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Office of the President
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April 15, 2016

Via email: JUST@parl.gc.ca

Anthony Housefather, M.P.
Chair, Justice and Human Rights Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Dear Mr. Housefather:

Re: Reinstating the Court Challenges Program

The Canadian Bar Association (CBA) appreciates this opportunity to comment on the proposed reinstatement and modernization of the Court Challenges Program. The CBA has a long history of support for the Program. In our view, the Program plays a vital role in increasing access to justice for marginalized and vulnerable groups, as well as official language minorities, and makes a unique and important contribution to democratic values in Canada.

The CBA is a national association representing 36,000 jurists across Canada. Among the Association's primary objectives are to improve and promote access to justice, and to seek improvement in the law and the administration of justice. This letter on behalf of the CBA was developed by the Access to Justice Committee, the Equality Committee, the Forum of French-Speaking Common Law Members, the Aboriginal Law Section, the Sexual Orientation and Gender Identity Community Forum, and the Constitutional and Human Rights Law Section.

The CBA lauds the federal government's commitment to reinstate the Program. We recommend four elements in reinstating and modernizing the Program:

- Affirm the structure and rationale behind the Program;
- Expand the Program mandate to increase access to justice in Canada;
- Improve social conditions for vulnerable and marginalized groups;
- Ensure financial sustainability of (and continued contribution of the legal profession to) the Program;

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

The Program played a distinct role in building human rights capacity and developing groundbreaking rights jurisprudence in Canada. Without assistance, disadvantaged individuals and groups are less able to challenge laws that violate their rights. The program ensures that equality and minority language rights exist not only on paper, but can result in systemic change for those in society whose voices are often ignored.

Affirm the Structure and Rationale Behind the Court Challenges Program

The reinstatement of the Program should affirm the importance of an independent funding body that enables individuals and groups to bring meritorious equality and language rights challenges against government activity.

The Program should provide funding to support individuals and groups bringing cases under the equality and language rights provisions in the *Constitution*. Test cases should promise to improve conditions for marginalized and vulnerable groups and the individuals who constitute them. Cases to enforce and respect the rights of official language minorities should foster their development. The Program should be run by an organization independent of government. Funding to administer the Program, for all cases including test cases, and for related work should be increased.

The Program is a vehicle for substantive equality in Canada. It enables the experiences of vulnerable and marginalized communities and official language minorities to inform key policy issues. To build these cases, litigants must have significant resources and legal capabilities – often not available in historically disadvantaged and socially disenfranchised groups. The CBA recommends that a renewed Program emphasize raising public awareness within, and building capacity amongst, communities best situated to bring equality and language rights claims to courts. The Program should take into account the unique needs of particular communities and groups, where appropriate.

In its 2013 *Reaching Equal Justice* report[1], the CBA called for a rights culture where individuals and groups are empowered to know and enforce their rights through strengthened legal capabilities. This requires a long-term commitment to:

- consult underrepresented communities on legal issues;
- develop cases and build awareness of equality law and language rights amongst those communities;
- study the likely impact of decided cases; and
- strengthen the agency and confidence amongst individuals and groups in advancing legal claims in complex systems.

The federal government should sustain its commitment to building public engagement around human rights, including activities that build legal capabilities, by helping rights claimants (individuals and groups) develop the knowledge, skills and attitudes to work effectively with lawyers and others to advance test cases under the *Canadian Charter of Rights and Freedoms*.

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1 Canadian Bar Association, *Equal Justice: Balancing the Scales*, Ottawa, 2013

Expand the Mandate of the Program to Increase Access to Justice

The previous Program restricted funding to constitutional and *Charter* linguistic rights, and to equality rights challenges under federal law, policies and practices. An expanded mandate should allow for equality and language rights challenges in a wider realm.

The CBA recommends that any expansion of mandate entail five areas:

1. **Equality challenges, with national implications, to provincial and territorial laws, policies and practices**

   The Program's mandate has been limited by excluding s. 15 challenges to provincial and territorial laws, policies and practices. These challenges often have precedential value beyond the jurisdiction, affecting laws, policies and practices in other provinces and territories as well as for the federal government. These precedents can advance the equality interests of all Canadians in all parts of the country.

2. **Complaints under the *Official Languages Act***

   Similarly, the Program's mandate has been limited by excluding language rights claims under the *Official Languages Act*.

3. **Meritorious cases under sections other than section 15 of the *Charter* that raise equality considerations**

   While the Program funded equality arguments under other *Charter* rights, funding was limited to the development of the equality rights element of the argument distinct from other aspects of the claim. The coverage should extend to the entirety of meritorious cases raising important equality issues under sections other than s. 15 of the *Charter.* Assigning funding solely to the equality rights element presented difficult parameters for the litigant and their counsel.

   This restriction is at odds with the realities of constructing s. 15 claims. Plaintiffs typically bear a high evidentiary burden in establishing a violation of their equality rights and the adverse effects in a complex social context. Litigants often embed s. 15 claims within more involved *Charter* arguments. See, for example, the grounds raised in *Carter v. Canada (Attorney General)* (ss. 7 and 15), *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence* (ss. 2(b), 2(d), 7 and 15), *Charkaoui v. Canada (Citizenship and Immigration)* (ss. 7, 9, 10, 12 and 15), and *Dunmore v. Ontario (Attorney General)*(ss. 2(d) and 15).[2]

   The CBA recommends that these complex claims be funded in their entirety, to encourage the effective advancement of s. 15 claims before the courts.

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[2] *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331, *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.

4. Claims of discrimination by historically disadvantaged groups under the *Canadian Human Rights Act*

The recent decision in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, is an example of a test case that could warrant funding from the Program. Complainants raising systemic issues, working in tandem with the Canadian Human Rights Commission, present an efficient way to raise and resolve equality issues. Legal advice and support in early stages can properly conceptualize and develop the case from an evidentiary perspective. The CBA also supports this extension to support an equality analysis that advances the law under both s. 15 of the *Charter* and under federal human rights legislation.

5. Dedicated resources for Aboriginal and treaty rights, and federal responsibilities to Aboriginal peoples

The government has emphasized the need for a renewed, nation-to-nation relationship with First Nations, Inuit and Métis communities in Canada. To this end, the Program should dedicate resources to litigation that seeks to define Aboriginal and treaty rights and federal responsibilities. Given the culture and history of violence exerted against them, Aboriginal communities do not have the financial resources to advance litigation. Yet the health and vitality of their communities frequently depends on their ability to assert legal claims against the federal government. This litigation extends beyond s. 35 of the *Constitution*, and should also explore the responsibilities of the federal government under the constitutional division of powers, such as the issues raised in *Harry Daniels v. The Queen*.[3]

Indigenous and Northern Affairs Canada administered an Aboriginal Test Case Funding Program until it was discontinued in 2012. The CBA supports a similar funding program to cover legal or other costs for cases with precedent-setting potential in treaty rights and federal responsibilities. We suggest that it be housed in a separate arm of the Program to invest it with more independence and greater expertise. In creating this funding program, we underscore the importance of consulting with First Nations, Inuit, and Métis communities in Canada. It is imperative that Aboriginal peoples shape and direct a program supporting the exercise of their legal rights, and we urge the federal government to commence this dialogue immediately.

Improve Social Conditions for Vulnerable and Marginalized Groups

Any expansion of the Program's mandate should maintain as its focus the use of law and legal processes to improve conditions for marginalized and vulnerable groups as well as official language minorities in Canada. With limited resources already allocated amongst competing claims, the CBA recommends that any expansion of mandate beyond equality rights, official language minority rights and Aboriginal rights maintain as a precondition that funding be awarded to cases with the potential to improve social conditions for vulnerable and marginalized groups.

Marginalized and vulnerable communities in Canada are disproportionately impacted by laws and practices that deprive them of their rights. For the approximately two million Canadians of official language minority communities, the impact is increased by the challenge of accessing the justice system in the official language of the minority. Marginalized and vulnerable communities are less

[3] Appeal of 2014 FCA 101, heard by Supreme Court of Canada on October 8, 2015, judgment pending.

equipped with economic and social resources required to launch public interest litigation. The Program can offer protection to minorities who may be harmed by the power of the majority, and gives voice to those in Canadian society who are often ignored. We also underscore the importance of public interest litigation or litigating as a group for communities whose language rights are disregarded or interpreted restrictively, or whose rights are compromised by discriminatory legislation, government policy or practices.

Systemic discrimination is about the cumulative negative effect of government conduct on individuals or groups, and requires systemic remedies. An analysis of systemic discrimination requires a perspective, supported by evidence, beyond the experience of one individual. As acknowledged by Justice Cromwell in *Downtown Eastside Sex Workers United Against Violence*,[4] individual challenges tend not to challenge the entire legislative scheme (para. 68), and can place disproportionate burdens on individuals who face great vulnerability in acting as individual parties in *Charter* litigation (para. 71). Litigating as a group makes it easier to advance complex and sometimes stigmatized claims against a daunting opponent: the government.

Publicly funded legal services in Canada differ greatly across the country, and civil legal aid for individuals is uniformly underfunded.[5] With limited exception, individuals from low-income communities are unable to access publicly-funded services to advance civil claims, including those raising equality or language rights. The Program is therefore critical for funding and support for public interest challenges raising systemic issues.

To the extent that Canada's international human rights obligations require the federal government to remedy historical inequalities, those obligations should be reflected in the Program mandate. The United Nations Committee on Economic, Social and Cultural Rights has recognized that the Program strengthens Canada's capacity to fulfill its obligations under international human rights instruments, and called for its reinstatement. Given the federal government's promise to implement the United Nations Declaration on the Rights of Indigenous People, we believe that expanding the Program's mandate to Aboriginal and treaty rights would enable Canada's First Nations, Inuit, and Métis to participate meaningfully in the domestic implementation of the Declaration.

Ensure financial sustainability and continued contribution of the legal profession

The CBA recommends a sustainable and robust financial structure underpinning the Program, particularly if it has a wider mandate for *Charter* claims raising equality issues and for language rights claims. In our view, the best way to ensure the viability of the Program is to anchor its existence in legislation. The new Program should be created by law.

The CBA has suggested that the federal government, with possible participation of provincial and territorial governments, create independent endowment funds to support each of the Program mandates: equality and language rights. If a third mandate is added for Aboriginal and treaty rights, an independent endowment fund should be dedicated to that as well. The CBA recommends that Heritage Canada examine the viability of the different legislative and financial structures that can bolster the long-term continuance of the Program.

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4 *Supra*, note 2.

5 *Supra*, note 1, pp 37-40.

Ensuring the sustainability of the Program is urgent given the rising costs of *Charter* litigation in Canada. Legal costs are usually much more than originally expected, depending on the complexity of litigation or the conduct of the defendant in responding to the court challenge. Equality claims are complex and often seek to describe the realities of communities who face multiple forms of disadvantage. In making their claims, litigants must rally immense documentary evidence before the courts.[6] If the litigants fail to do so, their claims may be denied for lack of a *prima facie* breach of rights.[7] If the case is defended vigorously, if tactics of delay are adopted, if there is more than one defendant, or if there are several intervenors whose positions may complicate the proceedings, the costs of the litigation can quickly multiply. Financial limits imposed under the old Program should be examined so as not to preclude meritorious cases from proceeding to Canada's highest court.

It may also be prudent for the Program to retain discretionary power to indemnify a litigant when a court awards costs against them in denying their equality, language rights, or Aboriginal rights claim. While rare, awards are particularly punitive for under-funded and under-resourced litigants, and can act as a chill for other litigants considering systemic rights claims against the government.

The CBA is proud that the legal profession has always played a key role in bringing equality and language rights cases to court. Counsel frequently reduces their legal fees to proceed with the case. The time they contribute is a personal *pro bono* contribution of time that could otherwise be devoted to fee-paying work. A renewed Program should encourage a reasonable *pro bono* contribution by lawyers and the involvement of law students and new lawyers, while striking a balance to ensure adequate resources for this vital work by lawyers.

Conclusion

As the representative national voice of the legal profession in Canada, the CBA is pleased to support the government in its commitment to reinstate – and reinvigorate – the Program. Our members help shape the public's legal claims, advocate for those claims before our courts, and are uniquely equipped to see the steps needed to build robust and progressive rights jurisprudence for all Canadians. With a renewed Program, we can work with confidence, at early stages, with the communities whose rights most deserve clarification and enforcement

Yours truly

(original letter signed by Janet M. Fuhrer)

Janet M. Fuhrer

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6 See, for example, *Canada (Attorney General) v. Bedford*, [2012] 109 O.R. (3d) 1, paras. 23-24 for references to the volume of affidavit, expert and socio-legal evidence before the Ontario Court of Appeal.

7 See, for example, the Court's findings on the claimants' evidence *in Kahkewistahaw First Nation v. Taypotat*, [2015] 3 S.C.R. 1101.