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**SUMMATIVE EVALUATION OF  
THE COURT CHALLENGES PROGRAM**

**Final Report**

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Canada

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## EXECUTIVE SUMMARY

The Court Challenges Program (CCP) is a funding program created by the Department of Canadian Heritage. The CCP was created to clarify constitutional provisions related to language and equality rights through the provision of financial assistance for test cases of national significance. Canadian Heritage mandates the Court Challenges Program of Canada (hereafter the Corporation or CCPC), an arms-length non-profit corporation, to administer the Program. In accordance with the Contribution Agreement signed between Canadian Heritage and the Corporation, an evaluation has been completed to assess the Program's relevance / rationale, design / delivery, success / impacts and cost effectiveness / alternatives. The full range of evaluation issues and questions is included in Table 1, in section 2.1.

### *Methodology*

The methodology used to complete the evaluation includes the following components:

- ▶ A literature review, addressing a number of themes, including the Program itself, the role of the courts in Canada, interest group litigation, and the jurisprudence related to constitutional provisions covered by the CCP.
- ▶ An administrative file review, where 40 Program files were reviewed.
- ▶ Key informant interviews, including interviews with representatives from Canadian Heritage, the Corporation, experts on language and equality issues, and various federal departments. A total of 39 interviews were completed.
- ▶ A survey of funding applicants and CCPC members. A total of 156 surveys were completed.
- ▶ Five case studies were prepared to illustrate how the Program functions.

The draft final report was also reviewed by two external reviewers, M<sup>e</sup> Renée Dupuis and the Honourable Gérard La Forest, C.C., Q.C.

### *Profile of the Court Challenges Program*

Launched in 1978, the CCP has a long history, during which its mandate was expanded, the Program was cancelled and then reinstated. Initially conceived as a program to provide funding for language test cases, the CCP was broadened to include equality rights in 1985.

The main purpose of the Program is to clarify certain constitutional provisions relating to equality and language rights. This is achieved through the provision of financial assistance for test cases of national significance put forward by or on behalf of official language minority groups or disadvantaged Canadians. A description of the rights covered by the CCP is included in Table 3, in section 3.1.

The Program's specific activities include those related to program promotion and access (to ensure that potential beneficiaries are aware of the Program), negotiation (to encourage parties to



use alternative dispute resolution mechanisms), and the funding of test cases. On the latter point, the CCP may fund case development, actual litigations, and impact studies. Table 4, in section 3.1, provides details on each of these activities.

In accordance with the Contribution Agreement, the Corporation delivers the Program and Canadian Heritage assumes overall management responsibilities. All funding decisions are made by two independent panels (Language Panel and Equality Panel), which are part of the Corporation's organizational structure, and whose members work closely with the Corporation's staff. The Aboriginal Peoples' and Human Rights Programs Directorate (at Canadian Heritage) is responsible for implementing and managing the Contribution Agreement and for reporting on its activities and expected results.

Over the five years covered by the Contribution Agreement, Canadian Heritage will have invested \$13.7 million in the CCP.

### ***Evaluation Findings***

#### ***► Relevance and rationale***

The Aboriginal Peoples' and Human Rights Programs Directorate at Canadian Heritage is involved in several activities that support the Department's central mission, which is to further a more cohesive and creative Canada. The Human Rights Program figures among these activities. It is through this program, which supports the "*development, understanding, respect for and enjoyment of human rights in Canada*", that the CCP is funded. The consultations indicate that there is a broad consensus that Canadian Heritage is best positioned to manage the Program.

The rationale for having the CCP appears to be founded on two main considerations. First, the constitutional provisions covered by the Program do require clarification and it is in the best interest of the government of Canada to facilitate this process. This clarification process is ongoing and will probably continue indefinitely. Second, by specifically supporting official language minority groups and disadvantaged Canadians, the Program provides greater access to the court system for these groups and facilitates the emergence of their perspectives to be considered during the clarification process.

The consultations identified several areas where clarification of the rights covered by the Program is required. The jurisprudence on numerous aspects of these rights is relatively recent. The evaluation findings also indicate that the Program, as currently structured and delivered, will only fund cases that help to protect and advance the language and equality rights covered by the CCP. When deciding on a specific funding request, Panel members can provide specific guidelines regarding the type of arguments that may be presented by the funding recipient and can ask, as a condition of funding, to review the draft arguments before they are tabled in the courts. In this sense, the two Panels play an active role in shaping the arguments presented with the support of the CCP.



The appropriateness of encouraging groups and individuals to initiate court challenges against their own government is the object of a significant body of literature. While some point towards power imbalance, high litigation costs, and the need for a variety of perspectives to be brought to the attention of the court in order to justify the CCP, others perceive this type of initiative as inappropriate, inefficient, and undemocratic.

Many of the consulted organizations and key informants would like to see the CCP expanded to include provincial-based equality challenges. This perspective was not shared by many representatives from the federal government who thought that, at the very least, the provinces would need to agree before such an expansion could be implemented.

▶ ***Design / delivery***

Managing over 1,000 case files (including 847 where funding was approved), the Corporation has established a number of administrative processes to facilitate the access to the Program and to support an efficient review process. Consultations indicate that funding applicants are generally satisfied with the application process. Organizational applicants tend to score the work of the Corporation higher than individual applicants and, not surprisingly, those applicants who received funding provide higher marks than those who were turned down.

Using a third party to deliver the Program is also a decision that the vast majority of those consulted supported. In such a context, the Corporation provides information, data, and reports to Canadian Heritage to assist the Department in meeting its accountability obligations. While current reporting practices provide aggregate information of the cases funded by the Program, there was a concern among some that the Program is not sufficiently transparent. This was particularly concerning, in light of recent reports from the Auditor General of Canada where third party program delivery was criticized as weakening the capacity of federal departments to report and account for publicly invested money. Some think that the current confidentiality policy of the Corporation is too restrictive and should be revised.

▶ ***Success / impact***

The individuals and groups benefiting from the CCP are located in all regions of the country and generally come from official language minorities or disadvantaged groups, such as natives, women, racial minorities, gays and lesbians, etc. Those generally turned down include groups and individuals who do not represent a historically disadvantaged group or whose arguments put forward would not advance the constitutional provisions covered by the Program.

Most key informants described the overall impact of the Program as significant. In relation to language rights, many noted that the CCP has always been a prominent player in practically all the critical court challenges related to these rights (ever since the Program was established in 1978). Key informants think that many of these challenges would never have been possible without the CCP. In relation to equality rights, key informants also think that the Program has been successful in allowing groups and individuals to raise strong arguments in favour of substantive equality rights.



The interviews also indicated that the very existence of the Program has a powerful legitimization effect. It signals to Canadians that it is appropriate to challenge a law, policy, or practice that they feel violates their rights and freedoms. Key informants noted that this is particularly significant, considering the fact that CCP beneficiaries often come from marginalized groups.

▶ *Cost-effectiveness / Alternatives*

The evaluation assessed whether the overall level of funding to the Program (\$2.75 million annually) is appropriate to meet the Program's objective. On this point, it is clear that the Program could support more cases if it had more resources. However, most key informants agreed that the current level of resources does allow the Program to fund a number of important challenges related to the constitutional provisions covered by the Program.

The evaluation also assessed whether the delivery of Program activities is efficient. The interviews revealed no significant problems, except for the Program's administration budget. Some argued that the budget for administration should be increased to take into account the fact that the number of funding applications has substantially increased over the years.

As an independent entity, the Corporation could technically access sources of funding other than the Contribution Agreement. A number of key informants noted that the Corporation could, and even should, pursue other sources of funding. If, however, this funding is to support court challenges in areas other than the ones covered by the Contribution Agreement, several cautioned that this should be explicitly discussed with Canadian Heritage.

As for alternatives to the CCP, there was a broad agreement among key informants that court decisions are, by far, the most efficient avenue to clarify constitutional provisions. Key informants also emphasized that having a third party to deliver the Program is a sound policy decision.

***Conclusion***

The evaluation indicates that the CCP addresses the need that led to the Program's creation. The activities of the Program are consistent with strategic objectives established by the Department in April 2000, particularly those relating to citizens' engagement and the promotion of official languages. The evaluation findings suggest that there are dimensions of the constitutional provisions covered by the Program that still require clarification and that, most probably, there will continue to be dimensions of the constitutional provisions that require clarification indefinitely.

While many of the individuals and organizations consulted expressed the desired to have the CCP expanded to include, in particular, equality-based challenges to provincial laws, policies, and practices, none of the evidence collected indicates that moving in that direction would actually meet a need or a strategic objective of the federal government.



The evidence collected indicates that the Program has an effective management structure in place, and that the procedures followed to review applications and allocate funding do reflect good practices in that field. One management aspect that requires special attention is the confidentiality policy adopted by the Corporation. The standards established in the *Access to Information Act* and the recommendations of the *Auditor General of Canada* and her latest reports all point towards a need for more transparency on the part of the Corporation.

The Program has been successful in reaching out to members of linguistic minorities and disadvantaged Canadians. Whether the current range of groups and individuals reached by the Program is adequate largely depends on the perspective one adopts in relation to the Program's objective. The CCP has also been successful in supporting important court cases that have had a direct impact on the implementation of rights and freedoms covered by the Program. The evaluation indicates that many of these courts cases would never have been brought to the attention of the Courts without the CCP.

The evaluation indicates that a better understanding of the rights and freedoms covered by the Program is best achieved by funding test cases. No alternative would be as efficient. Also, the evaluation confirms that funding a third party to administer such a fund is a sound policy decision. In doing so, however, Canadian Heritage must have access to all the information it requires to assume its management responsibility and to be fully accountable to Canadians for the activities and expected results of the CCP.



## 1.0 Introduction

The Court Challenges Program (CCP) is a funding program created by the Department of Canadian Heritage to clarify constitutional provisions related to language and equality rights through the provision of financial assistance for test cases of national significance. Canadian Heritage mandates the Court Challenges Program of Canada, an arms-length non-profit corporation (hereafter the Corporation or CCPC), to administer the CCP. The Department and the Corporation signed, in March 1998, a Contribution Agreement establishing the terms and conditions related to the administration of the Program. Section 17 of this Contribution Agreement states:

*17.1 An evaluation of the Program to assess its overall effectiveness in achieving its objective and its continuing need will be conducted by the Minister in consultation with the Corporation and the user groups in 2001-2002 and completed, if possible, prior to September 2002.*

Between December 2001 and April 2002, an evaluation framework was developed for the CCP. In June 2002, the Department contracted Prairie Research Associates (PRA) Inc. to assist in conducting the summative evaluation of the CCP. This report constitutes the Summative Evaluation Final Report. It includes five key sections:

- ▶ Section 2 presents the methodology used to evaluate the CCP.
- ▶ Section 3 describes the Program, including its administrative structure and the resources invested in it.
- ▶ Section 4 describes the main findings that emerged from the evaluation. Its structure reflects the evaluation issues and questions identified in the Evaluation Framework.
- ▶ Based on the evaluation findings, section 5 presents a series of conclusions and recommendations.





## 2.0 Methodology

### 2.1 Evaluation issues and questions

As established by the evaluation framework, the objective of this evaluation is “to assess the Court Challenges Program’s relevance/rationale, design/delivery, success/impacts and cost effectiveness/alternatives.”<sup>1</sup> More specifically, the evaluation is expected to address the following evaluation issues and questions, as identified in the Evaluation Framework:

<b>Table 1: Evaluation issues and questions</b>	
<b>Questions</b>	
<b>Issue: Relevance/Rationale</b>	
1.	How does the CCP reflect current priorities of the Government of Canada and the Department of Canadian Heritage? Is it operating within its mandate?
2.	Should the objectives of the Program be expanded or restricted? If so, why? Does a case exist to modify the objectives of the Program in any way?
3.	Are activities logically related to the outputs required? Are there any outputs that are required but not provided by the Program? Are there outputs that are not needed?
<b>Issue: Design/Delivery</b>	
4.	Do the activities of the CCPC reflect principles of effective program delivery? Does the Program have effective and clear procedures for applying for funds, criteria for determining eligibility and other management procedures?
5.	Does the CCPC have effective management to oversee how the funds it awards to groups and individuals are managed? Does the CCPC have the tools and procedures to ensure proper accountability and performance measurement?
6.	Are the activities described in the Contribution Agreement carried out as needed and as required by the Contribution Agreement?
7.	Do the activities and outputs all contribute to meeting the Program’s objective? What activities and outputs, if any, could be dropped without harming the Program?
8.	Do clients understand the eligibility requirements? Are they satisfied with the service and support offered by the CCPC?
9.	Is the delivery of the Program through a third party effective? Do the CCPC’s reports provide sufficient information to Canadian Heritage to maintain program oversight?
<b>Issue: Success/Impacts</b>	
10.	What are the general profile and characteristics of the groups and individuals who have benefitted from the activity of the CCP? Are there other groups that could logically benefit from the CCP and that have yet to be reached?
11.	What are the general profile and characteristics of the groups and individuals who have applied for support and been turned down? What reasons exist for the denial? Have any groups been refused support because their complaint/cause lies outside the current terms of reference for the Program?
12.	Is the CCP reaching its intended clientele? Are the target groups aware of the various activities funded by the CCP?

<sup>1</sup>These issues and questions reflect the guidelines from the Treasury Board Secretariat. See section 3.4.1. b) of Treasury Board Secretariat. (2001). *Guide for the Development of Results-based Management and Accountability Frameworks*, Ottawa.



<b>Table 1: Evaluation issues and questions</b>	
<b>Questions</b>	
<b>Issue: Success/Impacts</b> (continued)	
13.	How have funded groups/individuals benefitted from CCP support? How have the outputs produced short, intermediate, and longer-term outcomes? What are the specific outcomes? Does the CCPC collect appropriate outcome data?
14.	How many case development grants have proceeded to litigation? For case development grants that do not proceed to litigation, what is the main reason for not proceeding? For cases that do proceed to litigation, what is the impact of litigation on the understanding of language and equality rights?
15.	How have each of the Program elements contributed to changed public policy (provincial and federal): <ul style="list-style-type: none"> <li>- accessibility related research and consultation</li> <li>- case development</li> <li>- litigation</li> <li>- impact studies?</li> </ul>
16.	What unintended impacts (positive or negative) have occurred with the CCP?
17.	To what extent has the CCP allowed targeted groups to clarify their rights?
<b>Cost-effectiveness/Alternatives</b>	
18.	Is the current maximum amount of funding for each area adequate to secure effective research and legal representation? If not, what aspects are not being adequately covered?
19.	Are there instances where cases funded by the CCP would have been challenged anyway, without the funding? Do recipients access funding sources other than the CCP? What impact does the CCP funding have on the litigation process?
20.	Is funding test cases the most effective avenue to clarify the targeted rights and freedoms? What alternatives exist, if any, that would produce the same result? Does funding test cases duplicate other efforts or initiatives?
21.	Is funding the CCP the most effective means to support test cases? Are there alternatives to financial funding that would be effective (e.g., using Departmental staff resources, contracting with private bar to undertake the research)?

As the Contribution Agreement between the Department and the Corporation expires on March 31, 2003, the evaluation findings are also expected to assist the parties in determining the appropriate strategy in relation to this Contribution Agreement and its possible renewal.

## 2.2 Research methods

The following table describes what research methods were used to address these evaluation issues and questions.



<b>Table 2: Methodology</b>	
<b>Method</b>	<b>Data sources</b>
Literature review	The evaluation includes a review of relevant literature addressing a number of themes, including the Program itself (its relevance, strengths and weaknesses, etc.), the role of the courts in Canada, and interest group litigation. In addition, the jurisprudence related to the constitutional provisions covered by the CCP was reviewed.
Administrative file review	<p>The Corporation has 1,200 application files, including 847 that have been granted funding. The remainder have been rejected or have decisions pending. There are 933 equality rights files and 267 language rights files.</p> <p>Both closed and active files were considered for review; however, files with funding decisions pending were not considered. The Corporation contacted the selected file proponents to obtain their consent for the evaluation team to review their file.</p> <p>Each member of the evaluation team signed a confidentiality agreement prior to reviewing CCP files. A total of 40 program files were reviewed, including 30 equality rights files and 10 language rights files. This reflects the fact that 75% of the application files are equality rights files and 25% are language rights files.</p>
Key informant interviews	<p>A total of 39 interviews were conducted with a variety of key informants:</p> <ul style="list-style-type: none"> <li>- Individuals involved with the Court Challenges Program of Canada, including members of the Board of Directors, panels (equality and language) and Advisory Committees (equality and language) (n=14).</li> <li>- Representatives from the Department of Canadian Heritage involved in the management of the Program (n=5).</li> <li>- A number of experts on language and equality issues were interviewed. They are academics, from law faculties and political science departments, who study constitutional law, Charter litigation, or interest groups and who are located in various regions of the country (n=4).</li> <li>- Representatives from a number of federal and provincial government departments. The list includes individuals involved in policy and program development who have responsibility for management of policies / programs affected by court decisions where the CCP played a role (n=10). The list also includes individuals who represented departments during court challenges (counsel) (n=6). Most key informants were involved with federal departments; only one provincial government agreed to be interviewed.</li> </ul>
Survey of applicants and CCPC members	Every individual and organization that submitted a funding application to the Corporation was sent an evaluation survey. Some individuals or organizations no longer had valid addresses or contact information and, therefore, could not be reached. Approximately 700 surveys were mailed out, of which 156 were completed and returned.
Case studies	To better illustrate how the Program functions, the evaluation includes five case studies (three involving equality rights and two involving language rights). Cases were identified by the CCPC following a request from the evaluation team for cases reflecting the diversity of applications. Before providing the names, the CCPC contacted the applicants to obtain their consent for the evaluators to review and report on the case files.



### 2.3 Evaluation management process

The evaluation was directed and managed by the Corporate Review Branch of the Department of Canadian Heritage, with the assistance of a Steering Committee comprised of representatives of the Aboriginal Peoples' and Human Rights Program and the Corporation, whose role was to provide input into the project's Terms of Reference and to facilitate the evaluator's access to documents and key informants.

In addition, two external reviewers participated in the evaluation process to review and comment on the draft final report. They were selected on the basis of their extensive knowledge of constitutional and administrative law, human rights and Charter litigation. The two reviewers were M<sup>c</sup> Renée Dupuis and the Honorable Gérard La Forest, C.C., Q.C.

### 2.4 Impact of confidentiality requirements

As the organization responsible for delivery of the CCP, the Corporation receives all funding applications made under the CCP, along with any related documentation. This information is stored in the Corporation's head office located in Winnipeg and is not transferred to the Department of Canadian Heritage.

The Corporation, like any other federally incorporated entity, may adopt operational policies, including a policy related to the management of, and access to, information. In 1999, the Corporation modified its policy on confidentiality and information-sharing. The new policy "*permits the Program to release certain information, upon receiving permission from the applicant.*"<sup>2</sup>

This policy directly affected some aspects of the data collection for the summative evaluation. In practical terms, it meant that the evaluation team could only access case files if applicants consented. The following adjustments were therefore made to the methodology:

- ▶ *Administrative file review:* It was not possible for the evaluation team to randomly select case files to be reviewed. Instead, the evaluation team randomly selected file numbers and asked the Corporation to contact the applicants to obtain their consent to proceed with the review. The objective was to review 40 files. Therefore, PRA randomly selected approximately 80 file numbers from a list of all file numbers which were divided by activity area. The Corporation then obtained the 40 required consents.
- ▶ *Key informant interviews:* The identification of key informants who could discuss the impact of the Program was made more challenging by the limited information available on which cases are funded by the CCP.

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<sup>2</sup>See Court Challenges Program of Canada. (2001). *Annual Report 2000-01*. Winnipeg, section 3.2.



- ▶ *Survey of funding applicants and CCPC members:* The evaluation team did not have access to the names and addresses of funding applicants in order to mail out the survey. Instead, the surveys were prepared by the evaluation team and mailed by the Corporation. Reminders (two in total) were also mailed by the Corporation.
- ▶ *Case studies:* As noted in Table 2, in order to select the case studies, the evaluation team reviewed the Corporation's annual reports and discussed potential cases with the Corporation staff. Funding applicants were then contacted to obtain their consent to review their file and report them in a case study format.



### 3.0 The Court Challenges Program: Profile

First established in 1978, the CCP has seen its mandate, activities, and management structure evolve over the years. The purpose of this section is to describe the current program and provide a brief historical overview.

#### 3.1 Program objectives and activities

##### 3.1.1 Historical context

The CCP emerged during a period of intense public debate in Canada regarding language rights and their impact on national unity. The *Official Languages Act* in 1969, the Québec's *Charte de la langue française* in 1977 and a number of important language court cases<sup>3</sup> all contributed to putting language rights at the forefront of political debates across Canada. As the Supreme Court of Canada once noted, these court challenges combine “*legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity.*”<sup>4</sup>

In this context, the initial objective of the CCP was to provide funding to citizens and groups in order to assist them in bringing important linguistic challenges to the attention of the courts. The Secretary of State was responsible for the Program and its delivery.

With the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the Program was expanded to include language rights covered by the Charter. In 1985, the Program was again expanded to include challenges to federal legislation, policies, and practices related to equality rights under Section 15 of the Charter.<sup>5</sup>

In February 1992, the federal government cancelled the Program as part of a deficit reduction effort. The Government provided two main reasons for its cancellation:

- ▶ “*Since the Program had made it possible to establish a substantial body of case law, it was no longer needed;*”

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<sup>3</sup>See, for instance, *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016, *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, *R. v. Forest* (1976), 74 D.L.R. (3d) 704; *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Bilodeau v. Attorney General of Manitoba*, [1981] 5 W.W.R. 393.

<sup>4</sup>*Re Manitoba Language Rights* [1985] 1 R.C.S. 721, p. 728.

<sup>5</sup>Court Challenges Program of Canada. (1998). *Annual Report 1997-1998*. Winnipeg, and Court Challenges Program of Canada. (2000). *Annual Report 1999-2000*. Winnipeg.



- ▶ *There were less costly ways to manage the funding of court challenges and a government department (in this case the Department of Justice) could do so on a case-by-case basis.”<sup>6</sup>*

Following strong protests from equality-seeking and official language minority groups, special hearings of the *Standing Committee on Human Rights and the Status of Disabled Persons* on the impact of this closure, and a federal election, the Program was reinstated in October 1994 (Morton and Knopff 2000; Brodie 2001). Canadian Heritage and a newly established corporation, the Court Challenges Program of Canada, signed a first Contribution Agreement covering the period between October 1994 and March 1998. After an evaluation of the Program in 1997, the two parties signed a second Contribution Agreement for the period of April 1, 1998 to March 31, 2003.

### 3.1.2 Stated objective of the Program

The stated objective of the Program is substantially the same as it was when the Program was created; it is the clarification of certain constitutional provisions related to equality and language rights. As stated in the current Contribution Agreement:

*“This objective is to be achieved through the provision of financial assistance for test cases of national significance put forward by or on behalf of those individuals and groups described in Clause 7 of this Agreement.”*

Clause 7 of the Contribution Agreement defines who may benefit from the Program:

- 7.1 *The Corporation may provide financial assistance to the following eligible recipients for the reasonable costs incurred under Test cases:*
- a) *official language minority groups or individuals and/or disadvantaged groups or individuals; or*
  - b) *non-profit organizations representing the individuals or groups described in Clause 7.1 (a) but not to for-profit organizations.*

While language and territory essentially define “official language minority groups or individuals” (anglophones in Québec and francophones in the rest of the country), the definition of what constitutes “disadvantaged groups and individuals” is more fluid. Section 15 of the *Charter* provides insights in that regard, as it identifies some grounds of discrimination, such as race, colour, sex, religion, or disability. As a result, individuals belonging to racial minorities, women, religious minorities, or individuals with disabilities could logically be considered “disadvantaged groups or individuals”. But grounds of discrimination that are analogous to those identified in section 15 of the *Charter* can also be used to challenge a law, policy, or practice on the basis that it violates one’s equality right. It appears, therefore, that the definition

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<sup>6</sup>Court Challenges Program of Canada. (1995). *Annual Report 1994-1995*. Winnipeg.



of “disadvantaged groups and individuals” is, by the very nature of equality rights, a concept that may constantly evolve. In its analysis of funding applications (see section 3.2), the Equality Panel plays an important role in determining who is to be considered as “disadvantaged groups and individuals.”

As previously mentioned, the range of constitutional rights to be clarified through test cases has evolved since the Program was first established in 1978. Table 3 describes these rights, as included in the current Contribution Agreement.

Table 3: Constitutional rights and freedoms covered by the CCP		
Provisions	Description	
<b>Linguistic</b>	<b>Constitution Act, 1867</b>	
	Section 93	Protects rights and privileges regarding denominational schools.
	Section 133	Establishes English and French as the two languages to be used in Parliament and in the Québec Legislature, and for the publication of the laws adopted by these two institutions.
	<b>Manitoba Act, 1870</b>	
	Section 23	Establishes English and French as the two languages to be used in the Manitoba Legislature, and for the publication of the laws adopted by the Legislature.
	<b>Canadian Charter of Rights and Freedoms, 1982</b>	
	Sections 16 to 23	Sections 16 to 22 establish English and French as the two official languages of Canada and New Brunswick. These sections address issues related to Parliamentary proceedings, publication of statutes and records, courts and tribunals, and communication with the public. Section 23 establishes minority language education rights, including the right of linguistic minorities to manage their schools.
Section 2	Protects the freedom of expression (eligible cases defined by CCP mandate).	
<b>Equality</b>	Section 15	Protects equality rights (equal benefit of the law without discrimination).
	Section 28	Protects the equality of men and women.
	Section 2 or 27	Protects fundamental freedoms (Section 2) and multiculturalism (Section 27) (eligible cases defined by CCP mandate).
Source: Contribution Agreement (1998)		

In practical terms, a “test case” is initiated when an individual, or an organization representing this individual, challenges the constitutional validity of a law, legislation, policy, or practice, on the basis that it violates one of the rights described in Table 3. On this point, the Program makes an important distinction between language and equality test cases:

- ▶ *For language test cases:* the law, legislation, policy or practice may be that of any level of government, as long as the test case involves one of the rights described in Table 3 under “Linguistic”.
- ▶ *For equality cases:* the law, legislation, policy or practice must be that of the federal government and the challenge must be based on one of the rights described in Table 3 under “Equality”.<sup>7</sup>

### 3.1.3 Program activities

<sup>7</sup>See section 6.1 a) and b) of the Contribution Agreement (1998).





The CCP funds a number of activities expected to contribute to the achievement of the Program’s objective, which is the clarification of certain constitutional provisions. These activities relate to various dimensions of the litigation process and to the administrative requirements for delivering the Program itself. Table 4 provides a description of each of the activity areas funded by the CCP.

<b>Table 4: CCP key activities</b>	
<b>Activities</b>	<b>Description</b>
Program administration	Activities associated with the processing of applications and the maintenance and operations of an office.
Program promotion and access	<p>These activities are set out to help individuals better understand the rights covered by the Program and to promote these rights.</p> <p>Activities funded include:</p> <ul style="list-style-type: none"> <li>- activities promoting the awareness of, access to, or capacity to use the CCP</li> <li>- consultations on specific litigation within the mandate of the CCP, including meetings with community representatives and legal experts.</li> </ul>
Negotiation	Activities initiated for the purpose of negotiating or employing other recognized forms of alternative dispute resolution in order to attempt to resolve a dispute. Through negotiation, parties may avoid a court challenge by proceeding to a satisfactory policy change. The remedy sought through negotiation must meet the objective of the Program. Also, the case must meet the criteria of national significance.
<b>Test cases</b>	<p>Case development</p> <p>Activities initiated to explore a potential case. This type of activity may include a review of current jurisprudence, consultations with relevant individuals and groups, and similar research activities. The case must have potential to further the objectives of the Program.</p> <p>In order to determine whether an applicant has a good test case, the Program will provide funding for legal research and other development work. Case development funding allows an applicant to build his/her case and to meet the requirements for case funding.</p>
	<p>Litigation</p> <p>Activities carried out as part of a court litigation based on a constitutional provision described in Table 3. It includes activities associated with an action or application taken in pursuit of remedies awarded in an equality or language rights case that received CCP financial assistance. Under some conditions, financial support may also be provided to interveners.</p> <p>If an applicant receives case development funding and is later granted case funding, the amount of previous funding is deducted from the maximum available for the case.</p>
	<p>Impact studies</p> <p>Research activities undertaken to study important court decisions relevant to the CCP. These studies are distributed to the users of the Program and the public at large.</p>
<p>Note: The CCP may provide extraordinary funding to applicants when a case is difficult or when special circumstances exist.</p>	
<p>Source: 1998 Contribution Agreement, key informant interviews, and the CCPC’s web site</p>	



### 3.2 Delivery structure

During its first eight years of existence (1978 to 1985), the CCP was delivered by the Secretary of State (now the Department of Canadian Heritage). As the Program expanded in 1985 to include equality provisions under the *Canadian Charter of Rights and Freedoms*, the federal government modified the Program's delivery structure and mandated the Canadian Council on Social Development (CCSD) to deliver the Program on the government's behalf.

While maintaining the principle of third party delivery, the federal government transferred, in 1990, the management of the CCP from the CCSD to the Human Rights Research and Education Centre at the University of Ottawa. This mandate, however, was short-lived as the CCP was cancelled in 1992.

When the federal government reinstated the Program in 1994, it consulted various community organizations on the best strategy in relation to the delivery structure of the Program.<sup>8</sup> As a result, a number of these organizations together initiated the incorporation of a new entity, the Court Challenges Program of Canada. This non-profit organization was incorporated under Part II of the *Canada Corporations Act* on October 12<sup>th</sup>, 1994. The Letter Patent of the Corporation defines its objects as:

*To provide assistance for test cases of national significance (without regard to geographical factors), put forward on behalf of or by groups or individuals, which will promote and enhance the language rights of Canada's official language communities or the equality rights of historically disadvantaged groups and to administer test-case funding according to Contribution Agreements with the federal government and any other source of funding (...).*

Shortly after the Corporation was established, it signed a Contribution Agreement with Canadian Heritage on October 24<sup>th</sup>, 1994 and a second agreement on March 31<sup>st</sup>, 1998. These agreements set out the terms and conditions governing the administration of the Program, including its delivery structure.

As the entity mandated by federal government to deliver the CCP, the Corporation must follow the parameters established in the Contribution Agreement, including the following elements:

- ▶ maximum amount that may be provided for each area of funding (program administration, program promotion and access, negotiation and test cases)
- ▶ the eligibility criteria for financial assistance
- ▶ the categories of recipients that may access financial assistance
- ▶ the establishment of panels mandated to select cases that may access financial assistance
- ▶ the requirements for records and reports to Canadian Heritage.

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<sup>8</sup>For a detailed description of this process, see Court Challenges Program of Canada. (1995). *Annual Report 1994-1995*. Winnipeg.



The Corporation may establish additional structures and administrative processes to support the delivery of the Program, as long as the terms and conditions of the Contribution Agreement are respected. As a result, the CCP's delivery structure combines mandatory requirements established by the Contribution Agreement and organizational decisions made by the Corporation. Figure 1 (next page) identifies the key components of the CCP's delivery structure:

- ▶ *CCPC membership*: It includes stakeholders from official language minority and equality-seeking communities. Members must be non-profit organizations interested in pursuing CCP's objectives. There are three categories of members: equality-seeking organizations representing disadvantaged communities and individuals, organizations representing official language minority communities, and members of the CCPC's Board of Directors.
- ▶ *Board of Directors*: The Corporation has a volunteer Board of Directors whose responsibilities include the Corporation's budget, human resource management, establishing policies and committees, and the long and short-term plans for the effective operation of the Program. The Board consists of seven positions, including two representatives nominated by equality members, two representatives nominated by language members, a nominee from a law faculty or bar association, and the co-chair from each of the two panels.
- ▶ *Advisory Committees*: Advisory Committees for the equality and language members may be established by the Members to examine various issues on an as-needed basis. A representative of each Advisory Committee participates in the meetings held by the Board of Directors, in a non-voting capacity.
- ▶ *Language and Equality Panel Selection Committees*: These two committees assume an independent role in appointing members to the two panels. The Board of Directors is responsible for appointing the members who sit on these two Panel Selection Committees.
- ▶ *Panels (Language and Equality)*: In accordance with the Contribution Agreement, funding decisions are made by these two independent expert panels. While part of the Corporation's structure, these two panels are independent of the Board of Directors. The Panels have exclusive jurisdiction and their decisions are not subject to an appeal to the Board of Directors.<sup>9</sup> Panel members are appointed for three-year terms.
- ▶ *CCPC staff*: Staff members work closely with the two panels to process funding applications and prepare the required analysis of cases to support the work of the two panels. In addition, the staff manage the ongoing affairs of the Corporation, and report to the Board of Directors and the Annual General Meeting.

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<sup>9</sup>The decisions from the panels are final. However, a funding applicant can make a written request that the panel reconsider its decision or can appeal to the Board if it is believed that he or she has not been treated fairly in the application or decision-making process.

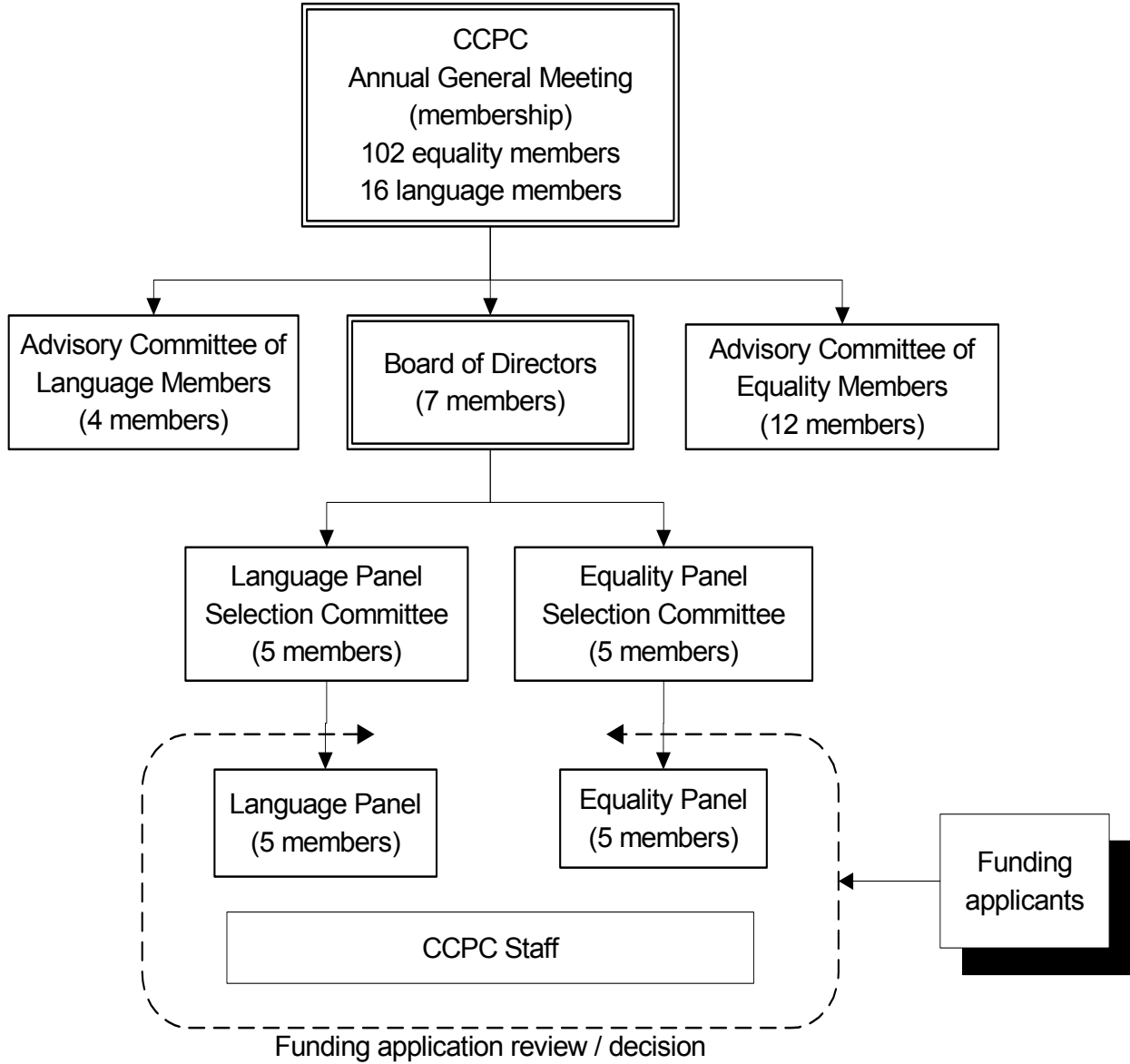


Figure 1



As indicated in Figure 1, the actual review of funding applications and the decisions to grant money for a test case rest with the two panels and the staff members. Figure 2 (next page) presents a flow chart that illustrates how each funding application is reviewed:<sup>10</sup>

- ▶ *Pre-analysis:* Upon receipt of an application, the CCPC staff conduct a pre-analysis to determine whether the applicant has provided enough background information and whether the nature of the request is clear. Incomplete applications may be returned to the applicant for more detail.
  
- ▶ *Administrative review:* Once the application is complete, the CCPC staff review the equality application to determine whether it is a question that involves a federal law, policy, or practice. The equality application is rejected if there is unanimous agreement among the analysts that the application *does not* involve a federal law, policy, or practice. If there is not unanimous agreement among the analysts regarding the above-noted issue, the application is reviewed using a standard analysis grid. The analysis grid covers the legal, social, and administrative issues that panel members will consider, including:
  - existing case law
  - the nature of the remedies being sought
  - the evidence being presented by the applicant
  - the applicant's financial need
  - the possibility that the arguments in the case will duplicate either those already funded by the Program or attempted at some point before the courts
  - whether the potential case is a test case. Using the analysis grid, a brief is prepared, and recommendations are made for the appropriate panel's consideration.
  
- ▶ *Panel review:* The administrative review is followed by a panel review. Panel members meet at fixed intervals to review and discuss the merits of each application, including the quality of the proposed argument, the quality of the legal counsel, and the likely effect it would have on the current status of the law. Applications may be sent back to staff for further review or answers to additional questions. When granting funding, the Panels may also set conditions, including specific directions regarding the type of arguments that the CCP applicant is expected to present in his or her cases. In this sense, the Panels assume a proactive role in ensuring that the funding granted will serve to advance the constitutional provisions covered by the CCP.

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<sup>10</sup>Canadian Heritage. (1997). *Evaluation of the Court Challenges Program*. Ottawa.



### CCP Application Process

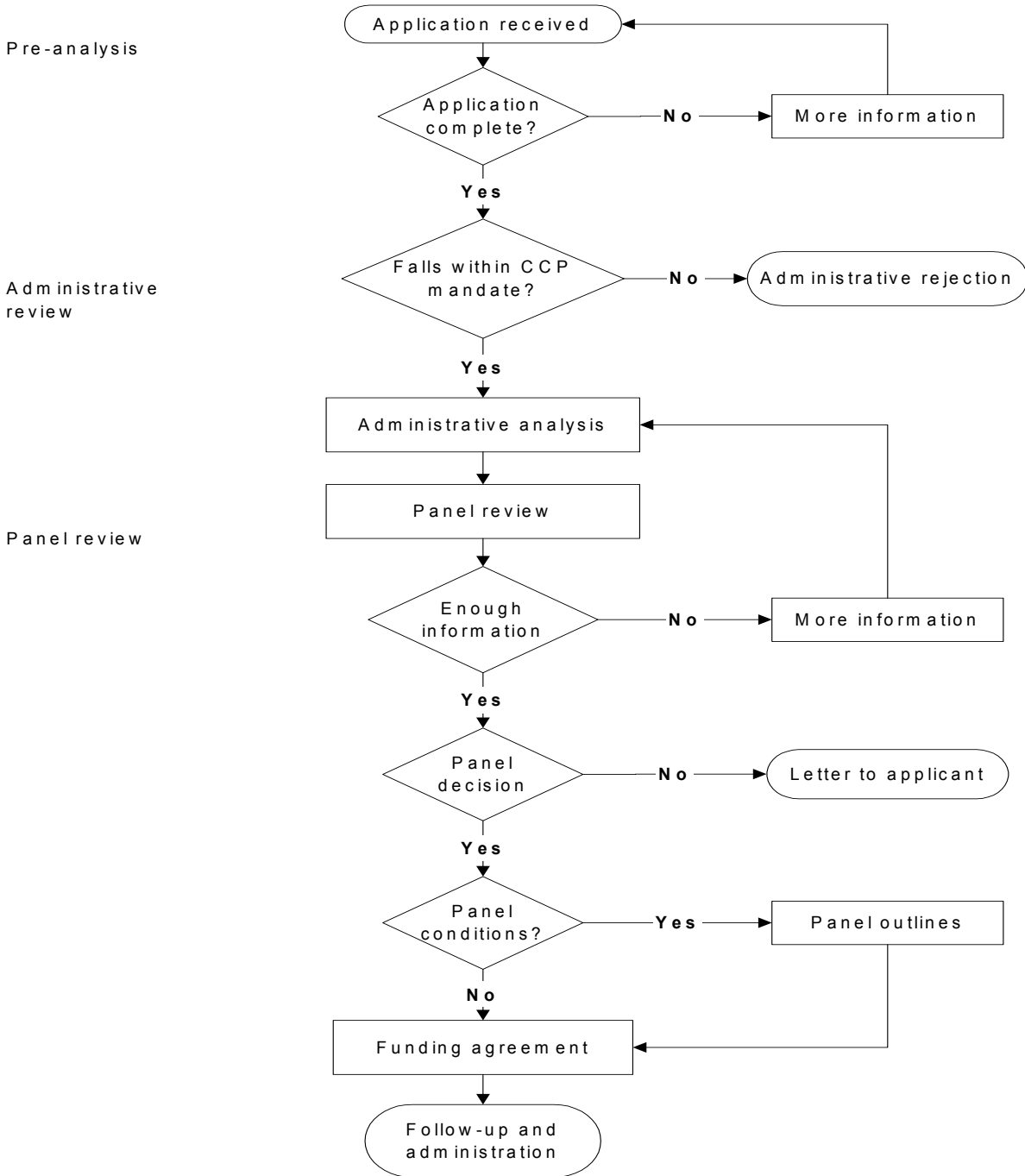


Figure 2



### 3.3 Program management

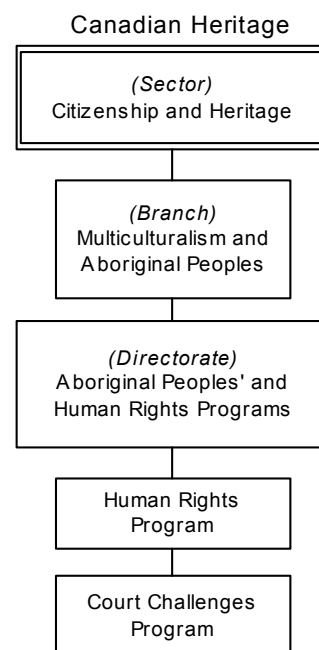
Funding the CCP is expected to advance and support the overall mandate of Canadian Heritage, particularly as it relates to the “*promotion of a greater understanding of human rights, fundamental freedoms and related values*” and “*the advancement of the equality of status and use of English and French.*”<sup>11</sup>

Administrative responsibility for the CCP rests with the Human Rights Program in the *Aboriginal Peoples’ and Human Rights Programs Directorate* at Canadian Heritage. The program has the following mission:

*The mission of the Human Rights Program is to promote the development, understanding, respect for and enjoyment of human rights in Canada.*

*To accomplish this, the Program undertakes educational and promotional activities involving the public, educators, non-governmental organizations, government departments and others. This includes providing a selected number of grants and contributions to eligible organizations and distributing human rights publications upon request.*

*The Program is also responsible for coordinating, with provincial and territorial governments, the domestic implementation of international human rights instruments and the preparation of Canada's reports to the United Nations.*<sup>12</sup>



In accordance with its mission statement, the Human Rights Program provides a *contribution*<sup>13</sup> to the Corporation for delivery of the CCP. This constitutes a transfer payment and, like any other contributions, is subject to being accounted for and audited.

<sup>11</sup>See section 4.(2) of the *Department of Canadian Heritage Act* (1995, c. 11).

<sup>12</sup>Information source: [www.pch.gc.ca/progs/pdp-hrp/index\\_e.cfm](http://www.pch.gc.ca/progs/pdp-hrp/index_e.cfm)

<sup>13</sup>The Treasury Board Secretariat’s *Policy on Transfer Payment* (2000) defines a contribution as “*a conditional transfer payment to an individual or organization for a specified purpose pursuant to a contribution agreement that is subject to being accounted for and audited.*”

The role of the Human Rights Program is to manage the Contribution Agreement between Canadian Heritage and the Corporation, which enables the Department to report to Parliament and Canadians on results. It tracks the activities of the Program through a number of reports submitted by the Corporation, including quarterly cash flow requirements, funding reports, financial statements (unaudited and audited) and program activity reports, such as the Corporation's annual reports.

### 3.4 Resources

The current Contribution Agreement between Canadian Heritage and the CCPC provides for a transfer to the Corporation of \$2.75 million annually. Of this amount, up to 20% is for program administration, 20% is for activities related to language rights, and 60% is for activities related to equality rights. The CCP budget is as follows:

- ▶ Program Administration: \$650,000
- ▶ Language Rights Funding: \$525,000
- ▶ Equality Rights Funding: \$1,575,000
- ▶ Total: \$2,750,000

Activity areas		Equality rights	Language rights	Total
Program promotion and access / Negotiation		\$165,000	\$55,000	\$220,000
<b>Test cases</b>	Case development	\$191,250	\$63,750	\$255,000
	Litigation	\$1,200,000	\$400,000	\$1,600,000
	Impact studies	\$18,750	\$6,250	\$25,000
Subtotal		\$1,575,000	\$525,000	\$2,100,000
Program administration				\$650,000
Total				\$2,750,000

Source: 1998 Contribution Agreement.

Table 5 describes the allocation of financial resources, as specified in the Contribution Agreement, for each of the Program's activities. The amounts included in the table are the maximum amounts that may be allocated in one year. Under some conditions, amounts uncommitted at the end of a fiscal year may be carried over into a new fiscal year.<sup>14</sup>

It must be noted that, at the end of the Contribution Agreement signed in 1994 (and effective until March 31, 1998), approximately \$2 million of uncommitted funds was carried over into the new Contribution Agreement. This amount has been used to provide additional support to language and equality rights test cases. In this context, it is important to distinguish between the new funding provided by Canadian Heritage for test cases and the actual funding available to

<sup>14</sup>For details, see Clause 3 of the 1998 Contribution Agreement.





panels to support test cases. While the former is indeed set at a yearly level of \$1.5 million for equality rights test cases and \$525,000 for language rights test cases, the latter is close to 20% higher as a result of the additional \$2 million provided by the former Contribution Agreement.

The Contribution Agreement signed in 1998 does not allow uncommitted funds to be carried over to a new Contribution Agreement.<sup>15</sup>

As described in Table 6, Canadian Heritage will invest an amount of up to \$13.7 million over five years in the CCP.<sup>16</sup>

<b>Activities</b>		<b>1998/99 to 2002/03</b>
Program promotion and access / Negotiation		\$1,100,000
<b>Test cases</b>	Case development	\$1,275,000
	Litigation	\$8,000,000
	Impact studies	\$125,000
Program administration		\$3,250,000
Total		\$13,750,000
Source: 1998 Contribution Agreement		

### 3.5 Planned results

The Evaluation Framework for the CCP states that the final outcome of the Program is that rights and freedoms covered by the Program are clarified and protected. To this effect, the Evaluation Framework identifies three intermediate outcomes:

- ▶ A greater awareness of the resources available to protect some of Canada’s constitutional rights and freedoms is achieved.
- ▶ Specified rights and freedoms covered by the Program are clarified.
- ▶ Greater access to the justice system for linguistic and disadvantaged groups and individuals is achieved.

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<sup>15</sup>See Section 13.2 of the 1998 Contribution Agreement.

<sup>16</sup>Any surplus or carry-over amount of funds remaining uncommitted at the end of the current Contribution Agreement is to be returned to Canadian Heritage.



Finally, the Evaluation Framework identifies the following short-term outcomes, expected to contribute to the achievement of the intermediate and final outcomes:

- ▶ Current and potential program recipients are reached by the Program.
- ▶ Litigation is settled through negotiation or other alternative dispute resolution process.
- ▶ Opinions and research are provided to clarify litigation opportunities.
- ▶ Cases are heard by tribunals.
- ▶ Research is produced on cases of significance.



## 4.0 Evaluation findings

This section presents the findings of the evaluation research, which are based on:

- ▶ the administrative file review
- ▶ literature review
- ▶ key informant interviews
- ▶ survey of CCPC members and funding applicants.

The evaluation issues and questions identified in the Evaluation Framework (see Table 1) form the structure for the information presented in the following sections.

### 4.1 Relevance and rationale

#### *How the Program relates to current government priorities*

Canadian Heritage's mission is to further a more cohesive and creative Canada.<sup>17</sup> To this effect, the Department pursues four broad objectives, one of which relates to *Active Citizenship and Civic Participation*. The Department defines this objective as follows:

*Promoting understanding of the rights and responsibilities of shared citizenship and fostering opportunities to participate in Canada's civic life.*

The Aboriginal Peoples' and Human Rights Programs Directorate at Canadian Heritage offers several programs and activities that support this strategic objective. As previously mentioned in Section 3.3, the mission of the Human Rights Program specifically refers to the "*development, understanding, respect for and enjoyment of human rights in Canada.*" Considering that the CCP's objective is the clarification of certain constitutional rights and freedoms, it aligns closely with Canadian Heritage's priorities.

The consultations with Canadian Heritage representatives confirm that this perspective is broadly shared. All key informants consulted within Canadian Heritage believe that the Program clearly fits the mandate of the Department, as it promotes Canadian values entrenched in the Constitution and helps promote active citizenship.

Key informants from other federal departments were also of the opinion that the Program reflects Canada's commitment toward official languages, human rights, and democracy. Some noted that the Department of Canadian Heritage, with its link to the *Official Languages Act* and the *Canadian Multiculturalism Act*, is best positioned to manage the Program. Representatives from the Corporation delivering the CCP also agreed that Canadian Heritage is a "*natural fit*" for the CCP, as its programs and activities tend to support official language minorities and disadvantaged Canadians.

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<sup>17</sup>For more information on the Department's mission and strategic objectives, consult the following web site: [www.pch.gc.ca/pc-ch/org/mission/index\\_e.cfm](http://www.pch.gc.ca/pc-ch/org/mission/index_e.cfm)



### *The rationale for the Court Challenges Program*

The range of opinions gathered on the rationale for having the CCP illustrates the relatively controversial nature of the Program. Some 24 years after it was first established, the CCP remains unique. The consultations and research completed for the purpose of this evaluation have identified no other country with a similar program.

The Contribution Agreement between the Department of Canadian Heritage and the Corporation provides insights into the rationale for such a program. The stated objective of the CCP (see Section 3.1.2) implies that those constitutional provisions covered by the CCP do require court clarification and that it is in the best interest of the Government of Canada to facilitate this process. In addition, by specifying who may apply for financial assistance under the CCP (official language minority groups or individuals or disadvantaged groups or individuals), the Contribution Agreement suggests that it is these groups that need support to bring their perspectives into the judicial process of clarification.

Most key informants point toward two concepts that support the rationale for the CCP:

- ▶ *Clarification of rights:* Constitutional provisions are not static. By their very nature, they evolve and are shaped by the broader context (political, social, and economic) to which they apply. For historically rooted provisions, such as the language rights found in the constitution, or for those as broad as equality rights (section 15 of the Charter), the process of clarification is critical and ongoing. Key informants we interviewed, particularly counsel and law professors, indicated that this clarification process is not time limited and emphasized that the high level of Charter-related cases before the Supreme Court of Canada supports that perspective.
- ▶ *Access to the justice system:* Both key informants and survey recipients emphasized that the CCP provides greater access to the court system for groups expected to benefit from the constitutional rights and freedoms covered by the Program. As indicated in Table 7, approximately 43% of survey recipients identified the need to provide greater access to the court system as one of the most important reasons for the CCP's existence.



<b>Table 7: What is, in your view, the reason for public funding to test the constitutionality of rights and freedoms in Canada? (n=156)</b>		
<b>Reasons</b>	<b>Count</b>	<b>Case %</b>
Greater access to the courts for disadvantaged Canadians	67	43%
Protect against potential abuses on the part of governments	36	23%
Ensure rights protected by the Constitution are implemented	29	19%
Clarify constitutional provisions	20	13%
Strengthen Canada's democracy	12	8%
Reflect Canada's international commitment to human rights	8	5%
Reflect the importance of justice and equality in our society	5	3%
Give the impression that constitutional testing does occur	3	2%
Answer given does not address the question	4	3%
Other	15	10%
No response	6	4%
Note: Respondents could provide more than one answer; totals may sum to more than 100%		
Source: Survey of Funding Recipients and CCPC Members		

Much of the literature focuses on the appropriateness of encouraging groups and individuals to initiate court challenges against their own government. Often referring to the notion of “interest group litigation,” several academics have explored the impact of groups and individuals bringing sensitive, and often controversial, issues to the attention of the courts, rather than leaving them to the Parliament or provincial legislatures to address. The literature identifies the following benefits of interest group litigation:<sup>18</sup>

- ▶ A power imbalance in the political arena may leave minority interests vulnerable to exclusion. The courts can moderate this by ensuring that minority interests are heard.
- ▶ Charter litigation is expensive. Without programs such as the CCP, only groups and individuals that have financial and political advantages might raise Charter questions.
- ▶ Interest group litigation helps ensure that the Court hears a wider range of perspectives on an issue before arriving at a decision. Litigation therefore has the potential to make public institutions more accessible, transparent, and responsive.
- ▶ Some key informants argued that elected institutions do not necessarily reflect the diversity of Canadian society. Without courts enforcing constitutional guarantees, government could make choices that harm minorities.
- ▶ Without groups ready to litigate, the Charter might have little impact. The Charter is a document, and documents are not self-enforcing. Interest group litigation

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<sup>18</sup>The following information is compiled from Hein (2000), Brodie (2001), Peltz (1997) and Eid, et al. (2001).



assists in achieving the Charter's promise of checks and balances on government action.

At the same time, others argue that supporting interest group litigation does not achieve greater access and transparency within public institutions and that it may not be the best way to deal with complex social policy issues.<sup>19</sup> The literature identifies several concerns with respect to interest group litigation:

- ▶ Some believe that funding group litigation is undemocratic in that it puts particular interest groups in control of the courts' agenda, which in effect, excludes other groups and members of the public.
- ▶ Government support for interest group litigation intensifies rights-based rhetoric, which could diminish full discussion and presentation of opposing views in Parliament. This view implies that Parliament is the preferred venue for debate of social policy issues.
- ▶ Many Charter challenges raise difficult moral, economic, and political questions. These controversial claims may pit courts against elected bodies by asking judges to qualify, or even reject, decisions of elected officials.
- ▶ When government initiates a program that facilitate access to the courts, such as the CCP, it must determine which groups may access this funding, the level of funding, and for what types of cases. Achieving fairness in this context may prove challenging.

### *Is the process of clarifying rights a neutral one?*

Some documents consulted in the literature review and some key informants expressed concerns about a perceived bias of the CCP as it is currently structured. They argued that, instead of facilitating the clarification of constitutional provisions, the CCP promotes a specific agenda embraced by member organizations of the CCPC. As one observer noted in a *Toronto Star* article, if the CCP is about clarification, why should it systematically fund only "one side of the argument," instead of allowing parties holding contradictory views to present their cases to courts?

*They're heavily funding the one side (...) It happens to be the gay-rights side, the pro-pornography side, the feminist side and the abortion issue.*<sup>20</sup>

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<sup>19</sup>Eid, et al. (2001).

<sup>20</sup>From professor Ian Brodie, quoted in the *Toronto Star*. (2001). *Ottawa funds left-wing agenda, prof. says; Pushing gay rights, feminist agenda by with cash for legal challenges*. (March 1).



The administrative file review and key informant interviews with representatives from the Corporation administering the CCP both indicate that the Program, as currently delivered, will only support cases that *protect* and *advance* rights covered by the Program. In other words, a group or individual that would present legal arguments calling for a restrictive application of these rights would not receive CCP funding. In its *Guide to the Court Challenges Program*, the Corporation states that the Program “*provides financial support to test cases that help to protect and advance the language and equality rights guaranteed under the Canadian Constitution.*”<sup>21</sup> In the Funding Criteria, the guide states that only cases that advance the targeted rights may receive funding.

When deciding on a specific funding request, Panel members ensure that the case will support and advance the Charter provisions covered by the CCP. As part of this review, the Panels can provide specific guidelines regarding the type of arguments that may be presented by the funding recipient and can ask, as a condition of funding, to review the draft arguments before they are tabled in the courts. In this sense, the two panels play an active role in shaping the arguments presented with the support of the CCP.

Key informants from the Corporation said that this approach is consistent with the Contribution Agreement, which specifically states that the funding is to be used to clarify the rights of official language minority groups and disadvantaged Canadians. According to these key informants, the clarification process is not neutral, as it unfolds in a broader political context in which various groups hold different positions of power and influence. This vision is reflected in the Letter Patent of the Corporation, which states that the objects of the Corporation are to:

*provide assistance to test cases of national significance (...), which promote and enhance the language rights of Canada’s official language communities or the equality rights of historically disadvantaged groups and to administer test-case funding according to Contribution Agreements with the federal government and any other source of funding (...). [underline added]*

Other key informants from federal departments noted that the Charter provisions are anything but neutral. The remedial purpose of language rights included in the Constitution has often been acknowledged by the courts,<sup>22</sup> and court decisions addressing equality rights do focus on the protection of essential human dignity and freedom, which may require differential treatment to

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<sup>21</sup>See Court Challenges Program of Canada. (2002). *A Guide to the Court Challenges Program*. Winnipeg, p. 1.

<sup>22</sup>In *Mahe v. Alberta* [1990] 1 S.R.C. 342, the Supreme Court of Canada agreed that section 23 of the Charter “*was designed to correct, on a national scale, the progressive erosion of minority official language groups (...)*”. See also *R. v. Beaulac* [1999] 1 S.R.C. 768 and *Arsenault-Cameron v. Prince Edward Island* [2000] 1 S.R.C. 3.



assist disadvantaged Canadians.<sup>23</sup> In other words, these key informants emphasize that the *Canadian Charter of Rights and Freedoms* (and some of the language rights entrenched in other constitutional acts) promote certain values and aim to advance the condition of target groups, such as official language minorities and disadvantaged Canadians. In his analysis of the Charter, Law Professor L.B. Tremblay noted:

*Bien que certains passages jurisprudentiels semblent équivoques, la justification des principes qui sous-tendent la Charte n'est pas neutre. Elle s'inscrit dans le cadre d'une théorie constitutionnelle perfectionniste.*<sup>24</sup>

Professor Tremblay added:

*Pour les juges, la théorie constitutionnelle qui sous-tend la Charte postule la supériorité de certains biens humains et sociaux, et ils essaient de les promouvoir et les réaliser en conséquence. La Constitution est donc conçue comme un agent de perfection pour la société et les individus.*<sup>25</sup>

If, indeed, the constitutional provisions covered by the CCP promote certain values, one can argue that the role of the CCP, in helping to clarify them, is to ensure that these provisions fully serve their purpose and societal objectives.

### ***Prime areas where clarification is needed***

As noted earlier, constitutional provisions constantly evolve.<sup>26</sup> New dimensions unfold as cases are brought to the attention of the courts. Over the years, important court decisions, including many from the Supreme Court of Canada, have explored different aspects of the provisions covered by the CCP. One objective of this evaluation was to determine, in light of this experience, what constitutes the prime areas where clarification is needed. Key informants provided a number of avenues in that regard, which are listed in the following table (this list is by no means intended to be exhaustive).

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<sup>23</sup>For a discussion on the purpose of section 15 of the Charter, see *Law v. Canada* [1999] 1 S.R.C. 497.

<sup>24</sup>Tremblay, L.B. (1995). *Le Canada de la Charte: Une démocratie libérale neutre ou perfectionniste?* In (1995) 40 R.D.McGill 487, p. 494.

<sup>25</sup>Ibid, p. 497.

<sup>26</sup>This well-established principle of constitutional law was captured in the *Edwards* case where the Court noted that a constitution is “a living tree capable of growth and expansion within its natural limits.” See *Edwards v. A.-G. Can.* [1930] AC 124, p. 136.





Table 8: Prime areas where clarification is needed	
Areas	Key issues
<b>Language rights</b>	
Sections 16 to 20 of the Charter	<ul style="list-style-type: none"> <li>▶ A first case has yet to come from the Supreme Court of Canada on section 16, to provide an overall interpretation of this right.</li> <li>▶ The range of institutions actually covered by these rights is not clear.</li> <li>▶ The right of employees working in the public sector to use the official language of their choice needs clarification.</li> </ul>
Section 23 of the Charter	<ul style="list-style-type: none"> <li>▶ The issue of reparation or compensation for past violations is unclear.</li> <li>▶ Division of responsibilities between the school boards and the ministries of education needs clarification.</li> <li>▶ The notion of “sufficient number” or the sliding scale, as defined by the Supreme Court of Canada, needs further clarification.</li> <li>▶ Equivalent quality of education (the notion of).</li> <li>▶ Clarify who may access minority schools.</li> </ul>
<b>Equality rights</b>	
Section 15 of the Charter	<ul style="list-style-type: none"> <li>▶ A range of issues relating to same-sex status and sexual orientation are not clear.</li> <li>▶ The level of protection that section 15 provides for social and economic conditions (education, health, housing, general benefits, etc.) needs clarification.</li> <li>▶ The impact of equality rights on First Nations is unclear.</li> <li>▶ Grounds of discriminations that are analogous to those enumerated in section 15 are not clear.</li> </ul>
<b>General comments</b>	
<ul style="list-style-type: none"> <li>▶ The interplay between equality rights and other rights in the Charter; how they influence each other</li> <li>▶ Interaction between international and national rights</li> <li>▶ The role of the courts in ordering governments to act on their decisions</li> <li>▶ Better understanding of the principle of minority protection</li> </ul>	
Source: Key informant interviews	

### *Should the CCP be expanded?*

In issuing its concluding observations in December 1998, the United Nations’ Committee on Economic, Social and Cultural Rights stated:

*The Committee recommends that the Federal Government extend the Court Challenges Programme to include challenges to provincial legislation and policies which may violate the provisions of the Covenant.<sup>27</sup>*

The issue of program expansion has long been debated in Canada. Expanding the mandate of the Program to cover equality cases in areas of provincial jurisdiction and language cases that involve certain portions of the *Official Languages Act* is a long-cherished dream of the Corporation’s membership. In 1998, the Corporation established a Mandate Expansion

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<sup>27</sup>Committee on Economic, Social and Cultural Rights. (1998). *Considerations of Reports Submitted by State Parties Under Article 16 and 17 of the Covenant, Canada*. The Committee issued the same recommendation in 1993, in addition to the one regarding the reinstatement of the Program itself.



Committee and developed a proposal relating to the establishment of a *Court Challenges Fund*. The Corporation based its strategy on the following considerations:

*By limiting the Program's influence on equality cases to areas of federal jurisdiction, the Contribution Agreement provides disadvantaged groups with partial access to the exercise of their equality rights. While the Program's cases certainly contribute to development in equality rights, many of the most recent advances have resulted from challenges to provincial laws and government actions. (...)*

*On the language side, in many provinces, key language rights are not provided by the Constitution, but by statute or by policy. The Program cannot finance language claims in these areas and therefore is limited in assisting groups and individuals in protecting and enhancing language rights.<sup>28</sup>*

The vast majority of key informants who are involved with the Corporation support the objective of expanding the mandate of the CCP with the following rationale:

- ▶ The Corporation receives applications that raise important equality issues in the areas of provincial jurisdictions. These applications are currently refused by the Program and have no alternatives for support. The cases are dropped or the quality of legal representation can be severely affected.
- ▶ By expanding the Program, the CCP could offer greater consistency and coordination among cases that raise similar equality issues. At this point, equality challenges in the areas of provincial jurisdiction are proceeding without the support and resources of CCP, and yet these decisions may, in the end, affect all Canadians.
- ▶ The CCP already funds challenges to provincial laws relating to language rights. In this sense, a precedent exists for the federal government to justify and expand the Program.

Some of the representatives from the Corporation acknowledged that, in the current political context, it could be difficult for the federal government to expand the Program without consulting provinces/territories. Key informants noted that such expansion could become a source of tension between governments.

The consultations with representatives from Canadian Heritage and other federal departments did not reveal unmet needs of the Department or the federal government that could be addressed by an expansion of the Program. Many key informants from these groups warned against an expansion of the CCP that, according to them, would create a backlash against the entire

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<sup>28</sup>See Court Challenges Program of Canada. (1999). *Annual Report 1998-1999*. Winnipeg.



program. Some believe that proceeding in that direction would require provinces and territories to agree in principle with the expansion and collaborate to determine how the financial responsibilities could be divided between the two levels of governments. Such an approach would reflect the following commitments included in the Social Union Framework Agreement (SUFA):

*The actions of one government or order of government often have significant effects on other governments. In a manner consistent with the principles of our system of parliamentary government and the budget-making process, governments therefore agree to:*

- *Give one another advance notice prior to implementation of a major change in a social policy or program which will likely substantially affect another government*
- *Offer to consult prior to implementing new social policies and programs that are likely to substantially affect other governments or the social union more generally. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation.<sup>29</sup>*

The experience to date indicates that many decisions supported by the CCP have had wide-ranging impacts on government policy (see Section 4.3). One may argue that, in the SUFA context, it would be inappropriate for the federal government to act unilaterally and expand CCP's equality mandate into provincial jurisdictions.

## **4.2 Design / delivery**

### ***Effectiveness of program delivery structure***

Since it was established in 1994, the Corporation has opened approximately 1,100 files in response to funding applications. In 784 cases (69%), funding was approved by the Panels, while the remainder are pending decisions (9%) or have been rejected (22%). There are 880 equality rights files and 257 language rights files. Table 9 shows the distribution of program files among funding categories.

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<sup>29</sup>See the SUFA's web site: [www.socialunion.gc.ca](http://www.socialunion.gc.ca)



<b>Table 9: Number of CCP program files (1994/95 to 2002)</b>				
<b>Funding category</b>	<b>Funded</b>	<b>Rejected</b>	<b>Decision pending</b>	<b>Total</b>
<b>Equality rights</b>				
Case development	139	60	0	199
Case funding	278	145	41	464
Case funding - Extraordinary funding*	53	29	0	82
Impact study	25	2	2	29
Program promotion and access funding	149	13	15	177
Negotiation	11	0	0	11
Equality rights - SUBTOTAL	602	220	58	880
<b>Language rights</b>				
Case development	39	13	7	59
Case funding	89	16	25	130
Case funding - Extraordinary funding*	10	16	0	26
Impact study	18	0	1	19
Program promotion and access funding	22	1	7	30
Negotiation	14	2	3	19
Language rights - SUBTOTAL	182	32	43	257
<b>TOTAL</b>	<b>784</b>	<b>252</b>	<b>101</b>	<b>1,137</b>
<p>*Note: The figures for extraordinary funding are not included in the totals since new files are not opened for these applications. This is because applications for extraordinary funding are only considered after an applicant has already received case funding. Once an application is granted extraordinary funding, a notation is made in the file. However, a notation is not made if an application for extraordinary funding is rejected. Information regarding the number of rejected applications can only be obtained from the minutes of Panel meetings. Source: Court Challenges Program of Canada.</p>				

As described in Section 3.2 (see Figures 1 and 2), the review of funding applications and the decisions rest entirely with the Corporation’s staff and two panels, respectively. Applicants first submit their application, at which time the Corporation creates a new file, and the process described in Figure 2 ensues. Note that a single organization or individual may submit more than one funding application, if different case scenarios exist.

The survey sent to funding applicants and CCPC members inquired about their satisfaction with the application process. As indicated in Table 10 (next page), nearly 70% of the respondents recorded satisfaction (“somewhat satisfied” or “very satisfied”) with clarity of the application process and the support provided during this process. Six out of ten respondents indicated that they were satisfied (“somewhat satisfied” or “very satisfied”) with the eligibility criteria, timeliness, explanations, and reporting.



Areas where levels of dissatisfaction were highest (approximately 15% of all respondents who said they were “very dissatisfied”) relate to the support provided during the application process, the criteria used to determine eligibility, and the explanations provided for the decision.

A further analysis of survey data indicates that differences exist between those who apply as individuals versus those who apply as organizations, and between those who received funding versus those who did not. Generally, individual applicants tend to express less satisfaction with the overall application process than do organizations. This may reflect the fact that these individuals have less resources and/or experience to deal with such a process. Additionally, and not surprisingly, those who did not receive funding tend to be less satisfied with the process than those who received funding.

**Table 10: Satisfaction with the application process (n=156)**

Component	Very satisfied	Somewhat satisfied	No opinion	Somewhat dissatisfied	Very dissatisfied	No response
Clarity of the application process	55%	17%	5%	6%	9%	9%
Support during the application process	53%	12%	8%	3%	14%	11%
Criteria used to determine the eligibility	45%	16%	10%	3%	15%	10%
Timeliness of the application review	39%	22%	11%	5%	10%	11%
Explanations for the decision rendered	47%	13%	9%	4%	14%	12%
Extent of reporting requirements	42%	18%	15%	2%	10%	13%

Source: Survey of Funding Recipients and CCPC Members

The survey also asked respondents to evaluate the work of the Corporation on aspects other than those directly related to the funding application process. These other areas include the capacity of the Corporation to: reach and inform potential program beneficiaries; consult stakeholders; offer fair access; and report on program activities. Table 11 summarizes these findings:

**Table 11: Satisfaction with the CCPC activities (n=156)**

Component	Very strong	Somewhat strong	No opinion	Somewhat weak	Very weak	No response
Capacity to reach and inform	15%	28%	12%	14%	15%	7%
Capacity to consult with stakeholders	20%	25%	12%	10%	12%	13%
Provide fair access to the Program	25%	30%	6%	6%	13%	11%
Report on program activities	22%	24%	11%	10%	13%	11%

Source: Survey of Funding Recipients and CCPC Members

Table 11 indicates that the overall level of satisfaction (very or somewhat) with these activities varies between 43 and 55%, with “provide fair access to the Program” receiving the highest support. The “capacity to reach and inform” is the activity that received the lowest review, with close to 30% of respondents reporting that the capacity of the Corporation in that regard is “somewhat” or “very weak.” The breakdown of data reveals that those who did not receive



funding registered lower satisfaction with the Corporation compared to those who received funding. As well, individual applicants ranked the capacity of the Corporation much lower than the organizational applicants on all four accounts.

The representatives from the Corporation who were consulted indicated that a strength of the Corporation is the ability of the Panel members and staff. They stated that these two groups are knowledgeable in the equality or language areas of law and were committed to serving all funding applicants well. Key informant interviews (CCPC staff) showed that the large number of funding applications makes it increasingly difficult for the staff to maintain the same level of support to funding applicants, a point that the survey results corroborate. Table 12 confirms the increasing number of funding applications being submitted to the Corporation.

**Table 12: Number of funding applications received (1994/95 to 2000/01)**

Type	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	Total
Equality	57	88	113	139	125	131	150	803
Linguistic	14	23	25	27	29	43	50	211
Total	71	111	138	166	154	174	200	1,014

Source: CCPC Annual Report, 2000/01

The CCPC representatives noted that the Corporation recently published a new guide to assist funding applicants. The Corporation intends this guide to clearly define the eligibility criteria and to provide specific guidelines and templates to facilitate the development of funding applications. They also felt that the decision-making process is fair and transparent and that the Panels clearly state the reasons and rationale for their decisions.

Representatives from Canadian Heritage provided few comments on this aspect of the Program. Some noted, however, that the delivery of the Program is effective and that the eligibility criteria used by the Corporation reflect requirements of the Contribution Agreement.

***Effectiveness of program management***

The management functions relating to the CCP are divided between the Corporation and the Aboriginal Peoples’ and Human Rights Programs Directorate. The overarching objective of management practices currently in place is to ensure that the parameters established in the Contribution Agreement are respected.



To this effect, the Corporation has established a number of internal procedures to review, approve, and track disbursements provided to funding recipients:

- ▶ All invoices submitted to the Corporation are first reviewed by the analyst assigned to the file. The analyst's responsibility is to ensure that the invoice reflects the terms of the agreement between the CCP and the funding recipients.
- ▶ The Executive Director of the Corporation then reviews all invoices submitted to ensure that they respect the parameters of the Contribution Agreement.
- ▶ The Treasurer (a member of the Board of Directors) reviews and approves all accounts / payments issued to funding recipients.

External auditors come annually to review and audit the Corporation. During this process, the auditors may access any file of the Corporation. No confidentiality rules or policies apply to the auditors.

The Aboriginal Peoples' and Human Rights Programs Directorate monitors the implementation of the Contribution Agreement. As such, it receives from the Corporation a number of reports:

- ▶ Quarterly Cash Flow Requirements
- ▶ Funding Reports
- ▶ Financial Statements (unaudited and audited)
- ▶ Program Activity Report
- ▶ Annual Reports.

Upon receipt of the proper documentation, the Directorate proceeds with the payments to the Corporation. The Contribution Agreement currently calls for 12 payments to the Corporation annually. The Directorate also ensures an evaluation of the Program, in accordance with requirements of the Contribution Agreement.

Representatives from both the Corporation and the Aboriginal Peoples' and Human Rights Programs (APHR) Directorate indicated that current managements practices are efficient and ensure that the parameters of the Contribution Agreement are respected. One aspect that could be reviewed, according to some key informants, is the current payment schedule. Proceeding with 12 payments annually is administratively burdensome, and the number of payments could be reduced to better reflect actual practices.

### ***Extent to which activities support program's objective***

During both the key informant interviews and the survey, respondents were asked whether all the activities currently supported by the CCP (see Table 4 for details) are contributing to the Program's objective. More specifically, the respondents were asked whether any one of these activities could be dropped without hurting the Program.



Survey respondents strongly supported the current range of activities. Approximately 87% of respondents responded that this range was either appropriate (17%) or very appropriate (70%). Key informants from the Corporation and Canadian Heritage echoed this opinion, indicating that the current range of activities should be maintained.

Some of the key informants consulted expressed concerns in relation to some of these activities:

- ▶ One expert noted that the impact studies are not distributed widely enough.
- ▶ Another expert noted that the outreach and program promotion activities are technically valid, but that they do not reach a sufficiently broad audience.
- ▶ One key informant suggested that the activities currently undertaken to expand the mandate of the Program are not directly covered by the Contribution Agreement. This person believed that these activities should be funded by sources other than the Contribution Agreement.

On the latter point, key informants from the Corporation noted that activities relating to program expansion, particularly the proposal to establish a *Court Challenges Fund*, were discussed with Canadian Heritage. They also noted that these activities reflected the need to address the recommendation of the United Nations' Committee on Economic, Social and Cultural Rights on the need to expand the CCP.

### ***Third party delivery and Canadian Heritage accountability***

The Department of Canadian Heritage manages the CCP and is accountable to Parliament for the resources invested in, and for reporting on the results of, this program. The Corporation delivers the Program on behalf of the Department and, as such, plays a vital role in meeting the Department's accountability responsibilities.

General agreement exists among key informants that a third party delivery of the Program is a sound decision. The nature of the Program, and particularly the fact that it may involve legal challenges to federal laws, policies, or practices, requires a delivery structure that establishes sufficient distance between the government and the Program beneficiaries. This opinion was shared by approximately three-quarters of survey respondents who said that it is somewhat (8%) or very important (65%) for a third party to deliver the Program.

Representatives of the Department of Canadian Heritage and other federal departments noted that a third-party delivery structure avoids political interference, conflicts of interest, interdepartmental conflicts, and the appearance thereof. Key informants involved with the Corporation added that this structure ensures independence, impartiality, and objectivity.

At the same time, a few key informants raised concerns with this approach to program delivery. They appeared to believe that the accountability for funding is tenuous, that the Corporation's





membership exercises too much influence over the Program, and that the government lacks overall control over the Program.

To fulfil its reporting responsibilities, the Department must rely on the Corporation to access the information required for accountability purposes. In a results-based accountability environment, the access to appropriate information is, in fact, paramount:

*The foundation of results-based management is accurate and timely performance information. Departments and agencies need to implement an information regime that measures, evaluates and reports on key aspects of the Program and their performance in core areas: holds managers accountable for achieving results and ensures unbiased analysis, showing both good and bad performance.*<sup>30</sup>

The Treasury Board Secretariat's *Policy on Transfer Payments* clearly states that Contribution Agreements are subject to being accounted for and audited.<sup>31</sup> The Policy adds that, in cases like the CCP where a third party further distributes the contribution amounts, the Contribution Agreement should include a provision stating the “*departmental right of access to relevant initial recipients, and where warranted, ultimate recipients' documents and premises.*”<sup>32</sup>

As described in preceding pages, the Corporation does submit a number of reports to the Department. This information assists Canadian Heritage in accounting (in aggregate form) for the activities completed and the resources committed by the CCP. The central issue, however, is whether the third-party delivery structure of the CCP weakens or strengthens the transparency and accountability requirements applicable to any public entity managing public funds. While not specifically discussing the CCP, the Auditor General of Canada, in its most recent report, expressed serious concerns in relation to delegated arrangements, including those where a third party receives money through a Contribution Agreement and exercises discretionary authority to redistribute it on the government's behalf:

*In collaborative arrangements, the governing framework's weaknesses are mainly in the level of co-ordination between the partners. A federal partner department or agency is accountable to Parliament in the traditional ways for the federal portion. But the accountability of the arrangement as a whole can be deficient in important respects. Shared accountability requires that more attention be paid to the relationship between the partners and the relationship each has with its governing body. The deficiencies require continuing attention, as we emphasized in our 1999 audit.*

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<sup>30</sup>Treasury Board Secretariat. (2000). *Results for Canadians: A Management Framework for the Government of Canada*. Ottawa, p.11.

<sup>31</sup>See Treasury Board Secretariat. (2000). *Policy on Transfer Payments*. Ottawa.

<sup>32</sup>Ibid.



*In delegated arrangements, the risks to good governance and accountability are higher. (...) Since delegated arrangements are established as non-profit corporations operating at arm's length from the federal government, their accountability to Parliament is in question. For these reasons, we have modified the governing framework we used as a model in 1999 and placed more emphasis on the essential requirements for accountability to Parliament.*<sup>33</sup>

The Auditor General of Canada identifies a series of requirements, all based on two principles of parliamentary democracy:

- ▶ Parliamentary sovereignty over federal policy. *“Whoever holds discretionary authority to spend federal taxpayer money or to execute federal authority must not be exempt from potential scrutiny by Parliament.”*
- ▶ Stewardship of the public trust. *“Any arrangement delivering federal programs and services must respect the public trust, observing public sector values of fairness, impartiality and equity.”*<sup>34</sup>

The requirements relate to a range of dimensions linked to accountability:

- ▶ reporting to Parliament and the public
- ▶ external audit regimes
- ▶ ministerial oversight
- ▶ measures to establish effective accountability mechanisms
- ▶ measures to ensure adequate transparency
- ▶ measures to protect public sector values and ethics.

The consultations completed as part of this evaluation raised few concerns regarding any of these requirements, other than those relating to transparency. On this latter point, the Auditor General of Canada identifies two specific requirements:

<b>Table 13: To ensure adequate transparency</b>	
<b>Elements</b>	<b>Description</b>
Provision for public access to information	Arrangements should be as open as possible regarding access to information on the agreements, objectives, activities, and achievements dealing with the federal purpose. Appropriate provision should be made for legitimate concerns of personal privacy, commercial confidence, and intergovernmental negotiations.
Provision for communicating key information	Pertinent information should be communicated to the public and stakeholders. Without direct ministerial control, a provision needs to be made in delegated arrangements for enhanced transparency, including access to corporate information that is relevant to the delivery of federal public functions.

Source: 2002 Report of the Auditor General of Canada (April - Chapter 1 - Appendix B)

<sup>33</sup>Office of the Auditor General of Canada. (2002). *April Report, Chapter 1: Placing the Public's Money Beyond Parliament Reach*. Ottawa.

<sup>34</sup>Ibid.



A number of key informants believe that the current policy of the Corporation on confidentiality and information sharing is too limiting. Adopted in March 1999, the CCPC policy established the following procedure:

*Unless the consent of the applicant or Member concerned is obtained, or the information has been published or made known to the public by a party other than the Court Challenges Program, all information received by the CCP will be considered and treated as confidential.*

*Where a party, other than an applicant or a member, requests information concerning any applicant or Member, that party shall first make a written request to this effect to the Executive Director, and such written request will not be considered unless it contains the following information:*

- The name of the party making the request for information*
- The name of every applicant or Member about whom the information is sought; and including any intention to publish.*
- A clear statement setting out the nature and purpose of the information request including any intention to publish.*

In determining whether this policy meets the requirements identified by the Auditor General of Canada, one must turn to the standards established by the *Access to Information Act*. This Act reflects what the Government of Canada considers the appropriate regime for determining what Parliament and the public should be allowed to see and know. Several key informants noted that the Corporation is not directly covered by the Act. While probably accurate, this fact is largely irrelevant. The Department of Canadian Heritage, as management for the Program, is covered by the Act. Therefore, it is Canadian Heritage's responsibility to ensure that the federal standards in relation to access to information are reflected in the Contribution Agreements it signs for the delivery of programs on its behalf.

At face value, the current policy of the Corporation appears more restrictive than the regime contained in the *Access to Information Act*. Key informants, particularly those from the Corporation, described the rationale for having such a policy:

- ▶ Issues raised by many of the court challenges supported by the Program are sensitive, even controversial. In this context, the funding recipients must be confident that the information they provide to the Corporation will be protected.
- ▶ The level of funding that a party can access is an important component of a legal strategy. Publicly revealing the amount of funding could jeopardize the funding recipient's legal strategy.
- ▶ The Corporation already sends a form inviting all funding recipients to allow the Corporation to give out certain information for such purposes as its annual reports or to help other applicants (signature of this form is optional).



- ▶ The Corporation already provides a significant amount of aggregate information to Canadian Heritage that serves reporting purposes.
- ▶ The external auditors reviewing the financial information of the Corporation have access to all files, with no restrictions. This ensures that the public funds are appropriately spent.

The Corporation partly based this policy on a legal opinion it obtained discussing its obligation to disclose program information.<sup>35</sup> After reviewing the regime applicable to legal aid systems in Canada, the opinion notes that, in this context, the key issue becomes one of determining the extent to which the CCP is similarly situated to legal aid, such that the parameters applicable to the legal aid would also apply to the CCP. While acknowledging that differences between the two exist, these differences are not, according to the opinion, sufficient to distinguish the two programs for the purpose of information disclosure. Based on that premise, the opinion turns to the Supreme Court of Canada, which ruled that information dealing with administrative matters or that deals with the actual nature of a legal problem is subject of solicitor-client privilege.<sup>36</sup>

Key informants from the Corporation further noted that their policy is based on a decision from an Associate Senior Prothonotary of the Federal Court of Canada who ordered, in April 2000, that the contracts between a funding recipient and the Corporation “*are the subject of solicitor client privilege*” and that they not be disclosed.<sup>37</sup>

Some key informants noted that making the Corporation subject to standards similar to those in the *Access to Information Act* does not mean that all information within its control must be accessible to the public. Being subject to the *Act* also means benefiting from the exemptions that the *Act* contains, including those reflecting the objectives of the *Privacy Act*, which deals with issues such as the information subject to solicitor-client privilege.<sup>38</sup>

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<sup>35</sup>The legal opinion was provided by Arvay Finlay Barristers, dated April 27<sup>th</sup>, 2002.

<sup>36</sup>See *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590.

<sup>37</sup>Federal Court of Canada, Trial Division. (2000). Docket: T-66-86-A. April 27<sup>th</sup>.

<sup>38</sup>See section 27 of the *Privacy Act*, R.S. 1985, c. P-21.



### 4.3 Success / Impact

#### *Who benefits from the Program?*

The administrative data of the Corporation provides an overview of the funding applications it receives and the decisions made by the Panels. This information is available from the Corporation's annual reports. For the purpose of this report, we highlight a few of these statistics in the following tables.

<b>Table 14: Geographic distribution of funding applications received (1994/95 to 2000/01)</b>						
Type	East	Québec	Ontario	West	North	Total*
Equality	67	89	311	329	4	800
Linguistic	57	35	37	66	16	211
Total	124	124	348	395	20	1,011

\* Does not include the funding applications submitted from a location outside of Canada (n=3)  
Source: CCPC Annual Report, 2000/01

Table 14 indicates that individuals and organizations from all regions of the country turn to the CCP for assistance. These data also indicate that 80% of the applications received for equality cases have come from Ontario or the Western provinces. Language-based applications are more evenly balanced among the various regions, with the three territories being more active on the language front than the equality one.

On the equality side, 65% of the organizations/individuals that applied for funding were successful. On the language side, the ratio is higher, as 77% of funding applications received funding.<sup>39</sup> Table 15 provides an overview of case funding granted, per level of courts.

<b>Table 15: Funding granted by level of court (1994/95 to 2000/01)</b>				
Type	First instance	Appeal	Supreme Court of Canada	Total
Equality	130	51	59	240
Linguistic	51	22	10	83
Total	181	73	69	323

Source: CCPC Annual Report, 2000/01

<sup>39</sup>See Table 9, in Section 4.2, for a breakdown of funding granted per activity area



Key informants involved with the Corporation indicated that the non-profit organizations (local, regional, or national in scope) and individuals who receive funding tend to be from official language minority groups or from disadvantages groups (women, natives, racial minorities, gays and lesbians, etc.), as required by the Contribution Agreement.

Table 16 provides a distribution of funding application rejections, based on key criteria. Key informants noted that the profile of individuals or organizations whose funding applications were rejected includes those who do not represent a historically disadvantaged group or whose arguments put forward would not advance the constitutional provisions covered by the Program. It was also noted that a number of “for-profit” organization have applied for funding but are not eligible.

Table 16: Overview of funding rejection (1994/95 to 2000/01)							
Type	Not a test case	Duplication	No federal link	Canadian Human Rights Act	No constitutional link	Other	Total
Equality	79	18	79	5	n/a	n/a	181
Linguistic	8	4	n/a	n/a	13	9	34
Total	87	22	79	5	13	9	215

Note: Some categories do not apply to either equality or language cases (marked as n/a).  
Source: CCPC Annual Report, 2000/01

As shown in Table 11 (Section 4.2), survey respondents were somewhat critical of the capacity of the Corporation to reach and inform. As some of the key informants from the Corporation noted, it is difficult to assign a significant level of resources to this task, since the processing of applications already requires most of the administrative resources. As well, the range of groups and individuals that may become beneficiaries of the CCP is large and dispersed.

***Impact of the CCP***

Taken in its simplest form, the objective of the CCP is the clarification of certain constitutional provisions. Since the Program was first established in 1978, there is little doubt that the courts have had numerous opportunities to address and clarify some dimensions of the rights covered by the Program. The evaluation task, in this context, is to assess the extent to which this clarification process is the result, in part at least, of having the CCP in place. As is typically the case in program evaluation, “*establishing impact essentially amounts to establishing causality.*”<sup>40</sup> Establishing an absolute causal link between the Program itself and the expected result is practically impossible. The discussion becomes more promising if we rather state the issue in terms of probability:

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<sup>40</sup>Rossi, P.H., Freeman, H.E., and Lipsey, M.W. (1999). *Evaluation: A Systematic Approach*. Sage Publications, p. 238.



*In the social sciences, causal relationships are ordinarily stated in terms of probabilities. Thus, the statement “A is a cause of B” usually means that if we introduce A, B is more likely to result than if we do not introduce A. This statement does not imply that B always results if A is introduced, nor does it mean that B occurs only if A is introduced.<sup>41</sup>*

For the purpose of this evaluation, the question becomes one of determining whether the clarification of rights is more likely to result with the CCP than without it. As mentioned above, this does not imply that clarification always results if the Program is in place (technically, if groups and individuals were to experience difficulties in accessing the Program, or if the support was not sufficient, the clarification may not occur), nor does it mean that clarification occurs only if the CCP is in place.

The vast majority of key informants believe that the Program has played a significant role in advancing our understanding of the equality and language provisions of the constitution that are covered by the CCP. Almost all key informants (regardless of whether or not they think this was a desirable outcome) noted that the Program has allowed official language minority groups and disadvantaged Canadians to turn to the courts and challenge laws, policies, or practices they felt violated their rights:

- ▶ In relation to language rights, many key informants said that the CCP has been a prominent player in practically all the significant court challenges related to these rights since the Program was established in 1978. Key informants think that many of these challenges would never have been possible without the CCP.
- ▶ In relation to equality rights, key informants also think that the Program has been successful in allowing groups and individuals to raise strong arguments in favour of substantive equality rights.<sup>42</sup>

The consultation also emphasized that the various components of the Program (impact studies, case development, litigation, and program promotion/access) have empowered official language minorities and disadvantaged groups, which have now a more sophisticated knowledge of the Charter and other constitutional provisions and of court challenges in general. It was emphasized that even when a case development grant does not proceed to litigation, it may still assist in initiating a policy change by focusing the attention of both the government and the affected groups on the potential or real impact of that policy.

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<sup>41</sup>Ibid.

<sup>42</sup>The notion of “substantive equality” refers to the need to treat individuals or groups differently, if necessary and according to their particular needs, in order to achieve a status equivalent to that of the majority. This notion is typically considered in opposition to “formal equality,” which refers to a similar treatment, regardless of the specific conditions of the individuals or groups. For a discussion of substantive equality, see *Law v. Canada* [1999] 1 S.R.C. 497.



Some key informants also noted that the very existence of the Program has a powerful legitimization effect. It signals to Canadians that it is appropriate to challenge a law, policy, or practice that they feel violates their rights and freedoms. This is particularly significant, added key informants, considering the fact that CCP beneficiaries often come from marginalized groups.

Other key informants stated that the Program, because it is administered by the CCPC, has essentially allowed a certain network of organizations to control it and, by extension, its impact on the policy-making process. These groups, according to key informants, quickly turn to the court system when they disagree with the decisions of the government and thus erode democratic accountability.

Although the CCP provides financial assistance to support court challenges, other barriers may affect the actual capacity of individuals or groups to proceed. This question was put to survey recipients who were asked how severely some barriers may affect individuals or groups.

Table 17 summarizes their answers.

<b>Table 17: Barriers to the justice system, other than financial, including an assessment of their severity (n=156)</b>					
<b>Barriers</b>	<b>Minor</b>	<b>Moderate</b>	<b>Major</b>	<b>No opinion</b>	<b>No response</b>
Lack of legal expertise	9%	11%	70%	2%	8%
Unwillingness of other complainants to support intervention	21%	28%	31%	10%	10%
Desire to avoid publicity	38%	21%	19%	10%	12%
Time commitment too great	15%	22%	49%	4%	10%
Too draining emotionally	15%	26%	45%	6%	8%

Source: Survey of Funding Recipients and CCPC Members

These data indicate that the lack of legal expertise, the time commitment, and the emotional strain are factors that may particularly affect the capacity of the Program to achieve its objectives.

The consultation also inquired about the impact of the CCP on governments. Again, there was consensus that many court challenges supported by the CCP have had wide-ranging impacts on government policy. The following table describes some of the equality-based challenges that were supported, in part at least, by the CCP. These cases illustrate the diversity of issues related to equality rights of the CCP.





Table 18: Equality rights cases	
Case	Description
<i>R. v. Williams</i> (Criminal Law: Racism)	<p>The accused was an Aboriginal man charged with robbery. The issue raised in his case is whether prospective jurors could be questioned to determine whether they had a racial bias, to ensure an impartial jury.</p> <p>On June 4, 1998, the Supreme Court of Canada found that, where there is evidence of widespread racial prejudice, there is a realistic potential of bias in candidates for the jury. It confirmed that a person accused of a crime has the right to question prospective jurors about their racial biases in such cases.</p>
<i>R. v. Latimer</i> (Criminal Law: Sentencing)	<p>This case involves an accused found guilty by a jury of the second-degree murder of his severely disabled daughter. Mr. Latimer was granted a constitutional exemption from the mandatory minimum sentence of life imprisonment without parole for ten years. The Council of Canadians with Disabilities, Saskatchewan Voice of People with Disabilities, Canadian Association for Community Living, People First of Canada, Disabled Women's Network of Canada, and People in Equal Participation received funding as a coalition to intervene in this case. Their intervention was essentially to remind the Court that Mr. Latimer had killed a child, a child whose life was as worthy of protection as that of her able-bodied peers.</p> <p>The Supreme Court of Canada confirmed the minimum sentence required by the <i>Criminal Code</i>.</p>
<i>R. v. Mills</i> (Criminal Law: Sexual Assault)	<p>Mr. Mills, who was accused of sexually assaulting a 13-year-old girl, wanted to obtain records of visits the girl had made to a counselling agency and a psychiatrist, for use in his case. These procedures, set out in Bill C-46, attempt to balance the accused person's right to know the case against him and make a full defence with the complainant's rights to privacy. The issue here is that Mr. Mills did not want to follow the procedures set out in Bill C-46 for accessing these records.</p> <p>The Alberta Court of Queen's Bench agreed with Mr. Mills that the provisions went too far in protecting complainants' rights and declared Bill C-46 to be unconstitutional. The complainant in the case appealed to the Supreme Court of Canada.</p>
<i>Reference Re: Firearms Act</i> (Gun Control)	<p>The Alberta government asked the province's Court of Appeal to provide its opinion on the constitutionality of a new federal law that regulates the possession and ownership of all types of guns. The province argued that this law was about regulating private property and so should be a matter for the provincial government alone to address.</p> <p>The Alberta Court of Appeal found that the law is a criminal law that is necessary to protect public safety and that it therefore falls within the federal Parliament's authority. The decision has been appealed to the Supreme Court of Canada.</p>
<i>Granovsky v. Canada (Minister of Human Resources Development)</i> (Social and Economic Rights)	<p>Mr. Granovsky challenged <i>Canada Pension Plan Act</i> provisions that required him to contribute a certain amount to the Plan for a specified period in order to be eligible for a disability pension. Mr. Granovsky has a progressive disability that prevented him from working continuously and from making sufficient contributions to qualify for CCP benefits. Mr. Granovsky argued that this denial discriminated against him on the basis of his disability.</p> <p>The Pension Appeals Board rejected his claim. This ruling was appealed to the Federal Court of Appeal where the Court found that the Plan discriminated against persons with progressive disabilities contrary to section 15 of the Charter, but went on to find that the discrimination could be justified under section 1 of the Charter. The Supreme Court of Canada found that the denial of disability pension benefits did not discriminate against Mr. Granovsky.</p>



Table 18: Equality rights cases	
Case	Description
<i>Vancouver Society of Immigration and Visible Minority Women v. Canada (Minister of National Revenue)</i> (Taxation)	<p>Revenue Canada refused to register the Vancouver Society of Immigrant and Visible Minority Women as a charitable organization for tax purposes. This refusal was based, in part, on the determination that the activities of the organization did not promote the advancement of education as required by the definition of "charity" in the <i>Income Tax Act</i> and related law. The Vancouver Society, along with other equality seekers, believed that Revenue Canada's refusal to grant them charitable status violated the guarantee of equality in section 15 of the Charter. In their view, this definition of "charity" failed to recognize the type of education and help needed by immigrant and minority women to overcome high levels of unemployment and poverty.</p> <p>All of the judges of the Supreme Court of Canada supported a broader understanding of the types of "education" that could be charitable. However, a majority of the judges found that one of the stated purposes of the organization was too vague. In their view, this purpose would allow for non-charitable activities such as maintaining an employee bank and helping immigrant women acquire recognition of their professional qualifications. For this reason, the majority would not allow the Vancouver Society to receive charitable status.</p>
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> (Customs / Taxation)	<p>Little Sisters Book and Art Emporium has had numerous shipments from the United States seized by Canada Customs because certain laws in the <i>Criminal Code</i> prevent the importation of materials that are obscene. Little Sisters brought a challenge in which they argued that the provisions in the customs legislation, as applied by Canada Customs, violated their equality rights and freedom of expression, as guaranteed by sections 15 and 2(b) of the Charter, respectively.</p> <p>The trial judge found that the Customs officials had violated Little Sisters' freedom of expression and equality rights at times by targeting their shipments for search and seizure but that the legislation itself was constitutional. The decision was confirmed by a majority of the British Columbia Court of Appeal.</p>
Sources: CCPC annual reports	

The following table describes some of the language-based challenges that have been supported, in part at least, by the CCP. Many of these challenges have forced provincial governments to modify the legislative regime pursuant to official language minority rights.

Table 19: Language rights cases	
Case	Description
<i>Mahé v. Alberta</i> (School governance)	In <i>Mahé v. Alberta</i> the Supreme Court of Canada recognized the rights of parents belonging to an official language minority group to govern minority language education facilities.
<i>Susan Abbey v. Essex County Board of Education</i> (Access to education)	<p>An English-speaking couple, Susan Abbey and her husband, registered their three children in a French-language school. When the family moved to another community, Ms. Abbey registered her children in an immersion school, but she quickly realized that the immersion program did not meet her children's educational needs. The English-language school board turned down her request to register her children in a French-language school and pay the tuition fees.</p> <p>The Ontario Divisional Court rejected the applicant's arguments. The Court of Appeal of Ontario decided in Susan Abbey's favour. It ruled that all Ms. Abbey's children were accorded rights under section 23, even if their parents were not French-speaking, given that the eldest had been educated in a minority French-language school.</p>



**Table 19: Language rights cases**

Case	Description
<p><i>Commission of Official Languages v. Her Majesty the Queen</i>  (Delegation of powers and language rights)</p>	<p>The CCP granted funding to the <i>Association des juristes d'expression française de l'Ontario</i> (AJEFO) so it could intervene in a court challenge calling into question the <i>Federal Contraventions Act</i> and the issue of delegation of powers. AJEFO was concerned that, in the Act, the federal government had failed to confirm the protection of acquired language rights provided for in federal law, and more particularly Bill 108 (<i>Streamlining of Administration of Provincial Offences Act</i>, 1998).</p> <p>The Federal Court ruled in favour of AJEFO.</p>
<p><i>Fédération franco-ténoise v. Canada</i>  (Territorial governments' linguistic obligations)</p>	<p>The CCP granted funding to the <i>Fédération franco-ténoise</i> for a court challenge to clarify whether the government of the Northwest Territories and, by extension, all territorial governments, were institutions of the Government of Canada in the application of section 20 of the Charter and of language rights in the area of services.</p> <p>According to Justice Rouleau, the Northwest Territories were part of the federal Crown and were therefore subject to the linguistic obligations set out in the Charter. The Northwest Territories launched an appeal of this ruling before the Federal Court of Appeal, which upheld the appeal.</p>
<p><i>Chiasson et al. v. The Attorney General of Québec</i>  (Language rights and freedom of expression)</p>	<p>The CCP granted funding for a court challenge involving Québec's <i>Charter of the French Language</i>, section 2 of the <i>Canadian Charter of Rights and Freedoms</i>, and the language of software in the workplace.</p> <p>Justice Pierre J. Dalphond of the Québec Superior Court, District of Montréal, declared that the <i>Charter of the French Language</i> did not allow the <i>Office de la langue française</i> to prevent an employer from providing English-language programs in a workplace where French-language programs were already available to employees.</p>
<p><i>Charlebois v. City of Moncton</i>  (Legislative bilingualism)</p>	<p>A City of Moncton building inspector issued Mr. Charlebois, a French-speaking resident of Moncton, an order that was written in English only. Mr. Charlebois challenged the constitutional validity of the order, as well as that of the by-law under which the order was issued, since the by-law was not adopted in both of New Brunswick's official languages. The <i>Société des acadiens et acadiennes du Nouveau-Brunswick</i> and the <i>Association des juristes d'expression française du Nouveau-Brunswick</i> intervened in Mr. Charlebois' favour.</p> <p>The trial court judge dismissed Mr. Charlebois' motion and stated that the City of Moncton had no constitutional obligation to adopt its by-laws in both official languages and that the fact that its by-laws were adopted in one or the other, but not both, official languages could not serve as a basis for having them declared null and void. The New Brunswick Court of Appeal reversed this decision in favour of Mr. Charlebois.</p>
<p><i>Lalonde v. Health Services Restructuring Commission of Ontario</i>  Unwritten principle of protection for minorities</p>	<p>In this case, the applicants were contesting the Ontario government's decision to close the only fully francophone hospital in the Ottawa region, the Montfort Hospital. The CCP granted the <i>Fédération des communautés francophones et acadiennes du Canada</i>, the <i>Association canadienne-française de l'Ontario</i>, and the <i>Association canadienne-française de l'Ontario</i> (Toronto) funding to intervene in favour of the applicants before the Ontario Court of Appeal.</p> <p>The Court rejected the appeal from the Ontario government and maintained the Divisional Court's decision stating that the closure of the hospital violated the unwritten principle of protection for minorities.</p>
<p>Sources: CCPC Annual Reports</p>	



Some key informants noted that the Charter, combined with the real possibility of court challenges, has forced governments to be proactive in avoiding breaches of these rights. A good illustration of this is found in section 4.1 (1) of the *Department of Justice Act* (R.S., 1985, c. 31), which obliges the federal Minister of Justice to examine every new piece of legislation presented to the House of Commons “to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms (...).” Moreover, many departments have created teams that monitor court challenges and prepare contingency plans to ensure that the government can efficiently respond to court decisions.

### ***Are there unintended impacts?***

One of the questions addressed by the evaluation is whether the CCP has had impacts that were not intended or that were difficult to predict when the federal government first launched the Program. Key informants noted the following points in that regard:

- ▶ The Program (and the fact that it is delivered by the Corporation) has allowed language and equality-seeking groups to better know each other and to better understand their shared interests.
- ▶ The CCP has contributed to strengthening both language and equality-seeking groups’ networks, an outcome praised by some and criticized by others.
- ▶ The Program has become one means by which the federal government meets obligations under international human rights instruments, such as the *International Covenant on Economic Social and Cultural Rights*.
- ▶ On the language front, the CCP has created some federal-provincial tensions by funding many challenges to provincial laws.

On balance, it appears that few, if any, unintended impacts have arisen because of the Program or its delivery by the Corporation.

## **4.4 Cost-effectiveness / Alternatives**

### ***Is the current level of resources sufficient to meet the Program’s objective?***

This issue needs to be addressed at two distinct levels. First, the evaluation must assess whether the overall level of funding to the Program (\$2.75 million annually) is appropriate to meet the Program’s objective. Second, we must assess whether the delivery of program activities is efficient. Since no comparable program exists, it is impossible to use a benchmark to compare the CCPC delivery with the result that a conclusion on these two aspects of cost-effectiveness must rely on opinion.

On the first point, key informants noted that the Program could, obviously, support more cases if it had more resources. However, most agreed that the current level of resources does allow the



Program to fund a number of important challenges relating to the constitutional provisions covered by the Program. An important consideration in that regard is the current range of constitutional provisions covered by the CCP. Should the Program be expanded to cover, for instance, equality-based challenges to provincial laws, policies and practices, this would logically require an increase in resources.

On the second point, the interviews revealed no significant problem, except for the budget relating to the administration of the Program. Section 3.2 (a) of the Contribution Agreement (1998) limits the budget for administration to \$650,000 annually, for the duration of the agreement. Some key informants involved with the Corporation noted that, as the Program becomes better known to Canadians, the number of funding applications increases. As illustrated in Table 12, this number has increased from 71 applications in 1994-95 to 200 applications in 2000-01. These key informants argued that the budget for administration should be increased to take into account this dimension.

As for case funding, the administrative data indicates that extraordinary funding was granted in approximately 20% of equality or language cases. This seems to indicate that most cases are able to proceed with the current maximum amounts provided.

As an independent entity, the Corporation could technically access sources of funding other than the Contribution Agreement. The other entities that previously delivered the Program (the Canadian Council on Social Development and the University of Ottawa's Human Rights Centre) were involved in other types of activities and received funding from other sources. A number of key informants noted that the Corporation could and even should pursue other sources of funding. If, however, this funding is to support court challenges in areas other than the ones covered by the Contribution Agreement, several cautioned that this should be explicitly discussed with the Department of Canadian Heritage. This avenue could, according to key informants, create confusion and even tension between levels of governments. As a result, these key informants argued that if non-federal funding were sought, the CCPC should clarify the process whereby the federal government's contribution is limited to what the Contribution Agreement states.

### ***Is there an alternative to the CCP?***

This question needs, again, to be addressed at two distinct levels. First, the evaluation must assess whether there is an alternative to funding test cases in order to meet the Program's objective of clarifying rights. If no alternative to funding test cases emerges, the evaluation must assess whether funding the CCP is the most efficient avenue to support test cases.

On the first point, there was a broad agreement among key informants that court decisions are, by far, the most efficient avenue to clarify constitutional provisions. As noted by some key informants, funding research, conferences, or other activities of this nature "*will never replace a decision from the Supreme Court of Canada.*" Facilitating the emergence of court decisions, particularly those from the Supreme Court of Canada, helps to build a much better understanding



of the constitutional rights and freedoms of Canadians and their implication of governments' policies.

On the second point (and as noted in section 4.2), key informants emphasized that having a third party to deliver the Program is a sound policy decision. A number of key informants noted that the CCP is still unique in its kind, which means that Canadians without financial means have no avenue of funding to present constitutional challenges. Some programs support legal challenges, such as the Women's Legal Education and Action Fund (LEAF) and the Aboriginal Test Case Funding Program (administered by Indian and Northern Affairs Canada), but none covers the same rights and offers the same scope of support as the CCP. In this context, redirecting the funding currently provided to the CCP toward other activities would significantly reduce assistance to Canadians for launching test cases.



## 5.0 Conclusions and recommendations

This section presents a series of observations and recommendations, based on the analysis provided in Section 4.0.

### *Relevance / Rationale*

The evaluation indicates that the CCP meets the need that led to the Program's creation and its activities are consistent with Department of Canadian Heritage strategic objectives (established in April 2000), particularly those relating to citizens' engagement and promotion of official languages.

The evaluation findings indicate that there are dimensions of the constitutional provisions covered by the Program that still require clarification and, most probably, there will be constitutional provisions requiring clarification indefinitely.

The criteria included in the Contribution Agreement, to determine who may access CCP funding, imply that the clarification of rights is to be supported by assisting specific groups (official language minority and disadvantaged Canadians) in bringing their perspective to the attention of the courts. In this regard, it is important to note that the Charter itself is an unbalanced document, designed to ensure that the rights of the minority are not unduly limited by the actions of the majority. A program that seeks to clarify and advance the rights of minority and disadvantaged groups appears entirely consistent with the Charter.

If this is, in fact, the goal of Canadian Heritage, it would be advantageous to have it better reflected in the provisions of the Contribution Agreement describing the Program's objectives.

- |                       |   |
|-----------------------|---|
| <b>Recommendation</b> | <b>1. The evidence presented in this evaluation suggests the Court Challenges Program is addressing the need that led to the Program's creation.</b>  |
| <b>Recommendation</b> | <b>2. Should the program be continued, its objectives should be clarified in revised Terms and Conditions. The evidence collected indicates that the actual objective of the CCP is to support the understanding, respect for, and enjoyment of the constitutional provisions listed in the agreement, through the provision of financial assistance to official language minority groups and disadvantaged Canadians, for test cases of national significance.</b> |

While many individuals and organizations consulted expressed the desire to have the CCP expanded to include, in particular, equality-based challenges to provincial laws, policies, and practices, none of the evidence collected indicates that moving in that direction would actually meet a need or a strategic objective of the federal government.



### *Design and delivery*

The evidence collected indicates that the Program has an effective management structure in place and that the procedures followed to review applications and allocate funding do reflect good practices in that field.

#### **Recommendation**

- 3. The Court Challenges Program Corporation has effectively managed the funding provided by Canadian Heritage. Should the program be renewed, CCPC is a viable delivery mechanism, provided that the issues raised in Recommendations 4 - 7 below are addressed.**

The evaluation indicates that the CCP panels are proactive in determining the types of arguments that the Program will fund. This proactive approach is consistent with the modified program objective described in Recommendation 2, but it is less so with an objective strictly limited to “clarifying” constitutional provisions.

One management aspect that requires special attention is the confidentiality policy adopted by the Corporation. While the Corporation is completely within its rights to adopt such a policy, Canadian Heritage is under no obligation to accept it. The standards established in the *Access to Information Act* and the recommendations of the Auditor General of Canada and her latest reports all point towards a need for more transparency on the part of the Corporation. While recognizing that the Corporation is most probably not covered by the *Access to Information Act*, Canadian Heritage should ensure that any future Contribution Agreement with the Corporation includes provisions that better reflect the objectives of the Act.

Any provision dealing with the access to information relating to the CCP should reflect the sensitive nature of the funding applications submitted and the fact that these applications are part of legal procedures before the courts. One avenue that both parties could explore is the possibility of making closed administrative files subject to such provisions. By administrative files, we mean the files related to the actual funding applications, which involve the individual or group and the Corporation. Information typically protected by exemptions or by the *Privacy Act*, including any information subject to solicitor-client privilege, would not be disclosed. A revised policy would, at a minimum, identify all individuals and organizations who received funding from the Program and the level of support provided (once the file is closed).

In reviewing the cases funded by the Program, it became apparent to the evaluators that some benefit would arise if Canadians were more familiar with the significance of these decisions. For example, cases such as Corbiere are central to defining the issue and scope of Aboriginal self-government. The Annual Report, which is available on-line through the web site does present a synopsis of the main cases that have proceeded through the courts, but this is selective information. Some of the misunderstanding that the Program replaces political decision-making with judicial decision-making may be clarified with more publicity surrounding the Program. In principle, any case that is funded becomes a matter of public record by virtue of being heard in





court, but a regular reporting by the Corporation would increase the profile, transparency, and accountability of the Program.

- Recommendation**                      **4. Any funding agreement relating to CCP delivery should include provisions regarding the access to information on the CCP that more closely reflect the standards of disclosure established in the *Access to Information Act*.**

It would also be useful to revise the payment schedule for the contribution made by Canadian Heritage to the Corporation, to better reflect current practices.

- Recommendation**                      **5. Also, any funding agreement's payment schedule should reflect the actual patterns of disbursement.**

Recently, the Auditor General has commented on the failure of the federal government to offer adequate oversight on how third parties deliver government programs. We note that such comments have not been directed to the Corporation and this evaluation did not include a financial audit. It is certainly important that the Program has the independence to fund challenges without political interference, especially since the federal government is the de-facto “defendant” in challenges made to federal laws, policies, and practices that are believed to contravene the Charter. At the same time, to meet the challenge presented by the Auditor General means that decisions made to fund or not fund a specific applicant must be clear to Canadian Heritage.

Another issue is that the Corporation could use a particular social and political perspective to select the cases to be funded beyond the criteria that the case would advance the rights of minority or disadvantaged groups. Arguably, if the Program is not to violate the spirit of the Charter, the Program cannot fund challenges that limit the rights of minority and disadvantaged groups. Therefore, challenges that would attempt to reverse recent decisions that support, for example, the rights of gay and lesbian couples should not be supported by the Program because this is contrary to the spirit of the Charter. However, a publicly funded program that makes contributions to private citizens and fails to provide sufficient detail on the nature of its decisions to, at least, the Program sponsor (Canadian Heritage) risks being viewed as possibly having an “agenda” other than that stated in its mandate. Critics complain that the Program could encourage the substitution of judicial for legislative law making, and in this context, it would serve the interest of the Department if funding decisions made by the Corporation were more transparent.

Two central observations emerge in this regard:

- ▶ First, the process used by the Panels in arriving at their decisions, how the Corporation appoints Panel members, and the other laudable decision processes used by the Corporation should be promoted in annual reports. These processes demonstrate the extent to which the Corporation, its Board, and the two panels achieve due process.



- ▶ Second, as this evaluation demonstrates, it is possible to offer detail on funded and non-funded cases without violating client-solicitor privilege. Regular reports on funded and non-funded projects, at the same level of specificity as used in this report, would confer two benefits:
  - It would communicate the value of the Program by illustrating which cases are funded, as opposed to the selective citation that occurs, and which rarely is a balanced presentation of funding decisions.
  - It would provide confirming assurances that the Corporation and Program are adhering to the mandate.

Once again, this report shows that this disclosure can be accomplished without violating client-solicitor opinion.

Recommendation 6 represents a precaution rather than a correction. It also aligns with the current trend toward increased accountability and transparency over the funding to external agencies.

**Recommendation**

- 6. Should the program be renewed, to support transparency and accountability, the level of information sharing between Canadian Heritage and the Corporation should be increased in a manner that respects the independence of the two panels as well as client-solicitor confidentiality. To this end, Canadian Heritage should consider pursuing either or both of these two avenues:**
  - ▶ **requesting an increase in the frequency of reporting to Canadian Heritage (every six months) on all applications, the funding outcome of each application, and a rationale for the decisions to fund or not fund**
  - ▶ **requesting that the Annual Reports of the Corporation include more systematic information on funded cases and the decision processes used by Panels as well as the Board.**



### *Success / Impact*

The Program has been successful in reaching out to members of linguistic minorities and disadvantaged Canadians. Whether the current range of groups and individuals reached by the Program is adequate largely depends on the perspective one adopts in relation to the Program's objective. Addressing Recommendation 2 will help determine whether the Program does succeed in meeting its intended clientele.

The CCP has also been successful in supporting important court cases that have had a direct impact on the implementation of rights and freedoms covered by the Program. The evaluation indicates that many of these courts cases would never have been brought to the attention of the courts without the CCP.

### *Cost-effectiveness / Alternatives*

The evaluation indicates that the maximum amounts provided by activity are largely adequate. Only the budget for administration requires special attention, in light of the fact that the number of applications has significantly increased over the years.

**Recommendation**                      **7.    Should the Program be renewed, no need exists to change the overall funding provided to support the CCP.**

The evaluation indicates that a better understanding of the rights and freedoms covered by the Program is best achieved by funding test cases. No alternative would be as efficient. Additionally, the evaluation confirms that funding a third party to administer such a fund is a sound policy decision. In doing so, however, Canadian Heritage must have access to all the information it requires to assume its management responsibility and to be fully accountable to Canadians for the activities and expected results of the CCP.



**Summative Evaluation of the Court Challenges Program**

Management Response and Action Plan

**Overall Conclusions:** The Multiculturalism and Human Rights Branch finds the overall conclusions of the evaluation of the CCP to be positive and supportive of the direction and outcomes of the program. The evaluation provides a fair assessment and gives the Department valuable information about the results of the CCP over the last five years. It concludes that the CCP is a unique institution that makes important contributions to our understanding of Constitutional and Charter rights that could not be achieved by other means. It also concludes that the CCP is sound and well-run by the Court Challenges Program of Canada (CCPC), an independent arms-length organization. It provides some useful suggestions for augmenting the reporting relationship between the Department of Canadian Heritage and CCPC. It is expected that, after consultations with the CCPC, Treasury Board and within the Department, the few issues identified in the evaluation can be addressed in the next contribution agreement.

Recommendation	Response	Timeline
<p><b>Recommendation 1:</b> The evidence presented in this evaluation suggests the Court Challenges Program is addressing the need that led to the Program's creation.</p>	<p>The Branch will seek to renew the Court Challenges Program (CCP). In order to provide sufficient time to undertake required consultations and prepare a Results-Based Management and Accountability Framework (RMAF) and a Risk Based Audit Framework (RBAF), it is expected that a one-year ministerial extension of the existing agreement will be necessary.</p>	<p>One-year extension of existing agreement: April 2003</p> <p>New five-year agreement prepared by September 2003, for implementation April 1, 2004.</p>



<b>Summative Evaluation of the Court Challenges Program</b>		
<p><b>Recommendation 2:</b> Should the program be continued, its objectives should be clarified in revised Terms and Conditions. The evidence collected indicates that the actual objective of the CCP is to support the understanding, respect for, and enjoyment of the constitutional provisions listed in the agreement, through the provision of financial assistance to official language minority groups and disadvantaged Canadians for test cases of national significance.</p>	<p>The new contribution agreement with the Court Challenges Program of Canada (CCPC) will clarify and affirm the objective of the CCP.</p>	<p>As above.</p>
<p><b>Recommendation 3:</b> The Court Challenges Program Corporation has effectively managed the funding provided by Canadian Heritage. Should the program be renewed, CCPC is a viable delivery mechanism, provided that the issues raised in Recommendations 4-7 below are addressed.</p>	<p>The Branch will seek to negotiate a new contribution agreement with the CCPC as the delivery mechanism. The issues raised in the evaluation will be addressed in the process for renewal.</p>	<p>March to September 2003</p>
<p><b>Recommendation 4:</b> Any funding agreement relating to CCP delivery should include provisions regarding the access to information on the CCP that more closely reflect the standards of disclosure established in the <i>Access to Information Act</i>.</p>	<p>Consultations will be held with the ATIP Secretariat, Legal Services and the CCPC to discuss issues related to the disclosure standards, while respecting solicitor-client privilege.</p>	<p>February to June 2003</p>



Summative Evaluation of the Court Challenges Program		
<p><b>Recommendation 5:</b> Also, any funding agreement's payment schedule should reflect the actual patterns of disbursement.</p>	<p>Pending consultations with Treasury Board Secretariat (TBS), a revised payment schedule will be included in the new contribution agreement.</p>	<p>September 2003</p>
<p><b>Recommendation 6:</b> Should the program be renewed, to support transparency and accountability, the level of information sharing between Canadian Heritage and the Corporation should be increased in a manner that respects the independence of the two panels as well as client-solicitor confidentiality. To this end Canadian Heritage should consider pursuing either or both of these avenues:</p> <ul style="list-style-type: none"> <li>• requesting an increase in the frequency of reporting to Canadian Heritage (every six months) on all applications, the funding outcome of each application, and a rationale for the decisions to fund or not fund.</li> <li>• requesting that the Annual Reports of the Corporation include more systematic information on funded cases and the decision processes used by Panels as well as the Board.</li> </ul>	<p>Noting that the evaluation makes this recommendation as a precaution rather than as a correction, the Branch will closely examine issues relating to the reporting of information and consult with ATIP, Legal Services, Finance and the CCPC on additional measures.</p>	<p>February to June 2003</p>



Summative Evaluation of the Court Challenges Program		
<p><b>Recommendation 7:</b> Should the Program be renewed, there is no need exists to change the overall funding provided to support the CCP.</p>	<p>The Directorate is consulting with TBS and within the Department about funding issues. Additional reporting requirements that may be involved in satisfying recommendations 4 and 6 may have financial implications. These will also be discussed with the CCPC.</p> <p>(<b>Note:</b> The evaluation also states that the “budget for administration requires special attention, in light of the fact that the number of applications has significantly increased over the years.”)</p>	<p>February to June 2003</p>