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ACCESS TO JUSTICE

PART 1: COURT CHALLENGES PROGRAM

Report of the Standing Committee on Justice and Human Rights

Anthony Housefather
Chair

SEPTEMBER 2016

42nd PARLIAMENT, 1st SESSION

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THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

has the honour to present its

FOURTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the Court Challenges Program and has agreed to report the following:

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ACCESS TO JUSTICE

PART 1: COURT CHALLENGES PROGRAM

Introduction

On 23 February 2016, the House of Commons Standing Committee on Justice and Human Rights (the "Committee") decided to undertake a study on access to justice by proceeding in several phases, the first one consisting of reviewing the Court Challenges Program ("CCP").[1] In light of the federal government's recent commitment to re-establish the CCP, with a budget of approximately $5 million per year, the Committee wanted to take this opportunity to provide recommendations to the government as to how the CCP should be re-established.[2]

From February to May 2016, the Committee held six meetings during which it heard testimony from various experts and stakeholders, including organizations representing minority official languages and equality-seeking groups, representatives of government departments and individuals involved in the administration of the former CCP[3] and the current Language Right Support Program ("LRSP"). The Committee is grateful for their participation.

As underscored by most witnesses in the course of the Committee's study, the CCP, which was cancelled in 2006, was a key component of strengthening access to justice and upholding Canada's commitment to fairness and respect for the rule of law. The purpose of the CCP was to give a voice to those who might not have the ability to bring court challenges forward in order to clarify, expand and breathe life into constitutional equality and linguistic rights, and to hold government to account.[4] By levelling the playing field between disadvantaged groups and the government, such a program can also

1 Pursuant to Standing Order 108(2). Information about the next phases of the Standing Committee of Justice and Human Rights (the "Committee") study on access to justice is provided in the minutes of 23 February 2016 meeting.

2 The mandate letters of the Minister of Heritage and the Minister of Justice and Attorney General of Canada from the Prime Minister both indicate that the government is seeking to restore a modern Court Challenges Program ("CCP"). The Department of Canadian Heritage has taken the lead to modernize the CCP and has launched a consultation with experts, organizations and Canadians.

3 A list of witnesses who appeared before the Committee is set out in Appendix A and a list of briefs submitted to the Committee, in Appendix B of this report.

4 For example, according to Professor Badiou, the CCP "was a superb and uniquely Canadian tool designed to make the justice system more accessible to the most vulnerable and underprivileged Canadians. In my opinion and that of many others, the program also strengthened Canadian democracy by allowing the most disadvantaged Canadians to participate in the process of clarifying the Canadian Charter of Rights and Freedoms and the Constitutttion." House of Commons, Standing Committee on Justice and Human Rights ("JUST"), *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Noël Badiou, Assistant Vice-President, Equity, Diversity and Human Rights, Laurentian University).

contribute to ensuring that rights "exist not only on paper, but can result in systemic change for those in society whose voices are often ignored."[5]

Over the years, the CCP has provided funding for cases of national significance related to important legislative and policy areas, including access to social and economic benefits for disadvantaged groups, such as Indigenous people, women and the lesbian, gay, bi-sexual and transgender communities; accessibility of public transportation for persons with disabilities; preventing deportation to a country where an individual would be at risk of torture; and access to education in minority official languages.[6]

This report summarizes the views expressed during those hearings concerning issues related to sustainability, fairness, efficiencies, accountability and scope of a new program and presents the Committee's observations and recommendations for the renewal of the CCP. The intention of our recommendations is to improve the CCP.

The following sections of this report present an overview of the CCP's history and the revival of its linguistic rights components with the establishment of LRSP in 2009 and the Committee's proposals for reform.

The Court Challenges Program History and Objectives

The federal government first created the CCP in the late 1970s to help official language minority communities take legal action to clarify and affirm their language rights. With the adoption of the *Canadian Charter of Rights and Freedoms* (the "Charter") in 1982, the scope of the CCP was broadened to include cases dealing with the language rights newly entrenched in sections 16 to 23 of the Charter and language rights cases dealing with the clarification of the freedom of expression guaranteed by section 2 of the Charter.[7]

In 1985, the CCP was again expanded to provide financial support for individuals and groups wishing to challenge federal statutes and government policies and practices relating to Charter equality rights (namely ss. 15 and 28, as well as ss. 2 and 27 when invoked in support of s. 15 – see Table 1 below).

To avoid any potential conflict of interest, the administration of the CCP was transferred from the Department of Justice (responsible for managing the equality rights component) and the Department of the Secretary of State (responsible for managing the linguistic rights component) to an independent body, the Canadian Council on Social Development. From that point on, the CCP was always managed by an independent third party.

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5 JUST, 1st Session, 42nd Parliament, The Canadian Bar Association, Brief, 15 April 2016, p. 2.

6 JUST *Evidence*, 1st Session, 42nd Parliament , 8 March 2016 (Rachel Wernick, Assistant Deputy Minister, Strategic Policy, Planning and Corporate Affairs, Department of Canadian Heritage); Department of Canadian Heritage, Brief submitted to the Committee, 8 March 2016.

7 Department of Canadian Heritage, *Summative Evaluation of the Court Challenges Program – Final Report*, 26 February 2003.

As the Committee was reminded by Sylviane Lanthier from the Fédération des communautés francophones et acadienne du Canada ("FCFA"), "the CCP had a rather difficult history".[8] In 1992, the federal government cancelled the CCP.[9] Then, following significant protest, the CCP was restored in 1994,[10] only to be abolished again in 2006. At that point, new funding applications were not accepted, however, the government promised to honour pre-existing grants.[11] According to the testimony of Rachel Wernick from the Department of Canadian Heritage, in March 2016, 28 equality and language rights cases were still being funded under the old CCP and the Department of Canadian Heritage was receiving $1.4 million annually to manage these cases.[12]

8 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Sylviane Lanthier, President, Fédérations des communautés francophones et acadienne du Canada).

9 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Kathleen Tansey, Vice-President of the Board of Directors, Court Challenges Program of Canada).

10 Ibid.

11 JUST, *Evidence*, 1st Session, 42nd Parliament, 8 March 2016 (Rachel Wernick, Assistant Deputy Minister, Strategic Policy, Planning and Corporate Affairs, Department of Canadian Heritage).

12 Ibid.

At the time of its elimination, the rights covered by the CCP were as follows:

Table 1 – Rights Covered by the CCP, 1994–2006[13]

Provision	Description	
Language rights (*These rights are currently protected under the LRSP.)	***Constitution Act, 1867***	
	Section 93	Protects the rights and privileges of denominational schools.
	Section 133	Protects the use of English and French during parliamentary debates, before the courts and in the printing and publication of the laws adopted by the Parliament of Canada and the Quebec legislature.
	Manitoba Act, 1870	
	Section 23	Establishes English and French as the two languages to be used in the Manitoba legislature, and in the publication of the laws adopted by the legislature.
	***Canadian Charter of Rights and Freedoms*, 1982**	
	Sections 16 to 23	Sections 16 to 22 establish English and French as the two official languages of Canada and New Brunswick. These sections also 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 freedom of expression (eligible when invoked in a language minority case).
Equality rights	Section 15	Protects equality rights (equal benefit of the law without discrimination).
	Section 28	Ensures the equality of men and women.
	Section 2 or 27	Protects fundamental freedoms (s. 2) and multiculturalism (s. 27) (eligible when invoked in support of arguments based on s. 15).

Source: Table prepared using information provided by witnesses and documents submitted to the Committee.

13 The CCP was subject to funding exclusions. For equality rights cases, the CCP did not provide funding for any case covering an issue already funded by the CCP or that was already before the courts; challenges to actions taken by provincial governments; complaints under the *Canadian Human Rights Act*; challenges to provincial laws, policies or practices; and public education, community development, lobbying or political advocacy. For language rights cases, the CCP did not provide funding for: any case covering an issue already funded by the CCP or that was already before the courts; complaints or proceedings under the *Official Languages Act*; applications for judicial review or appeals in respect of actions or measures taken by the Commissioner of Official Languages; complaints or other actions filed pursuant to any provincial or territorial law, policy or practice relating to the protection of official language rights not within the constitutional rights covered by the CCP; and public education, community development, lobbying or political advocacy. See: CCP, *A Guide to the Court Challenges Program of Canada*, pp. 4 and 6.

The former CCP was comprised of a Board of Directors responsible for the administration of the program and two distinct panels of experts, one for linguistic rights and one for equality rights, who were responsible for all decisions regarding funding. The CCP expert panels funded various activities, including test case development, litigation and impact studies.

In 2009, following an out-of-court settlement with the FCFA, the federal government created the LRSP,[14] which is aimed at protecting the same linguistic rights areas covered by the former CCP.[15] It was decided that the LRSP would be administered by the University of Ottawa with an annual budget of $1.5 million. As shown in Table 2 below, the current contribution agreement for the LRSP, which will expire 31 March 2017, provides that it be comprised of four components relating to the four specific objectives, noted in Table 2 below.

Table 2 – Components and Objectives of the Language Rights Support Program

Component	Description	Objective
Information and promotion	This component funds information and promotion initiatives or impact studies related to constitutional language rights and those that serve to inform or educate the Canadian public.	To promote awareness of language rights through public education.
Alternative dispute resolution (ADR)	This component involves the use of non-judicial means to resolve disputes (e.g., mediation, arbitration, negotiation, the opinion of an expert chosen by both parties, mini-trial or any other legitimate ADR process).	To offer access to alternative dispute resolution processes to settle disputes out of court.
Legal remedies	This component provides funding for trial proceedings, authorizations for appeal, and appeals.	To support litigation that helps to advance and clarify constitutional language rights when test cases are involved and dispute resolution efforts have not resolved matters.
Exploratory study (since April 2012)	This component provides funding to prepare an applicant's file (through an exploratory study) in support of the ADR process.	To support the applicant in his or her decision to engage in an ADR process.

Source: Marie-Ève Hudon, The Role of the Courts in the Recognition of Language Rights, Library of Parliament, Background Paper, No. 2011-68-E, revised 23 January 2013.

14 The Fédération des communautés francophones et acadienne du Canada, supported by other community organizations, originally applied to the Federal Court asking for a declaration that the decision to cancel CCP funding was null and void. This case led to this settlement in October 2006.

15 JUST, *Evidence*, 1st Session, 42nd Parliament, 8 March 2016 (Rachel Wernick, Assistant Deputy Minister, Strategic Policy, Planning and Corporate Affairs, Department of Canadian Heritage).

Proposals for reform

The majority of witnesses who appeared before the Committee during our study were unequivocal that the CCP is a key component of access to justice. Many of them reminded us of the ever-increasing cost of litigation and the fact that, unfortunately, money is often the biggest barrier to accessing justice.[16] The reinstatement of the CCP was not only viewed as necessary to level the playing field between disadvantaged groups and the government,[17] but also to keep up with societal changes. As noted by Erin Brady from the Department of Justice, our Constitution is "a living tree" that "is meant to be interpreted progressively over time so that it can stay in step with changes in social conditions and continue to adapt to modern realities."[18] For these reasons, most witnesses were of the view that the CCP is as important today as it was when it was originally created in the late 1970s.[19]

The Committee recognizes the contribution of the former CCP and the current LRSP to the clarification and advancement of constitutional language and equality rights. However, some of its members do not see the need for reinstating the equality rights aspect of the CCP. Therefore, the Committee, on division, supports the decision of the government to restore the program.

The following sections discuss the recommendations that the Committee considers essential in order to improve access to funding for issues of national significance that could potentially clarify, expand and breathe life into our constitutional equality and linguistic rights and to ensure greater accessibility, transparency and accountability in the new CCP.

A. The Need to Enhance the Renewed Program's Sustainability

One of the key concerns discussed throughout the Committee's study relates to the non-permanent nature of the CCP. Since its inception in the late 1970s, the CPP was cancelled twice and its administration was relocated a number of times. During our

16 Elizabeth Shilton noted for example that "[t]here is concern throughout legal circles about the extent to which legal costs operate as a significant barrier to access to justice in general." JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Elizabeth Shilton, Board of Directors Member, Women's Legal Education and Action Fund).

17 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 May 2016 (R. Douglas Elliot, Egale Canada Human Rights Trust); *Evidence*, 19 April 2016 (Anne Levesque Chairperson, Human Rights Committee, Council of Canadians with Disabilities).

18 JUST, *Evidence*, 1st Session, 42nd Parliament, 8 March 2016 (Erin Brady, General Counsel, Human Rights Law Section, Public Law and Legislative Services Sector, Department of Justice).

19 For example, John Rae stated the following: "We've come further up the road in terms of being equal before it under the law, but we're a long way from realizing the charter's promise of equal benefit of Canadian law […] It's one thing to have good law in this country, and I think we have pretty good law. As citizens and organizations, if we do not have the resources to be able to test and try to expand what that law covers, then it's just not achieving what we need. This is where the court challenges program is important […]."JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (John Rae, Second Vice-Chairperson and Chairperson of Social Policy Committee, Council of Canadians with Disabilities).

hearings, several options were proposed to better protect the new program from cancellation.

One of these options was to entrench the CCP in the Constitution. This approach, which would make it more secure than any of the other approaches discussed during our study, was, however, considered impractical as the constitutional amendment formula would have to be applied.[20]

Another option suggested by a number of witnesses, including the FCFA, the Quebec Community Groups Network ("QCGN") and the African Canadian Legal Clinic ("ACLC") is to endow a foundation.[21] The Committee was told that this option would not only enhance sustainability, but also ensure the program's independence from government.[22] This approach would obviously require more money than currently budgeted by the government, and as noted by Kathleen Tansey from the Court Challenges Program of Canada, the question remains as to the size of the endowment that would make it sustainable.[23] The Committee believes that endowing an independent organization to ensure the continuation of the CCP is an option that should be considered by the government at a future date.

The option most often suggested by witnesses was to enshrine at a minimum the new CCP in legislation, rather than in a government program. Like the witnesses who addressed this issue, the Committee recognizes that this would not guarantee the permanency of the new program, since future legislation could always be enacted that would cancel it. However, the Committee agrees with witnesses that it would at least provide that a government seeking its cancellation would require the approval of Parliament.

In light of these considerations:

RECOMMENDATION 1

The Committee recommends enshrining the Court Challenges Program in legislation in order to enhance its sustainability and to ensure that any government seeking its cancellation would require the approval of Parliament.

Recognizing that the government is currently conducting consultations on the restoration of the Court Challenges Program and considering the time needed to enact legislation, the Committee

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20 See for example, JUST, *Evidence*, 1st Session, 42nd Parliament, 8 March 2016 (Michel Francoeur, Director and General Counsel, Official Languages Directorate, Public Law and Legislative Services Sector, Department of Justice).

21 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Margaret Parsons, Executive Director, African Canadian Legal Clinic); Fédération des communautés francophones et acadienne du Canada, Brief, 2016.

22 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Justice Michel Bastarache).

23 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Kathleen Tansey, Vice-President of the Board of Directors, Court Challenges Program of Canada).

recommends that the government immediately restore the Court Challenges Program through policy until such legislation can be brought into force.

B. The Need to Ensure Fair and Efficient Management of the Renewed Program and its Accountability

While the vast majority of witnesses who appeared before the Committee believed that the administration of the former CCP acted fairly, Gwendolyn Landolt from Real Women of Canada and Gerald Chipeur, a lawyer at Miller Thomson LLP, were of the view that the CCP was biased.[24] They both told the Committee that their funding applications were never selected as their views were different from those of the expert panel responsible for funding decisions. In her testimony, Ms. Landolt also argued that "the program was not accountable to the public, did not report to Parliament, and was not subject to the *Access to Information Act*."[25]

On the basis of the evidence we heard, and considering that the perception of fairness is often as important as fairness itself, the Committee considers that a number of changes to the governance structure of the former CCP are needed. Like a number of witnesses, the Committee believes that the new program needs to be more transparent and accountable to the public. The Committee also believes that the government must find ways to ensure administrative efficiencies, so that less money is allocated to its administration and more is used to fund linguistic and equality rights cases.

1. Independence

One of the main elements agreed upon by witnesses appearing before the Committee is that the renewed CCP should be administered independently from government, as is the current LRSP, which is administered by the University of Ottawa in accordance with a contribution agreement between the University of Ottawa and the government.

As previously noted, a number of witnesses, including former Justice of the Supreme Court of Canada Michel Bastarache,[26] were of the view that the best way to achieve such independence would be to create a foundation with a substantial initial endowment. During his testimony, Jerry Peltier from the Congress of Aboriginal Peoples indicated "how important it is that [the new CCP] operates with distance from the Department of Justice, so that the program is impartial in both theory and in practice."[27] In the same vein, Margaret Parsons from the ACLC noted that:

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24 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Gwendolyn Landolt, National Vice-President, REAL Women of Canada); *Evidence*, 19 April 2016 (Gerald Chipeur, Partner Miller Thomson LLP).

25 JUST, *Evidence*, 1st Session, 42ndParliament, 14 April 2016 (Gwendolyn Landolt, National Vice-President, REAL Women of Canada).

26 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Justice Michel Bastarache).

27 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Jerry Peltier, Senior Advisor, Congress of Aboriginal Peoples).

> It is critical that the court challenges program be an arm's-length institution from the Government of Canada. It should be a stand-alone, not-for-profit organization, as it was in its previous iteration. This will allow for greater independence and garner considerable trust and confidence in the CCP as a resource to turn to for support for charter-based court challenges.[28]

The Committee agrees with these witnesses that the new CCP should be independent from the government. Such a characteristic is essential to ensure the perception of fairness and confidence in the program.

2. Location of the New Program

In choosing the appropriate location to house the new CCP, the Committee believes that the government must take a number of considerations into account. The goal should be to maximize the investment in the program, while ensuring its accessibility and independence.

In this regard, the Committee learned that although universities may seem well-suited for housing such a program, it may also have the unwanted consequence of limiting access for certain groups. During her testimony, Ms. Parsons strongly recommended that the new program not be housed in a university:

> The ACLC feels strongly that the program should not be housed in an academic institution. While much important work is done within academia, the general public and especially the collective African Canadian community, which experiences high levels of social and economic exclusion, will not feel that the CCP is a welcoming and receptive institution for them to access if it is housed in a university.[29]

Justice Bastarache was not against the idea of housing the program in a university. However, he believed that in order to avoid any perception of bias, the new CCP should not be administered by a university. He explained that the LRSP, which is currently administered by the University of Ottawa, is viewed by some as a program that focuses and favours Ontarians. Therefore, his advice to the Committee was that the new program "should not have such ties and should be truly independent."[30]

The Committee is also mindful of the importance of maximizing the investment in this program by reducing its administrative costs as much as possible.[31] This is why the Committee does not agree with witnesses who argued that it would be best to create two completely separate programs, one for the protection of linguistic rights and one for the

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28 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Margaret Parsons, Executive Director, African Canadian Legal Clinic).

29 Ibid.

30 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016.

31 The Committee was concerned by the high administrative costs of the former CCP. According to Justice Bastarache, 35% of its funding was earmarked for administration. JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016.

protection of equality rights.[32] The Committee considers that two administrations would be inefficient and would waste precious funding dollars intended to fund linguistic and equality rights cases.

Cost must also be a consideration in the choice of location for the new CCP. The goal is to find a way of administering and housing the CCP with as little overhead as possible so as to maximize the funds available for linguistic and equality rights cases.

In light of these considerations, the Committee considers that it would be more efficient to house the new CCP in a federal department or agency, providing that adequate safeguards are in place to ensure its independence and autonomy. The model proposed should include safeguards similar to those in place to ensure the independence of the Special Advocates Program. This program is currently housed within the Department of Justice.[33]

RECOMMENDATION 2

In order to minimize administrative costs, the Committee recommends that the renewed Court Challenges Program be an independent and autonomous entity housed in a federal government department or agency, such as the Canadian Human Rights Commission. Issues related to capacity, accessibility and public perceptions of independence must be taken into account in determining the appropriate department or agency.

Although the Committee does not recommend creating two separate administrations, in order to recognize the distinct nature of equality and linguistic rights, it considers that the new program must be comprised of two separate expert panels responsible for funding decisions concerning language and equality rights cases, respectively. Moreover, in order to minimize administrative costs, the Committee came to the conclusion that members of the panels should not be remunerated. They should only be entitled to reimbursement for reasonable travel and accommodation and a minimum per diem for attending meetings.[34]

RECOMMENDATION 3

Recognizing the distinct nature of equality and linguistic rights, the Committee recommends that the renewed Court Challenges Program be comprised of one board of directors and two separate expert panels responsible for making all decisions regarding funding, one for linguistic rights and one for equality rights. Members of these panels

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32 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Marlene Jennings, Quebec Community Groups Network); Fédération des communautés francophones et acadienne du Canada, Brief, 2016.

33 Department of Justice, *Special Advocates Program*.

34 The contribution agreement for the Language Rights Support Program provides that members of the panels may be remunerated at a maximum rate of $300 a day, during the period the panel meets. The contribution agreement of the CCP also included a clause providing a maximum of $250 a day.

should only be entitled to reimbursement for reasonable travel and accommodation and a minimum per diem for attending meetings.

3. Fairness and Impartiality

It is important to understand the difference between the role of the expert panels to that of the University of Ottawa in the current LRSP or the board of directors of the former CCP. Only panel members can review funding applications and make decisions concerning funding. As noted by Yvan Déry of the Department of Canadian Heritage, the "panel is sovereign […] in the decision they make in a case."[35] The panel is completely independent from the administrators of the program – the University of Ottawa in the case of the LRSP and the board of directors of the former CCP – and of the government. Only the expert panel can decide which cases it will support based on the funding budget to which it has access.

The selection of these panel members is consequently of great importance in ensuring confidence in the program and avoiding any bias, or perception of bias, in the decision-making process.

The FCFA and the QCGN suggested that members of the board of directors as well as members of the expert panels be appointed by Parliament. Members of the LRSP expert panel are currently appointed by the Minister of Canadian Heritage based on a list of potential candidates provided by organizations, such as the FCFA and the QCGN. The Committee came to the conclusion that consultation with the stakeholders and the communities affected by the program is an essential element that should be replicated in the new CCP. To enhance confidence in the new CCP, the Committee also agrees with some witnesses that members of the panels as well as employees of the new program should reflect the diversity of Canadian society.[36]

In light of these considerations:

RECOMMENDATION 4

The Committee recommends that members of each panel be appointed by means of a federal government nomination process based on consultations with relevant stakeholders. For the linguistic rights expert panel, consultations must include members of linguistic minority communities and legal experts in the area. For the equality rights panel, consultations must include a diverse range of groups interested in equality rights, including poverty rights groups, as well as legal experts in the area.

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35 JUST, *Evidence*, 1st Session, 42nd Parliament, 8 March 2016 (Yvan Déry, Senior Director, Policy and Research, Official Languages Branch, Department of Canadian Heritage).

36 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 May 2016 (Avvy Go, Clinic Director, Metro Toronto Chinese and Southeast Asian Legal Clinic); see also, Canadian Muslim Lawyers Association, Brief, 19 April 2016.

Another fundamental element identified during our study that the Committee believes would encourage fairness and avoid any perception of bias in decision-making would be to ensure that the legislation creating the new CCP clearly identify eligibility criteria for funding. Ms. Landolt told us:

> The CCP's mandate was to assist the disadvantaged groups in cases that had legal merit and promoted equality. The criteria were not defined in the mandate. This omission became the basis of many of the problems with the CCP, as those expressions were defined according to the ideological biases of those who were managing the program.[37]

Although her particular perspective was not shared by most of the witnesses who appeared before us, it highlights the value of building a more transparent framework for governance in order to enhance transparency and the perception of fairness. Therefore:

RECOMMENDATION 5

The Committee recommends that funding criteria to be applied by the expert panels be made clear and transparent to avoid any perception of bias.

To avoid any perception of bias in the renewed CCP, the Committee also believes that it is essential to include a provision in the legislation – and in the program policy framework in the meantime – stating explicitly that any panel member who is in a position of conflict of interest in relation to a funding application must recuse him or herself automatically from the decision-making process.

RECOMMENDATION 6

The Committee recommends that when a panel member is in a position of conflict of interest in relation to a funding application, including but not limited to a pre-existing relationship with an applicant to the program or a law firm representing such applicant, he or she must recuse him or herself from the decision-making process.

4. Transparency and Accountability

During our review, some witnesses criticized the poor quality of the decision-making data disclosed in the annual reports of the former CCP and the current LRSP. According to Ms. Landolt, the CCP administration ceased to disclose funding information to the public in 2000 (e.g., the name of the recipients and the amount provided for the cases, including for consultations, and case preparation) following a court order stating that CCP applications and funding contracts are protected by solicitor-client privilege.[38] This change of practice made it impossible for outsiders to evaluate results in light of dollars spent.

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37 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Gwendolyn Landolt, National Vice-President, REAL Women of Canada).

38 Ibid.

This practice is also applied by the administration of the current LRSP. In response to a question about the cases that have been funded by the LRSP since its inception in 2009, the Director of the LRSP, Geneviève Boudreau, noted the following:

> I have to be careful of the cases I name because the way we work at the Language Rights Support Program is that if an application comes to us, it's confidential, so who made the application and the fact that they made application is confidential. If they are approved for funding, then at that point we ask them to fill out a form. The form is a bit complex but it basically asks them what information can we provide to the public. Unless they give us a yes, a tick, and they sign that form telling us exactly what information we can provide, whether it's their name, the type of funding they get, the subject of the case, the details of the case.... It's a detailed form. And it asks at what point can we provide the information. Can we provide it now, or when it's all over?[39]

The Committee is mindful of the importance of not disclosing certain information until all appeals are completed. That being said, the Committee agrees with the witnesses that in order to avoid any perception of bias, the funding process needs to be as transparent and accountable as possible. The standard should be that information about cases funded by the CCP (such as names of recipients and a general overview of the case) must be disclosed in each annual report after a case was filed, except to the extent it was reasonably believed that such disclosure would prejudice the litigant(s). The Committee believes that any additional information including the actual amounts funded would need to be disclosed after the completion of the case, including all appeals and the lapse of any appeals periods.

In accordance with Avvy Go from the Metro Toronto Chinese and Southeast Asian Legal Clinic, the Committee also believes that transparency and accountability would be enhanced by recruiting from and reaching out to more community groups.[40] Some witnesses also believed that ensuring regional representation and diversity in the administration of the program could contribute to building its inclusiveness.

In light of these considerations:

RECOMMENDATION 7

In order to ensure transparency, the Committee recommends that once a case is filed, the names of the recipients of Court Challenges Program funding be disclosed along with the nature of the cases in each annual report, except to the extent it is reasonably believed that such disclosure would prejudice the litigant(s). The Committee further recommends that all other information including funding information be automatically disclosed upon completion of litigation related to the case, including all appeals and the lapse of any appeal period.

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39 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Geneviève Boudreau, Director, Language Rights Support Program).

40 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 May 2016 (Avvy Go, Clinic Director, Metro Toronto Chinese and Southeast Asian Legal Clinic).

C. The Need to Maximize the Funding Envelope

Maximizing the CCP funding envelope is paramount given the program's projected annual budget of $5 million and the escalating cost of litigation. Based on the evidence we heard, the Committee agrees that CCP funding should be allocated to disadvantaged groups and individuals who could otherwise not afford to launch a challenge. Although the funding for individual cases was described by some witnesses as "seed money" or "a drop in the bucket of the general budget for a big test case litigation challenge,"[41] CCP funding was nevertheless considered to be very important in getting a case off the ground.[42] As noted by Mr. Déry, CCP support was more than symbolic. Having a panel of experts and leaders in the field approve the litigation added credibility to a case.[43]

Under the former CCP, eligibility criteria for funding included that cases had to be of national significance, that applicants were required to be in need of financial assistance and that cases funded could not duplicate cases that had already been funded, or attempted, or that were before the courts. Funding was available for various activities including consultations and interventions.

Although witnesses had diverse opinions on the manner in which the renewed CCP should allocate its limited funding, the evidence clearly supports a renewed program focused on funding cases that are national in scope and impact. Expert panels should also be mindful of the financial needs of the applicant in considering funding requests.

According to Mr. Chipeur, the funding threshold applied under the former CCP was too high. On that point, he warned the Committee that the *Carter v. Canada (Attorney General)* case on medical aid in dying would never have been funded under the former CCP since the Supreme Court of Canada had previously decided the issue.[44]

The Committee believes that the introduction of a funding threshold is important. However, the Committee is mindful that setting a funding standard that would be too high could be an invitation for an expert panel to pick and choose cases in a way that is not transparent and could be perceived as favouring some groups over others. It could also preclude funding for some meritorious cases. At the low end of the spectrum, clearly, no frivolous or vexatious cases should be funded. In order to maximize the budget and allow flexibility in funding decisions, the Committee concluded that only cases demonstrating some likelihood of success should be eligible for funding.

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41 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Cynthia Petersen, Partner, Goldblatt Partners LLP); 19 May 2016 (R. Douglas Elliot, Member, Honorary Advisory Board, Egale Canada Human Rights Trust); 14 April 2016 (Rajwant Mangat, Director of Litigation, West Coast Women's Legal Education and Action Fund).

42 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Cynthia Petersen, Partner, Goldblatt Partners LLP).

43 JUST, Evidence, 1st Session, 42nd Parliament, 8 March 2016 (Yvan Déry, Senior Director,Policy and Research, Official Languages Branch,Department of Canadian Heritage).

44 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Gerald Chipeur, Partner, Miller Thomson LLP).

Moreover, funding for consultations is an essential element of a new CCP. The Committee heard that funding consultations "is a very important way of engaging the community."[45] Indeed, the Committee was made aware of a number of cases in which consultations were instrumental in building the arguments and defining the issues. For instance, Cynthia Petersen, a lawyer at Goldblatt Partners LLP, explained that national consultations funded by the CCP had been instrumental for lesbian, gay, bi-sexual and transgender communities. She also noted:

> The funding for those national consultations enabled communities to come together and build the cases that were eventually successful in the courts. These are not simple cases. Constitutional litigation often requires a collective effort, often requiring consultation with not only legal experts but also experts from a variety of other social science fields who might be able to bring together evidence to support people's claims.[46]

Similarly, Professor Faisal Bhabha explained how consultation funding was crucial for the constitutional challenge of security certificates and detention orders in the Supreme Court of Canada case of *Charkaoui v. Canada (Citizenship and Immigration)*:

> In February 2005 the African Canadian Legal Clinic in Toronto convened a national consultation to discuss the issue of security certificates, which at the time was a pressing issue for many members of marginalized communities. The session brought together immigration lawyers, constitutional lawyers, law professors, representatives of the Canadian Arab and Muslim communities, various organizations, other equality rights-seeking groups, and political activists at large.
>
> The group shared information and knowledge and brainstormed strategies, including how best to support the case of the so-called Secret Trial 5.
>
> By August 2005, a year before the case went to court, the groundwork had already been laid by the communities that were interested in the case. Several intervenors sought and were granted court challenges funding to appear, to make equality arguments in the case. Counsel for these intervenors took a lead role in mobilizing communities, engaging members of those communities, doing public events, educating the public on what was going on at the court, and bridging the distance between the bench and the public.[47]

Funding intervenors that bring constitutional arguments different from those of the main litigants and the government could also contribute to the mandate of the CCP, which is to clarify, expand and breathe life into constitutional rights. Interventions may also be more cost-effective than undertaking a court challenge as a main litigant. Elizabeth Shilton from the Women's Legal Education and Action Fund explained that intervention "is

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45 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 May 2016 (Avvy Go, Clinic Director, Metro Toronto Chinese and Southeast Asian Legal Clinic).

46 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Cynthia Petersen, Partner, Goldblatt Partners LLP).

47 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Faisal Bhabha, Associate Professor, Osgoode Hall Law School, York University).

considerably less expensive on a per case basis and allows […] to respond more nimbly to emerging issues."[48] Therefore:

RECOMMENDATION 8

In order to maximize the renewed Court Challenges Program funding envelope, the Committee recommends that the expert panels focus on funding cases that are national in scope and impact. Eligibility standards must also include that a case have some likelihood of success and that the applicant demonstrate a need for funding ("means test"). Applications that are frivolous or vexatious and applications that cover issues already before the courts in a different case should not be eligible for funding.

RECOMMENDATION 9

The Committee recommends that the federal government provide the expert panels with the flexibility necessary to maximize the funding envelope which may include funding for intervenors in some circumstances and consultations among potential litigants, particularly when they have the potential to reduce overall costs.

Under the LRSP an attempt at alternative dispute resolution (ADR) is required before litigation funding can be approved.

Drawing on his experience working at the LRSP, Professor Pierre Foucher highlighted the problems associated with this requirement. He considers it to be problematic and ineffective, and noted that most lawyers are resistant to the idea of pre-litigation mediation.[49]

Over the course of our study, several witnesses raised concerns over the suitability of ADR in the context of constitutional rights litigation. Ms. Parsons explained:

> Alternative dispute resolution is an important part of our legal system, but it should not be actively encouraged or supported by the CCP where the matter being challenged is systemic in nature. The reason we take this position is that ADR prevents the establishment of much-needed equality jurisprudence that meaningfully serves to address and uproot systemic discrimination and inequality.[50]

Justice Bastarache underscored the necessity of litigation in constitutional right cases, while recognizing, however, that in appropriate cases certain groups should have access to funding for mediation:

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48 JUST, *Evidence*, 1st Session, 42nd Parliament, 14 April 2016 (Elizabeth Shilton, Board of Directors, Women's Legal Education and Action Fund).

49 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Pierre Foucher, Analyst, Language Rights Support Program).

50 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Margaret Parsons, Executive Director, African Canadian Legal Clinic).

> Can a fundamental right truly be addressed through mediation? We cannot simply choose to acknowledge half of our constitutional rights. Either we uphold them, or we do not. I believe that one should be able to request funding for mediation in appropriate cases, but I do not think that it is necessary in all cases.[51]

That being said, the Committee appreciates the potential benefit of ADR for narrowing issues and recognizes that ADR may be beneficial in appropriate cases in view of the evolving nature of litigation. However, considering the limited funding envelope, the emphasis needs to be on funding cases that will potentially clarify equality or language rights, rather than on private negotiations. The Committee came to the conclusion that ADR should not be considered unless the applicant(s) and the respondent(s) in the litigation agree.

In light of these considerations:

RECOMMENDATION 10

The Committee recommends that there be no requirement for alternative dispute resolution in the renewed Court Challenges Program and that it may be considered only if the applicant(s) and the respondent(s) agree.

D. The Need to Expand the Scope of the Renewed Program

1. Language Rights

Challenges against federal, provincial or territorial legislation, policies or practices pertaining to the protection of official languages are currently eligible for funding under the LRSP. However, such recourse can only be sought for challenges brought on the basis of *constitutional* language rights (see Table 1 – Language Rights). Challenges brought on the basis of federal laws, such as the *Official Languages Act*, have never been eligible for funding.

The consensus amongst official language minority witnesses was that all federal laws protecting language rights should be included in the new CCP.[52] Such expansion was also supported by the Commissioner of Official Languages, Graham Fraser.[53] This would include at least 30 federal statutes containing processes implementing language rights, such as the *Official Languages Act* and the *Criminal Code* (Part XVII: Language of Accused). Therefore:

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51 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Justice Michel Bastarache).

52 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Sylviane Lanthier, President, Fédération des communautés francophones et acadienne du Canada); JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Marlene Jennings, Quebec Community Groups Network); JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Eric Maldoff, Lawyer); JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Justice Michel Bastarache).

53 JUST, *Evidence*, 1st Session, 42nd Parliament, 21 April 2016 (Graham Fraser, Commissioner of Official Languages, Office of the Commissioner of Official Languages).

RECOMMENDATION 11

The Committee recommends that in addition to the existing constitutional and *Canadian Charter of Rights and Freedoms* provisions that can be used in support of minority language rights cases under the Language Rights Support Program, the renewed Court Challenges Program allow funding for challenges based on the *Official Languages Act* and all other federal laws with linguistic obligations.

2. Equality Rights

As previously noted, the CCP funded equality rights challenges based on certain Charter rights (see Table 1 – Equality rights). Provincial laws, policies or practices allegedly infringing sections 15 or 28 of the Charter were excluded from CCP funding.

Several witnesses told the Committee that infringements of other Charter rights should be eligible for funding in the new CCP. Views ranged from enlarging the scope from one to all sections of the Charter.[54] That being said, most witnesses recommended expanding the scope to section 7, either on a stand-alone basis or in support of section 15.[55]

A number of witnesses believe that restrictions placed on the funding of equality rights cases rested on an artificial distinction, as section 15 claims are often embedded within other Charter arguments.[56] This created a situation where cases could be only partially funded. Witnesses argued that section 7 rights are now being interpreted through the lens of the equality guarantee under section 15.[57] Several examples of these current issues were provided, such as the Insite case in British Columbia involving injection drug users, which involved arguments related to the security of the person and discrimination.[58] In the same vein, Ms. Go noted right to housing cases in which the lack of a housing policy may have a disproportionate impact on disadvantaged groups under section 15, but also

54 See for example, Egale Canada Human Rights Trust, Brief,19 May 2016.

55 JUST, Metro Toronto Chinese and Southeast Asian Clinic, Brief, May 2016; JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Margaret Parsons, Executive Director, African Canadian Legal Clinic); 19 April 2016 (Ziyaad Mia, Member, Legal Advocacy Committee, Canadian Muslim Lawyers Association); 14 April 2016 (Cynthia Petersen, Partner, Goldblatt Partners LLP).

56 See for example: *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 (ss. 7 and 15), *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence*, [2012] 2 SCR 524 (ss. 2(b), 2(d), 7 and 15), *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 (ss. 7, 9, 10, 12 and 15) and *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016 (ss. 2(d) and 15).

57 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Faisal Bhabha, Associate Professor, Osgoode Hall Law School, York University); see also, 19 May 2016 (Avvy Go, Director, Metro Toronto Chinese and Southeast Asian Clinic). See for example *Gosselin v. Québec (Attorney General)*, 2002 SCC 84.

58 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 May 2016 (R. Douglas Elliot, Member, Honorary Advisory Board, Egale Canada Human Rights Trust); see also *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

may raise issues under the section 7 right to security.[59] Other examples involve issues related to the over-representation of Indigenous and African Canadians in the criminal justice system that could be challenged not only under sections 7 and 15, but also under other sections of the Charter that deal with criminal law issues.[60]

In addition, many witnesses suggested expanding the mandate to include provincial and territorial laws, policies and practices alleged to infringe rights protected by the new CCP. According to Professor Bhabha:

> I understand from a political standpoint the reason for separating the jurisdictions, but I think if you take a purposive approach to the mandate of the program it simply doesn't make sense. Look at the Charter as a piece of neither federal nor provincial legislation, but rather as a constitutional instrument that sits above all of the other laws in the country, whether they're passed by federal, provincial, or municipal law-making bodies. From the perspective of the people who are experiencing the law, it makes no difference where the jurisdiction to make that law or to change that law resides.[61]

This approach would also ensure that the new CCP is more responsive to the laws that most directly and most often impact the majority of Canadians, such as family law and access to social services legislation. For example, John Rae from the Council of Canadians with Disabilities explained that most disability cases implicate equality concerns that fall under provincial jurisdiction, such as employment issues. He considers that Canadians with disabilities need the opportunity for more systemic responses to widespread exclusion and discrimination.[62] Similarly, Ms. Parsons highlighted that many issues that disproportionately affect minorities in Canada, such as education and housing, are provincial in nature.[63]

In light of these considerations:

RECOMMENDATION 12

The Committee recommends that in addition to the *Canadian Charter of Rights and Freedoms* provisions applicable under the former Court Challenges Program, the renewed Court Challenges Program allow for challenges based on section 7 in support of equality rights cases on a stand-alone basis.

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59 JUST, *Evidence*, 1st Session, 42nd Parliament 19 May 2016 (Avvy Go, Director, Metro Toronto Chinese and Southeast Asian Clinic).

60 Ibid.

61 JUST, *Evidence*, 1st Session, 42nd Parliament, 12 April 2016 (Faisal Bhabha, Associate Professor, Osgoode Hall Law School, York University).

62 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (John Rae, Second Vice-Chairperson, Chairperson of Social Policy Committee, Council of Canadians with Disabilities).

63 JUST, *Evidence*, 1st Session, 42nd Parliament, 19 April 2016 (Margaret Parsons, Executive Director, African Canadian Legal Clinic).

RECOMMENDATION 13

The eligibility criteria for funding under the renewed Court Challenges Program should also include challenging provincial and territorial laws, providing that the cases are national in scope and impact. In other words, challenges under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* would be treated in the same way as existing language rights cases are under the current Language Rights Support Program.

LIST OF RECOMMENDATIONS

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Canadian Heritage	2016/03/08	4
Yvan Déry, Senior Director Policy and Research, Official Languages Branch		
Liane Venasse, Senior Policy and Research Analyst Human Rights Program		
Rachel Wernick, Assistant Deputy Minister Strategic Policy, Planning and Corporate Affairs		
Department of Justice		
Erin Brady, General Counsel Human Rights Law Section, Public Law and Legislative Services Sector		
Michel Francoeur, Director and General Counsel Official Languages Directorate, Public Law and Legislative Services Sector		
As individuals	2016/04/12	6
Noël A.J. Badiou, Assistant Vice-President Equity, Diversity and Human Rights, Laurentian University		
Faisal Bhabha, Associate Professor Osgoode Hall Law School, York University		
Fédération des communautés francophones et acadienne du Canada		
Audrey LaBrie, Vice-President		
Sylviane Lanthier, President		
Language Rights Support Program (LRSP)		
Geneviève Boudreau, Director		
Pierre Foucher, Analyst and Professor		
Quebec Community Groups Network		
Marlene Jennings		
Sylvia Martin-Laforge, Director General		
As an individual	2016/04/14	7
Cynthia Petersen, Partner Goldblatt Partners LLP		
Aboriginal Affairs Coalition of Saskatchewan		
Kim Beaudin, President		

Organizations and Individuals	Date	Meeting
Congress of Aboriginal Peoples	2016/04/14	7
Jerry Peltier, Senior Advisor		
REAL Women of Canada		
Gwendolyn Landolt, National Vice-President		
West Coast Women's Legal Education and Action Fund		
Kasari Govender, Executive Director		
Rajwant Mangat, Director of Litigation		
Women's Legal Education and Action Fund		
Diane O'Reggio, Executive Director		
Elizabeth Shilton, Board of Directors Member		
As an individual	2016/04/19	8
Gerald Chipeur, Partner Miller Thomson LLP		
African Canadian Legal Clinic		
Margaret Parsons, Executive Director		
Canadian Bar Association		
Sarah Lugtig, Chair Access to Justice Committee		
Mark C. Power, Special Advisor Forum of French Speaking Common Law members		
Canadian Civil Liberties Association		
Cara Zwibel, Director Fundamental Freedoms Program		
Canadian Muslim Lawyers Association		
Ziyaad Mia, Member Legal Advocacy Committee		
Council of Canadians with Disabilities		
Anne Levesque, Chairperson Human Rights Committee		
John Rae, Second Vice-Chairperson Chairperson of Social Policy Committee		
As individuals	2016/04/21	9
Michel Bastarache, Legal Counsel		
Eric Maldoff, Lawyer		
Court Challenges Program of Canada		
Kathleen Tansey, Vice-President of the Board of Directors		
Frank Verrillo, Board Member		

Organizations and Individuals	Date	Meeting
Office of the Commissioner of Official Languages	2016/04/21	9
Graham Fraser, Commissioner of Official Languages		
Office of the Commissioner of Official Languages		
Johane Tremblay, General Counsel Legal Affairs Branch		
Canada Without Poverty	2016/05/19	20
Michèle Biss, Legal Education and Outreach Coordinator		
Harriett McLachlan, President Board of Directors		
Charter Committee on Poverty Issues		
Bonnie Morton, Chairperson		
DisAbled Women's Network of Canada		
Carmela Hutchison, President		
Egale Canada Human Rights Trust		
R. Douglas Elliott, Member Honorary Advisory Board		
Metro Toronto Chinese and Southeast Asian Legal Clinic		
Avvy Go, Clinic Director		
Social Rights Advocacy Centre		
Bruce Porter, Executive Director		

APPENDIX B
LIST OF BRIEFS

Organizations and Individuals

Canadian Bar Association

Canadian Muslim Lawyers Association

Council of Canadians with Disabilities

DisAbled Women's Network of Canada

Egale Canada Human Rights Trust

Metro Toronto Chinese and Southeast Asian Legal Clinic

REAL Women of Canada

West Coast Women's Legal Education and Action Fund

Women's Legal Education and Action Fund

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 4, 6-9, 20-22) is tabled.

Respectfully submitted,

Anthony Housefather

Chair