



May 15, 2024

Via email: CHPC@parl.gc.ca

The Honourable Hedy Fry, P.C., M.P., Chair
Standing Committee on Canadian Heritage
Committees Directorate
House of Commons
131 Queen Street
Ottawa, Ontario K1A 0A6

Dear Chair Fry:

Re: Bill C-316, An Act to Amend the Department of Canadian Heritage Act (Court Challenges Program)

The Access to Justice Subcommittee of the Canadian Bar Association (CBA Subcommittee) appreciates this opportunity to comment on Bill C-316, An Act to Amend the Department of Canadian Heritage Act (Court Challenges Program).

The CBA is a national association of 38,000 lawyers, Québec notaries, law teachers and law students. Among the Association's primary objectives are to seek improvement in the law and the administration of justice, and to improve and promote access to justice. The Access to Justice Subcommittee coordinates and integrates activities of the Association to improve and promote access to justice for the poor and middle class in Canada, facilitates information sharing about legal aid and pro bono across Canada, and liaises with legal aid and pro bono organizations and CBA groups.

All Canadians benefit from the clarification of constitutional rights. The CBA Subcommittee supports Bill C-316 as a way to increase the Court Challenges Program's stability and independence. Since the Program's establishment in 1978, the series of cancellations and revivals underscore the program's inherent instability, emphasizing the necessity of an independently administered program.

The CBA is a longtime supporter of the Program's objectives to advance constitutional rights and freedoms by funding test cases of national significance in the areas of equality and official language rights. The CBA Subcommittee recognizes that the Program plays a vital role in increasing access to justice for marginalized and vulnerable groups, and that the Program makes a unique and important contribution to democratic values and citizenship.¹ The Program also contributes to Canada's capacity to fulfil its obligations under international human rights instruments and laws.

¹ CBA, Court Challenges Program Funding – Resolution 06-01-A, [online](#).

Measures to ensure the Program's Stability and Independence

The CBA Subcommittee continues to recommend that the program be run by an organization independent of government, as Bill C-316 seeks to ensure.²

For the Program to fulfil its distinct and vital role in building human rights capacity and developing groundbreaking rights jurisprudence in Canada, the CBA Subcommittee recommends that the government ensure:

- the Program is independent from government influence or appearance of influence;
- the protection of the solicitor-client relationship of the litigants; and
- financial sustainability of (and continued contribution of the legal profession to) the Program.

A fundamental tenet of the rule of law is the independence of the legal profession. For our justice system to function appropriately lawyers represent and advocate for their clients free from government interference. Confidence in the justice system requires not only protection from actual interference but also freedom from the appearance of undue influence or bias.

The Program supports litigation against government, and must therefore be arm's length to maintain its independence and public trust in its independence. Any mechanism or oversight that is not arm's length may leave the Program and its decisions open to challenge leading to a lack of confidence in the Program and the government's commitment to the fundamental principles of the rule of law and democracy.

The Program must maintain its current solicitor-client privilege and continue to decline disclosure of detailed information about funded clients. Solicitor-client privilege is important not only to the client who claims it, but to society as a whole³. Disclosing the names of clients and funding amounts received would violate a client's reasonable expectation of privacy.

Ensuring the sustainability of the Program is urgent given:

- the rising costs of *Charter* litigation in Canada;
- that 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; and
- in making their claims, litigants must rally immense documentary evidence before the courts.

Governments have significantly more resources at their disposal than individuals or advocacy groups. This resource asymmetry can manifest in various forms, including access to legal expertise, financial resources for litigation and institutional support. As a result, individuals and smaller organizations face significant barriers when attempting to challenge laws or government policies in court. These barriers are further exacerbated for individuals and groups that are historically vulnerable and marginalized.

The CBA Subcommittee recommends that the federal, provincial and territorial governments create independent endowment funds to support each of the Program mandates. The CBA Subcommittee further recommends that Heritage Canada examine the viability of the different legislative and financial structures that can bolster the long-term continuance of the Program.

² CBA, Reinstating the Court Challenges Program, April 15, 2016, [online](#).

³ *R v McClure*, [2001] 1 SCR 445

Expansion of the Program's Mandate to Increase Access to Justice

In 2016 the CBA recommended expansion of the Program's mandate to increase access to justice. The CBA Subcommittee continues to recommend the expansion of the Program's mandate to also include:

1. Equality challenges, with national implications, to provincial and territorial laws, policies and practices.
2. Claims of discrimination by historically disadvantaged groups under the *Canadian Human Rights Act*.
3. Dedicated resources for Aboriginal and treaty rights, and federal responsibilities to Indigenous peoples.

With the government's commitment to reconciliation and delivering on the Truth and Reconciliation Commission's Calls to Action, the CBA Subcommittee recommends the Program dedicate resources to litigation that seeks to define Aboriginal and treaty rights and federal responsibilities. This expansion would contribute to Canada's commitments under the *United Nations Declaration on the Rights of Indigenous Peoples*.

Indigenous and Northern Affairs Canada administered an Aboriginal Test Case Funding Program until it was discontinued in 2012. We recommend a separate arm of the Program be established to manage a similar initiative, in consultation with First Nations, Inuit and Métis communities. It is imperative that Indigenous peoples shape and direct a program supporting the exercise of their legal rights.

Centre Improving Social Conditions for Vulnerable and Marginalized Groups

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 Subcommittee recommends that as a precondition funding be awarded to cases with the potential to improve social conditions for vulnerable and marginalized groups.

Communities and groups which have historically been disadvantaged or socially disenfranchised may face more challenges in having the necessary understanding of the law, skills to apply it, and in the ability to work effectively with lawyers and others to advance their case. The CBA Subcommittee recommends that the Program support raising awareness within, and building capacity amongst, communities best situated to bring equality and language rights claims to courts.

Conclusion

Enshrining the Court Challenges Program into legislation ensures more equitable access to justice for all. It would ensure the stability and funding of the Court Challenges Program, and maintain a healthy balance of power between the government and the people it serves.

Yours truly,

(original letter signed by Véronique Morissette for Jennifer Khor)

Jennifer Khor
Chair, Access to Justice Subcommittee