal fees. Schedule I of the contribution agreement between the Canadian Council on Social Development and the government sets out the maximum amount payable. This is set at the same amount ($35,000) for each of the three levels of court: trial, appeal and the Supreme Court of Canada. If a recipient has received money for case development (up to a $5,000 maximum), this is deducted from the funding available for lawyers' fees. By setting up a separate fund for case development, as we have recommended, the amount available for actual legal expenses would increase automatically.

Another question that ought to be dealt with in the current context is to what extent the $35,000 was intended to cover the full legal cost of mounting a court challenge. The government has indicated that it never sanctioned the concept of total cost recovery in setting up the program. At the same time, our Committee was made aware that, in fact, recipients have always supplemented the $35,000 per level now available with voluntary and *pro bono* efforts worth at least as much as the government subsidy. The Women's Legal Education and Action Fund, for example, estimated the value of this voluntary effort to be between $2 and $4 for every dollar spent by the Court Challenges Program.

Our feeling that this $35,000 ceiling ought to be reviewed is bolstered by the fact that it has remained unchanged since the expansion of the program in 1985. In the meantime,

legal fees, like the cost of most services, have increased. In this regard, we note that the government took an inconsistent decision when it transferred the program to the Canadian Council on Social Development in 1985. While the contribution agreement froze the legal fees at $35,000, it provided for a considerable escalation in the money allocated for administrative expenses. This latter amount increased from $445,000 in 1986–1987, the first full year of operation, to $751,000 in 1989–1990. Obviously, some of these funds have gone to case development and outreach activities set up by the program, but others, such as the subsidy to the CCSD, have increased as well.

During our hearings, we heard evidence that, despite voluntary and *pro bono* contributions to the Court Challenges Program, the levels set for legal fees need to be reviewed as a result of increasing court costs. This contention was advanced by expert witnesses, such as the Human Rights Research and Education Centre of the University of Ottawa, representatives of equality-seeking groups such as LEAF and the Community Advisory Committee, as well as several minority language rights organizations. A telling argument was presented by the latter group, which pointed out that, despite the funding of court challenges, groups are at a disadvantage when confronted by government and corporate lawyers whose resources are not as seriously restricted.

Our Committee found these pleas for a higher ceiling most persuasive when they were combined with arguments in favour of greater flexibility for the panels to make decisions about amounts or about full funding throughout the court process without the need for successive applications. These suggestions were also combined with recommendations that the Court Challenges Program fee structure should provide for a legal opinion at each stage of a case to assess the probability of success. The Commission nationale des parents francophones, the Association canadienne-française de l'Ontario, and the Association canadienne-française de l'Alberta all brought forward these suggestions.

While we view these suggestions favourably in the light of changing conditions, we are also aware that any program that receives public funds must ensure that it gets full value for the dollars spent. There are two aspects to this issue. The first is making certain that a test case makes its way through the court system as expeditiously as possible. The Equality Rights Panel pinpointed a problem in the delays encountered in the system itself. The time lag resulted not only from busy court schedules but also from government action to stop the case from proceeding by raising procedural arguments unrelated to the main issue in contention. These delays result in tremendous cost overruns as lawyers argue issues not related to the *Charter* challenge *per se*. In one instance, when the courts overruled such delaying actions, the Crown offered a settlement with a condition that its terms not be disclosed. Therefore, efforts over two and a half years to develop a test case bore no results whatsoever because the courts did not rule on the issue at stake.

The Canadian Bar Association addressed part of this issue when it proposed to our Committee that the Court Challenges Program enter into some type of contract with applicants. This contract should specify that the litigants would not make a deal that is meaningful only to the individual and that cases should not be settled without a court judgement to ensure that issues are in fact resolved.

Currently, the Court Challenges Program has a mechanism in place to police legal fees. All accounts for legal expenditures must be taxed (evaluated by the relevant provincial law society) prior to payment. This means that lawyers who have worked on a case must wait a considerable length of time while their bill goes before the provincial law society to determine whether the amount charged is justified. The Women's Legal Education and Action Fund argued that the Schedule I of the contribution agreement created greater inflexibility and held up payment of many lawyers who already provided services at a lower than normal rate to minority groups funded by the program. Under normal circumstances, lawyers' accounts are subject to adjudication only if the client disputes the account. It appears to us that accounts can still be scrutinized and unjustified delays could be avoided easily if the contribution agreement were modified slightly.

In this regard, we would like to note that the government is in something of an anomalous position in setting fee schedules and requiring taxation of accounts in the contribution agreement. Either the program is at arm's length from the government or it is not, and these conditions in the contribution agreement appear to be an indirect means by which the government controls the administrative arrangements.

In light of the foregoing, we feel that there are several useful modifications that can be made to the contribution agreement. These can provide both flexibility and accountability in dealing with the funding of the legal aspects of the program.

We therefore recommend:

(19) That the contribution agreement be amended to give the Language Rights Panel and the Equality Rights Panel greater discretion in the following manner:

-1-There should be a regular, periodic review of the program's funding limit for court cases. These reviews should bear in mind that the program's mandate should continue to allow the panel to override the funding limit in exceptional circumstances.

-2-The requirement in the contribution agreement that all accounts be taxed should be replaced by a stipulation that all accounts be reviewed by the clients and by the staff of the Court Challenges Program and then approved by the appropriate panel. The agreement should also include a provision that either the client or the panel may request adjudication or taxation of a lawyer's account.

-3-The agreement should provide for either the Language Rights Panel or the Equality Rights Panel to make a funding commitment for the required number of levels of court.

This commitment should also be seen as an expenditure in the fiscal year of the funding decision to ensure that funds are available throughout the whole court process. The panel should review its decision at every level of court and have the capacity to decide to withdraw a funding commitment at any level.

–4–The Department of Justice should conduct a review of its approach to litigation under section 15 and report to this Committee by June 30, 1990 on its policies with regard to the Department's litigation strategy, particularly its approach to procedural issues in section 15 cases.

APPENDIX A

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

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.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one–third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification of the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for he offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, relition, 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.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicat with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of the, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province.

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of aprovince may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under sub-section (4).

Citation

34. This part may be cited as the *Canadian Charter of Rights and Freedoms*.

APPENDIX B

Memorandum of Agreement

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26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

This Agreement made this twenty fifth day of September 1985.

BETWEEN: THE GOVERNMENT OF CANADA (Hereinafter referred to as "Canada") represented herein by the Secretary of State of Canada (hereinafter referred to as "The Minister").

AND: THE CANADIAN COUNCIL ON SOCIAL DEVELOPMENT (CCSD), a corporation incorporated under Part 11 of the *Canada Corporations Act* (hereinafter referred to as "the Recipient") having its Head Office in the City of Ottawa, Province of Ontario, represented herein by Ralph Garber and T.M. Hunsley duly authorized to sign this agreement.

WHEREAS the Minister has established the Human Rights Program which is designed inter alia, to provide financial support to individuals and groups promoting the cause of human rights in Canada;

AND WHEREAS the Recipient has represented that it is dedicated to the objectives and principles underlying the Human Rights Program;

NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of mutual convenants herein, the parties agree as follows:

1. PURPOSE OF CONTRIBUTION

1.1 The Recipient agrees that during the term of this agreement it shall administer, manage and operate a basic organizational facility for the purposes described in Schedule 1.

1.2 The Recipient undertakes to organize and administer a Program known as the Court Challenges Program for the purposes described in Schedule 1 which is attached hereto.

2. MAXIMUM AMOUNT OF CONTRIBUTION

2.1 For the purpose of Clause 1.1, the Minister agrees, subject to the terms and conditions of this Agreement, to contribute towards the reasonable expenditures incurred by the Recipient, for the purposes described in Clause 1.1 the following amounts which shall not exceed in:

i) 1985–86: one hundred seventy five thousand dollars ($175,000);

ii) 1986–87: four hundred and forty five thousand dollars ($445,000);

iii) 1987–88: five hundred and forty three thousand dollars ($543,000);

iv) 1988–89: six hundred and forty five thousand dollars ($645,000);

v) 1989–90: seven hundred and fifty one thousand dollars ($751,000).

2.2 For the purpose of clause 1.2, the Minister agrees, subject to the terms and conditions of this Agreement, to contribute towards the reasonable expenditures incurred by the Recipient for the purposes described in Clause 1.2 the following amounts which shall not exceed:

i) one million dollars in 1985–86;

ii) two million dollars in each of the following years: 1986–87, 1987–88, 1988–89, 1989–90.

2.3 For the purposes of Clause 2.1 and 2.2, the year shall begin on April 1 and end March 31.

3. APPROVED BUDGET

3.1 The Recipient agrees that the contribution referred to in Clause 2.1 shall be applied only to the following allowable expenditures:

Salaries and benefits
Travel and meetings
Contracts
Audit
Facilities (rent, taxes, utilities, communications etc.)
Insurance
Data processing
Translation and interpretation
Office expenses & supplies

3.2 The Recipient agrees that the contribution referred to in Clause 2.2 above shall be applied only to the following allowable expenditures:

- financial support to litigation in court challenges involving language rights;
- financial support to litigation in court challenges under sections 15, 27 and 28 of the Canadian Charter of Rights and Freedoms;
- legal research expenditures.

3.3 The Recipient may transfer funds from Clause 2.1 to Clause 2.2 but the Recipient shall not transfer funds from Clause 2.2 to Clause 2.1 during any given year.

PAYMENT SCHEDULE

4.1 The Minister agrees to pay the contribution referred to in clause 2 to the Recipient as follows:

1985–1986

i) the first advance payment representing the Recipient's cash requirements for the months of October, November and December 1985 shall be made upon the signing of this Agreement and

the receipt and acceptance by the Minister of the cash flow forecast for the period October 1, 1985 to March 31, 1986;

ii) the second and final payment representing the Recipient's cash requirements for the months of January, February and March 1986 shall be made upon receipt and acceptance by the Minister of a financial statement and activity report for the period ending December 31, 1985;

1986–1987 and subsequent years

iii) the first advance payment representing the Recipient's cash requirements for the months of April, May, June, July and August shall be made upon the receipt and acceptance by the Minister of a monthly cash flow forecast statement for the current year;

iv) the second advance payment, representing the Recipient's cash requirements for the months of September, October and November shall be made upon receipt and acceptance by the Minister of financial statements and an activity report for three months ended June 30, the consolidated audited financial statements for the previous year and the annual report, all of which shall be submitted to the Minister no later than August 1st;

v) the third advance payment, representing the Recipient's cash requirements for the months of December, January and February shall be made upon receipt and acceptance by the Minister of financial statements and an activity report for six months ended September 30, all of which shall be provided by the Recipient before November 1st;

iv) the fourth and final advance payment representing the Recipient's cash requirements for the month of March shall be made upon receipt and acceptance by the Minister of financial statements and an activity report for the nine months ended December 31, all of which shall be provided by February 1.

4.2 Where advance payments are payable by the Minister to the Recipient under Clause 4.1, they shall be made within 30 working days following the receipt of the financial statements and activity reports provided that the expenditures reflected in said statements are in compliance with the terms and conditions of the Agreement and that the Recipient effectively addressed the issues, if any, named by the Minister in relation to the previous financial statements and activity reports.

4.3 The Recipient's cash requirements referred to in Clause 4.1 shall be determined on the basis of the accepted monthly cash flow forecast statement.

5. REPORTING

5.1 The Recipient agrees that it shall maintain separate books and records for the Court Challenges Program.

5.2 The Recipient agrees to report separately in its periodic financial statements and in its consolidated audited financial statements all costs associated with the Court Challenges Program as described in clause 3 of this Agreement.

5.3 The annual report referred to in Clause 4 shall include as a minimum, a brief account of all cases for which financial assistance was granted and the nature and number of cases which were not supported during the year.

5.4 The activity reports referred to in Clause 4 shall include a brief description of the activities of the Recipient in regards to this Agreement.

6. FINANCIAL STATEMENTS

6.1 For purposes of this Agreement the financial statements referred to in Clause 4 of this Agreement mean a detailed statement of all sources of revenue and items of expenditure incurred by the Recipient for the activities funded through this Agreement.

7. CONSOLIDATED AUDITED FINANCIAL STATEMENTS

7.1 In addition to the financial statements mentioned in Clause 4, the Recipient shall submit consolidated audited financial statements to the Minister within three months following the end of the period covered by the Agreement. These statements must disclose all sources of revenue and items of expenditure for all programs and operations of the organization, making clearly visible the revenues and expenditures for the activities funded by the Agreement and by any other departmental funding which may have been received over and above the Agreement. The audit shall be conducted by independent practising public accountants, licensed, if required, by the laws in force where the Recipient has its head office, or otherwise appropriately qualified. The consolidated audited financial statements shall include the Auditors' management letter.

8. NOTICES AND COMMUNICATIONS

8.1 All notices and communications to the Ministers concerning this Agreement shall be addressed to:

Department of the Secretary of State
Human Rights Directorate
Ottawa, Ontario
K1A 0M5

9. DURATION

9.1 Clause 1 of this agreement shall bind the Recipient only during the period beginning on October 1, 1985 and ending on March 31, 1990 and all contributions as may be payable by the Minister under this Agreement shall be payable only in relation to activities conducted and expenditures incurred by the Recipient for each year during that period.

10. GENERAL CONDITIONS - CONTRIBUTIONS

10.1 The document entitled "General Conditions - Contributions", which is attached hereto, is an integral part of this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement on the day first written above.

THE RECIPIENT

Signature

Ralph Garber

(Name in print)

Signature

Terrance M. Hunsley

(Name in print)

WITNESS

(Signature)

Harvey H. Hodgson

(Name in print)

THE GOVERNMENT OF CANADA

(Secretary of State of Canada)

WITNESS

(Signature)

Louise Bertrand

(Name in print)

PURPOSE OF CONTRIBUTION

The Canadian Council on Social Development (CCSD) undertakes to establish a Program designed to administer the funding of Court Challenges involving official language rights guaranteed by the Constitution of Canada and rights guaranteed under sections 15, 27 and 28 of the Charter of Rights and Freedoms. CCSD agrees to continue funding of those cases which have been approved for financial assistance under the previous Court Challenges Program.

SELECTION OF CHAIRPERSON AND MEMBERS

The Canadian Council on Social Development shall appoint a body consisting of not less than seven persons, including a designated Chairperson, subject to the approval of the Secretary of State and the Minister of Justice. The selection will be based on the individual standing of such persons and not on their group (organization, etc) affiliation.

A sub–committee shall be appointed by the CCSD with special qualifications appropriate to the selection of language rights cases to be supported.

CRITERIA FOR SELECTION OF CASES

1. Assistance may be provided to:

    a) cases which will test language rights based on sections 93 or 133 of the Constitution Act, 1867, or on section 23 of the Manitoba Act, 1870, or on sections 16 to 23 of the Constitution Act, 1982 or parallel constitutional provisions;

    b) cases which will test federal legislation, policies and practices based on sections 15 (equality) and 28 (equality of the sexes), or in which an argument based on section 27 (multiculturalism) is made in support of arguments based on section 15;

    c) individuals and non profit groups only.

2. The issue should be one of substantial importance and have legal merit.

3. The issue should have consequences for a number of people.

4. Duplication should be avoided; thus, when a legal issue is before the courts, another person espousing the same cause in the same or another case should not receive financial assistance.

5. In general, because intervenors do not have carriage of the action, they should not be funded.

6. In dealing with equality cases, priority shall be accorded to the funding of cases having national importance to disadvantaged groups as per subsection 15(2) of the Charter.

7. Funding should normally be denied where a case raises an issue that falls within the jurisdiction of the Canadian Human Rights Commission. Only where existing procedures for redress before the Commission have been exhausted, and no final determination of the issue has taken place, will funding be considered.

CEILINGS ON AMOUNT OF ASSISTANCE

8. Assistance may be provided for each stage of litigation to a maximum as follows:

Trial	$35,000
Appeal	$35,000
Supreme Court	$35,000

9. Payment of all accounts for legal expenditures will be subject to prior taxation by the appropriate taxing officer of the jurisdiction within which the case is brought.

10. An annual amount of not less than $300,000 will be provided for court challenges concerning language rights.

11. In exceptional circumstances, based on complexity of the factual or legal underpinnings of the litigation, the independent body may authorize additional funding over and above the amounts mentioned in (8) above, and in such cases, reasons for such additional funding will be given in its annual report.

12. Situations might arise where a case would involve only in part fundable issues concerning language or equality rights. In such instances, the independent body is empowered to decide whether partial funding would be warranted.

APPENDIX C

Funded Cases Judicially Considered

(as of September 1989)

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
Bregman v. *A.G. (Can.)*	Ontario Court of Appeal November 28, 1986	solicitor for Mrs. Bregman, applicant	*War Veterans Allowance Act* restricts benefits on the basis of number of years of prior residency in Canada	s.15 national/ethnic origin (also s.6 – mobility rights)	s.15 does not require Parliament to extend funding benefits to those outside scope of legislation – s.6 also not impugned
R. v. *Swain*	Ontario Court of Appeal February 11, 1986 (application for leave to appeal to SCC granted on March 27, 1987)	Canadian Disability Rights Council (CDRC) sponsored on appeal to SCC	*Criminal Code* s.542(2) – automatic commitment of an insane acquittee, which doesn't apply to ordinary acquittal	s.15 – all those similarly situated be treated equally	OCA – upheld legislation as reasonable limitation – need to protect public
Re Seaboyer and the Queen	Ontario Court of Appeal August 6, 1987 (leave to appeal to SCC granted)	LEAF funded as intervener to advance position that legislation enacted to protect a disadvantaged group under s.15 – women	*Criminal Code* ss.246.6, 246.7 – restriction on questioning the previous sexual conduct of a complainant in a sex assault case	s.7 – right to fundamental justice s.11(d) – right to fair and public hearing * *not* a s.15 case	OCA held that these sections not unconstitutional
Joseph Borowski v. *A.G. (Canada) et al.*	Supreme Court of Canada March 9, 1989	LEAF (Women's Legal Education and Action Fund) granted status as intervener	*Criminal Code* – abortion legislation ss.251(4)(5)(6)	s.15 whether foetus has right to equal protection under the law	SCC found that this appeal to the SCC was moot, as legislation had already been struck down – they refused to render a decision on the merits

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
A.G. Canada v. *David J. Vincer*	Federal Court of Appeal December 1, 1987	Mr. Vincer funded as respondent, as well as to make fresh application (no funding for costs related to remedy, but only for the making of legal arguments)	– Regulations under the *Family Allowance Act* which stipulate that benefits go to mother, unless father has *sole* custody (Mr. Vincer had joint custody, but denied equal share of benefits) – Benefits $36/month * matter of significant national importance, but arises only in instances of *joint* custody	s.15 – discrimination on the basis of sex	FCA ruled that the matter had to go back to Federal Court Trial Division because internal Review Committee lacked jurisdiction to make Charter decision
Re Rosen	Federal Court of Appeal April 9, 1987	Mr. Rosen funded as applicant	*Canadian Human Rights Act* s.14(c) provides for termination of employment when an employee has reached "the normal retirement age for employees in similar positions" (This case was a Canadian Human Rights Commission (CHRC) issue, but Commission brought case to Federal Court before proceeding with its own investigation)	s.15 – discrimination on the basis of age	FCA said that the CHRC must first go through its own investigation and adjudication procedure before bringing matter to FCA

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
Law Soc. of B.C. and the A.G. (B.C.) et al. v. *Mark David Andrews et al.*	Supreme Court of Canada February 2, 1989	LEAF – granted intervener status – funding for *research* purposes only, *not* for litigation – LEAF taking no position, but advanced an interpretation of s.15 that ensures equality for women	*B.C. Barristers & Solicitors Act* requires Canadian citizenship to practise law in the province, regardless of academic qualifications	s.15 – discrimination based on national origin vs. whether citizenship an essential requirement to the practice of law and therefore a reasonable limitation	– the legislation is unconstitutional – grounds of discrimination enumerated in s.15(1) not exhaustive – citizenship does not ensure familiarity with Canadian institutions or commitment to Canadian society * first pronouncement by SCC on meaning and scope of s.15
R. v. *Canadian Newspapers Co. Ltd.*	Supreme Court of Canada September 1, 1988	LEAF granted intervener status because of expertise in area of sexual violence against women. LEAF argued purposive approach to s.15 – that the law being challenged is designed to ameliorate the condition of women as a disadvantaged group	*Criminal Code* s.442(3) requires that the identity of the complainant in a sexual assault charge not be disclosed or published in any newspaper or broadcast (mandatory provision)	s.2*(b)* – freedom of the press s.11*(d)* – right to public hearing * *not* a s.15 case	law is not an unreasonable limit on Charter rights and is therefore valid * no reference in judgment to s.15, but case is one of "national importance" to women

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
Nixon v. *C.E.I.C. and A.G. (Can.)*	Federal Court of Appeal December 14, 1987	Mr. Nixon, as appellant of UIC Umpire decision	*Unemployment Insurance Act* ss.20(7), 36, which fails to provide "extended benefits" to persons unavailable for work because of illness (While Mr. Nixon became disentitled prior to proclamation of s.15, his period of disentitlement extended after the section came into force)	s.15 – discrimination on the basis of physical disability	matter sent back to UIC Board of Referees on technical grounds, where Charter matter can be considered
R. v. *Favel*	Sask. Court of Appeal September 21, 1987	Mr. Favel (appellant) funded for leave application to SCC	*Criminal Code* ss.562,563 – accused entitled to fewer challenges of prospective jurors than Crown. Other aspects of jury selection more favourable to Crown	ss.15,7,11(d) – fair trial issue	even if s.15 rights violated, right to fair trial was not, so accused not entitled to any relief

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
Elizabeth Symes v. *Her Majesty the Queen*	Federal Court of Canada (Trial Division) May 11, 1989	Ms. Symes funded as applicant	*Income Tax Act* policy limits child care deduction by s.63(1); also s.18;(1)(a) – definition of gaining or producing income from business – Ms. Symes unable to deduct cost of nanny for her children, though she maintains it to be a business expense	s.15 – law has discriminatory effect on women – disallowing child care expenses as a business expense affects women more than men – also, parent/ employer dis– criminated against, as other employers can deduct from business income the wages paid to general employees	– applicant should be able to deduct costs of nanny as business expense * decision makes specific note of need to promote equality of women
Re Henrie and Security Intelligence Review Committee et al.	Federal Court of Canada (Trial Division) October 18, 1988 (decided preliminary technical issue only) Federal Court of Appeal hearing pending	Mr. Henrie funded for portion of case that addresses s.15 and Charter decision to be heard before Federal Court of Appeal	Policy of Security Intelligence Review Committee denying security clearance on the basis of membership in certain political groups	s.15, 2(b)	pending
Gail Horii v. *Commissioner of Corrections et al.*	Federal Court of Canada (Trial Division) December 8, 1987	Ms. Horii as plaintiff	Policy of Corrections Canada – failure to establish penitentiary facilities for women in other provinces or otherwise to provide for the incarceration of women in their home provinces	s.15 – discrimination on the basis of sex	– not proper forum for motions judge – need for extensive evidence

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
Schachter v. *The Queen et al.*	Federal Court of Canada (Trial Division) June 7, 1988	– Mr. Schachter – LEAF granted intervener status	*Unemployment Insurance Act* ss.30,32 denies special benefits to fathers who leave work temporarily to care for their children	s.15 – discrimination on the basis of sex	declaration should be issued that natural parents (mother or father) should be entitled to same benefits as those granted to adoptive parents
Walter Patrick Twinn et al. v. *The Queen*	Federal Court of Canada (Trial Division) October 31, 1986	limited funding for interveners: Native Council of Canada; Native Council of Canada (Alberta); New Status Indian Association	*Indian Act* (amendments) – modified rules relating to band membership (amended as a result of coming into force of s.15; amendments provided for equal protection of and benefit to both sexes)	– s.15 – s.2(*d*) – freedom of association – also that the amended legislation infringes on the aboriginal rights of Indian bands to determine their own membership as guaranteed under s.35 of the *Constitution Act, 1982*	– decision relates to preliminary and procedural matters only – no decision yet on merits of case
Energy Probe et al. v. *A.G. (Canada)*	Ontario High Court (motion) September 4, 1987 (preliminary issue as to whether corporations have standing to challenge constitutional validity of legislation)	Energy Probe	*Nuclear Liability Act* creates limitation period in respect of claims arising out of nuclear accident	ss.15,7 – distinguishes unfairly between claimants on the basis of whether personal or property injuries were sustained as a result of nuclear accident or otherwise	s.15 applies to individuals only, except where a corporation raised the section as a defence to civil or criminal liability

Name of Case	Court Level Date of Decision	Funded Party Information	Legislation/Reg/ Policy Challenged	Charter Issue	Decision
In the Matter of the Unemployment Insurance Act and Mariaurora Mota	Unemployment Insurance Umpire (appeal from decision of Board of Referees) October 9, 1987	Ms. Mota received case development funding for Umpire's hearing, and for leave to appeal from his decision	*Unemployment Insurance Act* ss.25(a), 36 – foreign students ineligible to collect UIC benefits because they are not "available for work" on account of denial of employment authorization	s.15 – discrimination on the basis of nationality	Umpire rejected s.15 argument (but case sent back to Board of Referees for determination of related issues) (Ms. Mota to apply for leave to appeal Umpire's s.15 decision)
Timothy John Richardson v. *Min. of Employment and Immigration*	Immigration Appeal Board January 8, 1988	Mr. Richardson	*Immigration Act, 1976* s.72 – grants Minister 30 days to bring appeal, where the applicant has only 5	s.15 – existence of two appeal periods violates the guarantee of "equal benefit of the law"	Charter argument fails – applicant not "similarly situated" to the Crown, and the inequality complained of does not constitute discrimination
Canadian Disability Rights Council v. *H.M.Q. and the Minister of Employment and Immigration*	Federal Court of Canada (Trial Division) October 18, 1988	CDRC	*Canada Elections Act* s.14(4)(f) – restriction on voting rights on the basis of mental disability	s.15 – discrimination on the basis of disability (mental) (also s.3 – right to vote)	Charter argument (s.3) upheld: section ruled unconstitutional
Canadian Council of Churches v. *Canada*	Federal Court of Canada (Trial Division) April 26, 1989	Canadian Council of Churches (partial funding only)	*Immigration Act* (new amendments brought in under Bills C–55, C–84)	s.15 – refugees (discriminated subclass of national origin)	– decision on preliminary matters only – no decision yet on merits of case

APPENDIX D

Briefs submitted

- Advocacy Resource Center for the Handicapped
- Assembly of First Nations
- *Association des juristes d'expression française du Nouveau–Brunswick*
- *Association des parents du Programme Cadre de Français*
- Canadian Bar Association
- *Association canadienne–française de l'Ontario*
- *Association canadienne–française de l'Alberta*
- Canadian Advisory Council on the Status of Women
- Canadian Association for Community Living
- Canadian Council on Social Development
- Canadian Disability Rights Council
- Canadian Labour Congress
- Center for Research–Action on Race Relations
- *Centre de recherche et d'enseignement sur les droits de la personne (Université d'Ottawa)*
- Centre for Spanish Speaking People
- Charter Committee on Poverty Issues
- *Commission nationale des parents francophones*
- Coalition of Provincial Organizations of the Handicapped
- Commissioner of Official Languages
- Community Advisory Committee on Equality Rights to the Court Challenges Program
- Dawn Canada: Disabled Women's Network Canada
- Disabled Victims of Violence
- *Fédération des Francophones Hors–Québec*
- Inter–Church Committee for Refugees
- National Anti–Poverty Organization
- Prisoners' Rights Committee
- Public Interest Advocacy Centre
- R.EA.L. Women of Canada
- *Société des Acadiens et Acadiennes du Nouveau–Brunswick*
- Victims of Violence Resource Centre (Canadian Centre for Missing Children)
- Women's Legal Education and Action Fund (LEAF)

APPENDIX E

Witnesses

On Thursday, June 8, 1989

From the Canadian Council on Social Development:

Kathleen Ruff
Director, Court Challenges Program

Francine Fournier
Chairperson, Equality Rights Panel
Court Challenge Program

On Thursday, September 28, 1989

From the Commissionner of Official Languages :

D'Iberville Fortier

Marc Thérien

Jean Fahmy

Michael O'Keefe

From La Société des Acadiens et Acadiennes du Nouveau-Brunswick :

Diane Hachey-Desjardins

From l'Association canadienne-française de l'Ontario :

Rolande Soucie
President

Jeanine Legault Treasurer,
Board of Directors

Sylvie Lépine
Liaison Officer

From La Fédération des francophones hors Québec :

Aurèle Thériault
Director General

François Dumaine
Legal Adviser

From l'Association des juristes d'expression française du Nouveau–Brunswick :

Luc Desjardins
Member

Louise Guérette–Cormier
Director General

From the Charter Committee on Poverty Issues :

Linda Marcotte
End Legislated Poverty (B.C.)

Sarah Walsh
President, National Anti–Poverty Organization

Larry Kowalchuk
Equal Justice for All (Saskatoon)

André Paradis,
Ligue des droits et Libertés (Montreal)

Andrew Pavey,
NAPO

Jeanne Fay
Dalhousie Legal Aid (Halifax)

From the Canadian Advisory Council on the Status of Women :

Gwen Brodsky

Shelagh Day

From the Office des droits des détenus :

Jean–Claude Bernheim

Renée Millette

Stephen Finberg

Bertrane Royer

From Community Advisory Committee to the Court Challenges Program :

Andrew Cardozo

Shelagh Day

Larry Kowalchuk

André Paradis

From the Human Rights Research and Education Centre :

Michelle Boivin

Bill Black

On Tuesday, October 3, 1989

From La Commission nationale des parents francophones :

Raymond Poirier
President

Armand Bédard
Research Director

From the Canadian Disability Rights Council :

Henry Vlug

Yvonne Peters

From R.E.A.L. Women of Canada :

Gwendolyn Landolt

Anne Hartmann

Carole Roy-Blais

From the Women's Legal Education and Action Fund (LEAF) :

Christie Jefferson

From the Advisory Resource Centre for the Handicapped (ARCH) :

Mark Nagler
President

David Baker
Executive Director

From the Assembly of First Nations :

Peter Digangi
Director

Elizabeth Thunder

From the Canadian Association for Community Living :

Gordon Porter
President

Diane Richler
Executive Vice–President

From the Canadian Bar Association :

Lloyd Brennan

John Giokas

From the Centre for Research–Action on Race Relations :

Fo Niemi
Executive Director

Tariq Alvi
Researcher and Policy Analyst

From the Canadian Council on Social Development :

Kathleen Ruff
Director
Court Challenges Program

Francine Fournier
Chairperson
Equality Rights Panel

Gerard Lévesque
Chairperson
Language Rights Panel

Terrance Hunsley
Executive Director

On Thursday, October 5, 1989

From Disabled Victims of Violence :

Barbara Campbell

Jim Campbell

From Equality for Gays and Lesbians Everywhere (EGALE) :

Michael Smith Researcher

Les McAfee

On Tuesday, October 10, 1989

From the Department of Justice :

Martin Low Senior General Counsel Human Rights Law Section

On Tuesday, October 17, 1989

From the Canadian Council on Social Development :

Kathleen Ruff Director Court Challenges Program

On Thursday, October 26, 1989

From the Canadian Council on Social Development:

Terrance Hunsley Executive Director

Harvey Hodgson Director Finance and Administration

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, your Committee requests that the Government table a comprehensive response to the Report within 150 days.

A copy of the relevant Minutes of Proceedings and Evidence of the Standing Committee on Human Rights and the Status of Disabled Persons (*Issues Nos. 3, 10, 11, 12, 13, 14, and Issue 15 which includes this Report*) is tabled.

Respectfully submitted,

Bruce Halliday,
Chairman.

MINUTES OF PROCEEDINGS

TUESDAY, OCTOBER 31, 1989

(24)

The Standing Committee on Human Rights and the Status of Disabled Persons met *in camera* at 3:40 o'clock p.m., in Room 208, West Block, this day, the Chairman, Bruce Halliday, presiding.

Members of the Committee present: Gilles Bernier, Maurizio Bevilacqua, Barbara Greene, Bruce Halliday, David Kilgour, Peter McCreath, Maurice Tremblay, Joseph Volpe.

In attendance: *From the Research Branch of the Library of Parliament*: Jack Stilborn, William Young, Howard Mirsky, Research Officers.

The Committee resumed consideration of the Draft Report to the House on the Court Challenges Program.

At 5:47 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, NOVEMBER 2, 1989

(25)

The Standing Committee on Human Rights and the Status of Disabled Persons met *in camera* at 9:40 o'clock a.m., in Room 208, West Block, this day, the Chairman, Bruce Halliday, presiding.

Members of the Committee present: Gilles Bernier, Barbara Greene, Bruce Halliday, David Kilgour, Peter McCreath, Svend Robinson, Christine Stewart, Joseph Volpe, David Walker.

Acting Member present: Bill Casey for Bob Hicks.

In attendance: *From the Research Branch of the Library of Parliament*: Jack Stilborn, William Young, Research Officers.

The Committee resumed consideration of the Draft Report to the House on the Court Challenges Program.

By unanimous consent, it was agreed that—The Secretary of State of Canada be invited to appear before the Committee to share his views concerning the Court Challenges Program.

At 10:20 o'clock a.m., the Committee adjourned to the call of the Chair.

TUESDAY, NOVEMBER 7, 1989

(26)

The Standing Committee on Human Rights and the Status of Disabled Persons met *in camera* at 9:30 o'clock a.m., in Room 208, West Block, this day, the Chairman, Bruce Halliday, presiding.

Members of the Committee present: Gilles Bernier, Maurizio Bevilacqua, Barbara Greene, Bruce Halliday, David Kilgour, Peter McCreath, Svend Robinson, Christine Stewart, Maurice Tremblay, Joseph Volpe, David Walker.

In attendance: *From the Research Branch of the Library of Parliament*: Jack Stilborn, William Young, Research Officers.

The Committee resumed consideration of the Draft Report to the House on the Court Challenges Program.

At 11:20 o'clock a.m., the Committee adjourned to the call of the Chair.

WEDNESDAY, NOVEMBER 22, 1989

(27)

The Standing Committee on Human Rights and the Status of Disabled Persons met *in camera* at 3:40 o'clock p.m., in Room 208, West Block, this day, the Chairman, Bruce Halliday, presiding.

Members of the Committee present: Gilles Bernier, Maurizio Bevilacqua, Barbara Greene, Bruce Halliday, David Kilgour, Peter McCreath, Svend Robinson, Christine Stewart, Joseph Volpe, David Walker.

In attendance: *From the Research Branch of the Library of Parliament*: Jack Stilborn, William Young, Research Officers.

The Committee resumed consideration of its Draft Report to the House concerning the Court Challenges Program.

By unanimous consent, it was agreed,—That the Draft Report, as amended, be concurred in.

Ordered,—That the Chairman present the Report to the House.

By unanimous consent, it was agreed,—That the Committee print in a bilingual tumble format, with a Mayfair cover, 5,000 copies of its First Report to the House.

By unanimous consent, it was agreed,—That pursuant to Standing Order 109, the Committee request the Government to table a comprehensive response to the Report.

By unanimous consent, it was agreed,—That the Chairman be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the Draft Report to the House.

By unanimous consent, it was agreed,—That the Chairman be authorized to retain the services of a firm for the production of the First Report to the House on audio-cassettes.

By unanimous consent, it was agreed,—That if the Report is tabled in the House before the printed Report is available to the public necessary photocopies be made for the media.

At 5:10 o'clock p.m., the Committee adjourned to the call of the Chair.

Marie Louise Paradis

Clerk of the Committee