OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

February 1, 2007

Mr. Gary Schellenberger, M.P.
Chair, Canadian Heritage Committee
House of Commons
Ottawa, ON K1A 0A6

Dear Sir:

Re: Study on the Court Challenges Program

I am writing on behalf of the Canadian Bar Association (CBA) regarding your study on the elimination of the Court Challenges Program. The CBA is a national association representing approximately 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improving the law and the administration of justice.

We believe the elimination of the Court Challenges Program will have a serious impact on the Rule of Law and the administration of justice in Canada.

The Court Challenges Program was created to provide financial assistance for important court cases that clarify language and equality rights. The program is unique in that it provides a source of funding for groups that would otherwise have no recourse to the courts to uphold these important constitutional rights. Prior to its elimination, funding for the Program remained virtually at 1994 levels, despite the increasing number of applications it receives. The Program played a critical role to assist in giving a voice to those in society who are often ignored. It did so very efficiently and at relatively little cost to the taxpayer.

In a society governed by the Rule of Law, people who are subject to the law must be given an effective means to enforce their legal rights. In other words, the law must work for everyone. The *Canadian Charter of Rights and Freedoms* was enacted through the exercise of a democratic process and was adopted by duly elected Members of Parliament. The Supreme Court of Canada has said that "it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the *Charter* and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court."[1] We have long recognized in Canada that one's rights should not be curtailed merely because he or she lacks the resources to defend them.

[1] *B.C.G.E.U. v. British Columbia (Attorney General)* [1988] 2 S.C.R. 214 at para. 24.

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An issue that has arisen during the course of your hearings is whether the Court Challenges Program has "lined the pockets" of lawyers of certain political affiliations. The reality is that Program funding is not a political plum; it provides basic amounts permitting a committed lawyer to take on a case, albeit at some professional sacrifice. The relatively modest amounts given to litigants ($60,000 for a trial, $35,000 for an appeal or intervention) must pay for all expenses associated with a case. This includes expert witness fees, travel expenses, court fees, and other out-of-pocket expenses. Litigation against governments with deep pockets is especially costly. At the end of the day, paying these expenses from Program funds often meant that lawyers drastically reduced their fees or performed part of the work *pro bono* in order to bring *Charter* cases to court. They do so in accordance with one of the best traditions of the legal profession – working to ensure that everyone has the same rights regardless of their economic status.

The government has said that the Program is not required because it does not intend to introduce unconstitutional legislation. Decades of *Charter* jurisprudence belie this argument. Sometimes the most pernicious discrimination is unintentional. It is often through legal challenges that the unintended negative effects of laws against vulnerable persons are revealed. To give but a few examples of legal milestones achieved with the assistance of the Program:

- the right of deaf persons to sign language interpretation so they can understand doctors and other hospital staff;
- the right of women to say no to sexual contact and have this right respected; and
- the right of children in a French-speaking minority to quality education.

Some witnesses have suggested to your Committee that the Program criteria for funding equality cases are themselves discriminatory. The criteria require that the equality test case have "the potential to stop discrimination or improve the way the law works for members of a disadvantaged group or groups in Canada." In other words, they are aimed at supporting cases that advance the fair administration of justice, an important goal of any democratic society governed by the Rule of Law. Considering applications on the basis of whether the proposed legal arguments would contribute to the better operation of the law for marginalized groups cannot be considered discriminatory. The fair administration of justice is simply not furthered by a notion of equality that would disregard the real effects of the law on marginalized groups, or for maintaining a discriminatory status quo.

We strongly urge your Committee to recommend that funding for the Court Challenges Program not only be reinstated but increased, coupled with a commitment to its long-term financial stability.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.