L'ASSOCIATION DU BARREAU CANADIEN
THE CANADIAN BAR ASSOCIATION

Cabinet du président
Office of the President

June 7, 2017

Via email: Hon.Melanie.Joly@canada.ca

The Honourable Melanie Joly, P.C., M.P.
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC K1A 0M5

Dear Minister:

Re: Reinstatement of the Court Challenges Program

In February, the Canadian Bar Association (CBA) applauded your announcement regarding the reinstatement and modernization of the Court Challenges Program. The program ensures that equality and minority language rights result in systemic change for those in society whose voices are often ignored. Without assistance, disadvantaged individuals and groups are less able to challenge laws that violate their rights. The previous incarnation of the Program played a distinct role in building human rights capacity and developing groundbreaking rights jurisprudence in Canada.

Much of the success of the renewed program will depend on how the government implements and administers it. Your announcement signalled a good start to the successful reinstatement of the Program. We offer our comments to ensure that it operates as intended. As well, we have some concerns about extending the scope of the Program to section 2, 3, and 7 *Charter* rights, and the continued exclusion of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*.[1]

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. The CBA's Access to Justice Committee, Equality Committee, Sexual Orientation and Gender Identity Community Forum, Aboriginal Law Section, and Constitutional and Human Rights Law Section would be pleased to provide further assistance as plans progress for implementation.

We recommend that the government do the following in the course of implementing a reinstated and modernized Program:

- Clarify that cases selected under the expanded mandate must contain an equality claim, or at least be consistent with *Charter* equality values;

[1] Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

- Clarify that the Program's objective is to improve access to justice and social conditions for vulnerable and marginalized groups;
- Expand the Program to include section 35 Aboriginal and treaty rights;
- Ensure that Panel experts also demonstrate a commitment to substantive equality and access to justice for disadvantaged groups and official-language minority communities.

Claims to Advance or Be Consistent with Equality Rights

In our April 2016 submission on the reinstatement of the Court Challenges Program, the CBA recommended expanding the mandate of the Program to include funding for language rights claims under the *Official Languages Act*, as well as funding all aspects of claims involving *Charter* section 15 and rights under other sections, not just the portion concerning section 15.[2] We were pleased to see the expansion of funded language rights claims, as well as the expansion beyond exclusively section 15 claims under the human rights portion of the Program.

The problem was not that Program funding was limited to claims involving equality rights and language rights. There are good reasons for the Program to prioritize these claims. Claims for equality rights ordinarily involve historically marginalized and politically underrepresented groups who suffer from the "worst oppression," discrimination reinforced by law.[3] They are amongst those whose access to justice needs are greatest. Further, the ever-changing test for a violation of section 15 has worked to the disadvantage of equality claimants, who have lower rates of success than claimants under other rights.[4]

Rather, the problem was that the Program limited funding to development of the equality argument, and would not fund anything attributed to the other part of the claim. Assigning funding solely to the equality rights element presented difficulties for litigants and their counsel. It did not reflect the reality of how they construct section 15 cases.

Plaintiffs bear a high evidentiary burden in establishing a violation of their equality rights and adverse effects in a complex social context. Litigants must rally immense documentary evidence before the courts. If the litigants fail to do so, their claims may be denied for lack of a *prima facie* breach of rights.[5] Litigants often embed section 15 claims in more involved *Charter* arguments, as was the case in *Carter v. Canada (Attorney General)* (sections 7 and 15), *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence* (sections 2(b), 2(d), 7 and 15), *Charkaoui v. Canada (Citizenship and Immigration)* (sections 7, 9, 10, 12 and 15), and *Dunmore v. Ontario (Attorney General)* (sections 2(d) and 15).[6]

We share the concern expressed by the National Association of Women and the Law and the Council of Canadians with Disabilities (together with other signatories) in their March 13, 2017 letter, that funding non-section 15 claims under the "human rights" part of the Program opens the possibility

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2 Canadian Bar Association, Letter to Anthony Housefather, M.P. Chair, Justice and Human Rights Committee (April 15, 2016) (http://ow.ly/gp7v30cdT40).

3 *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at 172 (per McIntyre J). See also Wilson J. at 152, concerning the application of section 15 to "discrete and insular minorities."

4 Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013), 63 Sup Ct L Rev (2d) 261.

5 For instance, in *Kahkewistahaw First Nation v. Taypotat*, [2015] 3 S.C.R. 1101.

6 *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.

of funding for *Charter* claims that could seriously undermine, rather than reinforce, your government's and our shared objective of a more diverse, inclusive and equitable Canada.

So-called claims of "conflicting rights" are amongst the most contentious under the *Charter,* and most involve equality rights of minorities and women deemed to conflict with the rights of politically influential and privileged groups. While the courts in principle are to balance conflicting rights, we are not satisfied that they have been successful in all cases, to the detriment of equality rights. We could envision cases in the following areas being submitted to the Program:

- religious freedom of institutions to discriminate against those in the LGBTQ community, those who require or wish to provide assistance in dying, or women in their reproductive choices;
- fair trial rights advanced against the rights of sexual assault complainants to a non-discriminatory trial process;
- freedom of expression to undermine hate speech prohibitions;
- section 3 rights against any attempt to enhance diversity of elected representatives in our electoral system.

We recommend that the government clarify that any claim submitted to the Program must include a section 15 claim, or at least be consistent with *Charter* equality values. In fact, the *Charter* itself mandates the latter: section 28 requires that *all* rights be read through a gender equality lens.

Improve Access to Justice and Social Conditions for Vulnerable and Marginalized Groups

Our concern about stand-alone claims under sections 2, 3, and 7 is compounded because there appears to be no assurance that the Program will maintain its focus on 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, it is particularly important that, if the Program expands beyond equality rights and official language minority rights, its specifically stated objective should be to improve access to justice for historically disadvantaged groups and official-language minority communities. The mandate should further state that funding will 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 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 the cumulative negative effect of government conduct on individuals or groups. It 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*, individuals tend not to challenge the entire legislative scheme, and disproportionate burdens are placed on those who act

as individual parties in *Charter* litigation.[7] 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.[8] With limited exceptions, individuals from low-income communities cannot access publicly-funded services to advance civil claims, including those raising equality or language rights. The Program is 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 UN 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.[9]

Include Indigenous Rights under Section 35 of the *Constitution Act, 1982*

We support the call by others for section 35 of the *Constitution Act, 1982* (Aboriginal and treaty rights) to be included in the reinstated Program. Given the federal government's promise to implement the UN 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. The continued exclusion of Aboriginal and treaty rights is difficult to square with Canada's firm commitment to reconciliation with its Indigenous people. Cases under section 35 seek to redress longstanding imbalances that have prejudiced Indigenous peoples and resulted in great disparities between them and non-aboriginal society. Thus, section 35 cases may also have the effect of lessening inequality.

Panel Experts to Demonstrate Commitment to Equality and Access to Justice

We were pleased to see that decisions on Program funding will be rendered by two independent expert panels: an Official Language Rights Expert Panel and a Human Rights Expert Panel. We agree that it is important for the panels to include recognized legal experts on linguistic or human rights, who will be appointed through an open, transparent and merit-based selection process, and who will report to the independent organization that will administer the Program.

To ensure the Program's mandate is respected, we support the recommendation by NAWL *et al.* that government should also require Panel members to have a demonstrated commitment to promoting equality and access to justice for disadvantaged groups and official-language minority communities. This will ensure that the commitment of Panel members to promote the mandate is sincere, and also recognize that expertise is necessarily developed in working on linguistic and human rights "on the ground," understanding what is necessary for linguistic minorities and groups experiencing historical disadvantage to enjoy rights in fact, and not just on paper.

Conclusion

As the representative national voice of the legal profession in Canada, the CBA is pleased to support the government in achieving its commitment to reinstate the Program. Our members help shape the

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7 *Supra*, note 6 at paras 68 and 71.

8 Canadian Bar Association, *Equal Justice: Balancing the Scales* (Ottawa: Canadian Bar Association, 2013) at 37-40.

9 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN Doc. E/C.12/CAN/CO/4-5, 22 May 2006, at para 42.

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. We work with the communities whose rights most deserve clarification and enforcement. We would be pleased to work with you to ensure that the Court Challenge Program is a principled expression of the government's commitment to the advancement of linguistic rights and substantive equality.

Yours truly,

(original letter signed by René J. Basque)

René J. Basque, c.r./Q.C.