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Chair

Mr. Anthony Housefather

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● (0845)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): Good morning, ladies and gentlemen.

[*Translation*]

Welcome to our meeting.

[*English*]

I wanted to thank our witnesses today from Canadian Heritage and Justice for coming to present to us on the court challenges program. I believe today there is going to be one panel, so the two departments are presenting together, and then we'll have a couple of rounds of questions.

Joining us today from Canadian Heritage are Rachel Wernick, who is the assistant deputy minister, strategic policy, planning and corporate affairs; Yvan Déry, who is the senior director, policy and research for the official languages branch of Canadian Heritage; and Liane Venasse, senior policy and research analyst.

From the Department of Justice, we have Michel Francoeur, who is the director and general counsel, official languages directorate; and Erin Brady, who is the general counsel of human rights law section.

I really appreciate your taking the time to come to address the committee. I know members of all parties are very happy to hear from you. I'd like to turn it over to you to make your presentations.

Ms. Rachel Wernick (Assistant Deputy Minister, Strategic Policy, Planning and Corporate Affairs, Department of Canadian Heritage): Thank you, and good morning.

I will take you through a short overview presentation just to get the basic information in front of you. And then, of course, we're at your disposal to answer questions following that.

[*Translation*]

I will take you through a historical overview of the Court Challenges Program.

The program was created in 1978 to fund court cases seeking to clarify constitutional linguistic rights. It was expanded in 1982 to include linguistic rights guaranteed under the charter. It was expanded again in 1985 to cover federal law, policies and practices based on equality rights under the charter. It was eliminated in 1992, then reinstated in 1994 with the same mandate. It was eliminated again in 2006.

[*English*]

The objective of the program is to achieve a better understanding, respect for, and enjoyment of human rights through the clarification of the following constitutional rights and freedoms.

There are official language rights as guaranteed by the interpretation or application of section 93 or 133 of the Constitution Act of 1867, or as guaranteed in section 23 of the Manitoba Act of 1870, sections 16 to 23 of the Constitution Act of 1982, or parallel constitutional provisions, or the clarification of the linguistic aspect of freedom of expression in section 2 of the Canadian Charter of Rights and Freedoms when invoked in an official language minority case.

With respect to equality rights, it's the equality rights guaranteed in sections 15 and 28 of the Canadian charter, including clarification of section 2 or 27 when invoked in support of arguments based on section 15.

That's a lot of different sections, but we can go into detail in them later if you're interested in exploring that.

The court challenges program was managed by a third party, a not-for-profit corporation called the Court Challenges Program of Canada made up of 17 volunteer board members. The membership was equal across equality and language rights organizations. Funding decisions were made by a language rights panel and an equality rights panel. Each was composed of individuals with experience and knowledge in their respective issues. It funded three areas: test case work including case development, litigation, and negotiation; impact study; and program promotion and access. Members of disadvantaged or official language minority groups or non-profit organizations representing such groups were eligible for funding. It had an annual budget of $2.85 million.

Looking at some of the key facts about the program between 1994 and 2006, the program received an annual average of 112 applications relating to equality rights and 32 applications relating to language rights. The equality rights panel approved 62.5% of these applications, and the language rights panel approved 75.7%. Unsuccessful applications were off-course because they did not meet the key eligibility requirements.

In terms of these test cases, we can provide some stats. Under the equality rights 15.3% were aboriginal; 13.6% related to colour, race, ethnicity, or nationality; 9.2% related to disability; and 8.4% related to gender equality. For the linguistics rights program a large percentage related to education rights and official language of choice. In terms of distribution, 53% of the applicants were groups and 47% were individuals.

● (0850)

I think that it is fair to say that the results of the cases funded through the program enhanced understanding of the constitutional and charter rights of Canadians and informed the legislative and social policy initiatives of the government while it was running. Over the years, CCP provided funding for cases related to important areas including age, race, disability, family status, poverty, religion, and sexual orientation.

Some of the important rulings by the Supreme Court of Canada on cases that received funding from this program addressed the following areas: access to social and economic benefits for disadvantaged groups, including aboriginal people, women, and persons with disabilities; accessibility of public transportation for persons with disabilities; voting rights for prisoners; preventing deportation to torture; access to education in minority official languages; and the right to communications and services in the official language of your choice from the RCMP in New Brunswick.

At the time of its elimination, the government did commit to honour previously approved cases up to the final stage of appeal. There are still 28 equality and language rights cases remaining, and currently $1.4 million annually is being allocated by PCH to manage these cases.

After 2006, following an out-of-court settlement between the Government of Canada and the Fédération des communautés francophones et acadienne du Canada, the language rights support program was established in 2009. Fundamentally it resurrected the same linguistic rights areas as the CCP and funded a similar stream of activities. It's administered by the University of Ottawa and, once again, the decisions on accepting the test cases are made by an expert panel. It has a budget of $1.5 million annually, again reallocated by the PCH, the heritage budget, and the current contribution agreement expires March 31, 2017.

That was just a high-level overview of the program to get us started.

I welcome your questions.

[*Translation*]

The Chair: Thank you very much for your presentation. It was very informative.

We will now start the first round of questions with Mr. Nicholson, representing the Conservative Party.

● (0855)

[*English*]

Hon. Rob Nicholson (Niagara Falls, CPC): I remember very clearly the rationale that went into this program. I was a member of this committee around 1985 when the charter kicked in, and we had to have a look at and review all parts of Canadian legislation that were completely or partially out of touch with what the charter was saying and what the charter required.

Many of the laws that we had a look at hadn't been touched since about 1892 when they were compiling the Criminal Code, and, indeed, some of the ones from 1892 had been taken from 60 or 70 years previously, from the early 1800s. There was a very important need to make sure that we were up to date.

The job wasn't left just to this committee and/or the government to update our laws. A good case was made to have a number of these laws and these cases brought before the court and, indeed, the court challenges program, but it was believed that, after approximately 20 years of funding these and the challenges, Canada's laws were up to date. It's not that some of these issues don't continue to exist—of course they do, and of course they are a concern—but we have a judicial system in this country that gives lawyers the opportunity to challenge any laws or regulations that they find either discriminatory or not inclusive, and so that was the decision at the time.

I'm sure you track these things. I'm sure there continue to be challenges, perhaps less so than there were in the past, and as I say, there has to have been a decline since the 1980s in terms of the unacceptability or non-compliance of federal legislation.

Aren't there still quite a few challenges to different regulations and laws in this country that are conducted by the lawyers who represent these individuals? I know for sure that many of those non-profit groups continue to take on the Canadian government and use their own resources as opposed to taxpayers' resources. Is that a fair comment?

Ms. Rachel Wernick: I think there are two parts to that answer. We are going to have a bit of this today.

I'll let Yvan tell you about where we are, how in recent years the PADL, the language-based program, continues to support cases. Then we can speak a bit, from Justice, about how there continue to be potential cases.

There was an independent evaluation of the program in 2003, which concluded that the program was addressing a need and that it had been successful in supporting important court cases that had had a direct impact on....

The other issue I would point to is the access to the justice system. The biggest barrier, bar none, is financial. There was a demonstrated need to provide some financial support in order to bring these test cases forward.

I'll let Yvan speak a little bit about the PADL.

Mr. Yvan Déry (Senior Director, Policy and Research, Official Languages Branch, Department of Canadian Heritage): Good morning.

Since 2009, after the abolition of the court challenges program and the creation of the language rights support program in 2009, we have had 125 requests for litigation support, and 85 of them were accepted. That speaks to the continued need, on the side of language rights anyway, for such a program. We had an evaluation of the language rights support program in 2014 that basically confirmed that need.

The challenges for complainants are high. The cost of litigation has exploded. The type of support these kinds of programs can provide is more than symbolic. It gets you past a certain threshold to have a good case and present it to the courts. We continue to think that there is a need for such a program.

By and large, over the last 30 years we've had one big decision by the Supreme Court a year, 30 decisions, on language rights issues. If we look at the cases that are in front of the courts today, we still have important parts of section 23 on education, for example, that need to be clarified.

I don't know what the trends were on the equality cases after the abolition of the court challenges program, but maybe Justice could speak to that.

● (0900)

Hon. Rob Nicholson: That would be something separate and apart. I believe the funding is going until 2017. It's already continuing, and it's on, which is something separate and apart now from the old court challenges program. This was a spinoff from the court challenges program, and it is going to continue, quite apart from this discussion.

If you have comments with respect to some of the other issues, I would be glad to hear those.

Mr. Michel Francoeur (Director and General Counsel, Official Languages Directorate, Public Law and Legislative Services Sector, Department of Justice): Your question is about whether there are still cases regarding language rights.

Mr. Yvan Déry: Equality rights.

Mr. Michel Francoeur: For equality rights, I would ask my colleague Erin Brady to talk.

Ms. Erin Brady (General Counsel, Human Rights Law Section, Public Law and Legislative Services Sector, Department of Justice): Certainly, there are still equality rights cases in the courts facing the federal government, as well as, of course, provincial and territorial governments. I would say that over the last number of years there has been a major decision before the Supreme Court every couple of years.

There was one just this past year in the aboriginal context. It is called the Taypotat decision. The one before that was in 2013, and it involved an issue in Quebec of matrimonial property division as well as support with respect to de facto spouses.

While we certainly have over 30 years of jurisprudence now built up with respect to equality rights, we continue to see cases coming forward against all levels of government. Certainly, we see the Supreme Court itself continuing to fine-tune its approaches to interpreting these rights.

On the horizon, we envision other issues that are going to come up, as well, that will be challenged. This also goes to a basic principle that the courts apply when interpreting the Constitution, which certainly applies to equality rights as well as official language rights. It is the idea that the Constitution is a living tree. It 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. That goes to the idea of need over time, as well.

The Chair: Thank you very much.

We are over time, so we are going to go to Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): First of all, thank you for your presentation.

I take Mr. Nicholson's point about this being fairly well-tilled ground; however, it still seems to be quite fertile. It's one thing to have rights expressed as high-flown words on paper; it's another to have them tested and to make them real. For people who have limited financial means, this is, of course, a great program to do that.

I am interested, in particular, in extending the program beyond language and equality rights. Do you have any recommendations on particular areas to extend the coverage of the program into, whether the charter in broad or particular sections of the charter?

Ms. Rachel Wernick: We are leading work right now for our minister and the Minister of Justice to modernize the court challenges program. That commitment was in both mandate letters. Of course we're starting that work by launching a fairly extensive consultation with experts and organizations and Canadians.

It's fair to say that as part of the development of proposed options for a modernized program, we will explore, in the spirit of evolving with the times, whether the scope of the program should be expanded. There are two areas that often come back from expert views on where it potentially could grow. This would be looking at some of the fundamental freedoms—freedom of association, freedom of religion, and religious expression, which is an area of evolving context—and applying to provincial and territorial cases, which is the case with language but not with equality.

I'm just telling you what we're exploring. I think it's really important to say that this is in the development phase, but we do good policy work. We look at all of the options and test the viability and strength of the evidence base to go there, and we consult. That work is under way already.

● (0905)

The Chair: Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): This touches on what Mr. Nicholson mentioned with regard to the building of jurisprudence. I think he mentioned that similar thoughts were expressed in 1992, when the court challenges program was cancelled for the first time, basically saying that one of the reasons was that there was no longer a purpose, since it had supported the establishment of a solid body of case law pertaining to charter rights.

I wonder if you can comment on the amount of jurisprudence that came forward between 1994, when the program was restored, and 2006, when it was cancelled again, in relation to equality rights and language rights.

Ms. Rachel Wernick: If I understand the question correctly, it's a similar question to how many cases were brought forward while it was existing.

Mr. Colin Fraser: Yes.

Ms. Rachel Wernick: Yvan, perhaps you could repeat your answer on that.

Mr. Yvan Déry: The 85 cases funded since 2009 were on the language side only.

In your deck, I think you have the data on the number of cases funded through the court challenges program since [*Inaudible—Editor*].

Ms. Rachel Wernick: On slide 6 we referred to the backward-looking statistics in terms of cases that were funded. It was 112.

The Chair: Ms. Wernick, I'm sorry to intervene, but I think Mr. Fraser was trying to make the point that in 1994 there was a similar claim that the program might not be necessary anymore because jurisprudence was settled. As such, he's asking how many cases were funded in the period between 1994 and the cancellation of the program in 2006.

Ms. Rachel Wernick: Between 1994 and 2006?

Mr. Colin Fraser: Yes. That was my question.

Ms. Rachel Wernick: There were 112 applications funded for equality rights and 32 related to language rights.

Mr. Colin Fraser: Thank you.

Ms. Rachel Wernick: My apologies; I didn't quite catch it the first time.

Mr. Colin Fraser: With regard to the understanding of jurisdictional issues, it has been discussed that provincial and local issues perhaps could be challenged in an expanded court challenges program. Can you explain why those maybe weren't able to be brought forward under the previous court challenges program, and how a new program could look at incorporating more provincial and local elements into the program?

Ms. Rachel Wernick: As I said, of course this is work that would be developed in collaboration and consultation with our provincial-territorial colleagues and explored. I don't want to suggest that any decision has been made, but I think from the evaluations in the past and some of the analysis that came forward, quite a few of these types of test cases play out at the provincial level.

So there is a point of view that you could explore expanding it to capture more of the cases that fundamentally, like the language rights, still could be strengthening the charter over time, and the constitutional rights.

The Chair: Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you, Ms. Wernick and your fellow panellists, for your excellent presentation. I want to start with a specific question and, time allowing, I have a couple of general ones.

The question deals with the linguistic rights program. My colleague François Choquette has a private member's bill seeking essential bilingualism among Supreme Court of Canada judges, not requiring a translation for those people. He's framing it as an equal access to justice issue. I notice in your presentation you talked about a case whereby the RCMP in New Brunswick was being challenged for the ability of citizens to communicate in the official language of their choice. Also by way of preamble, I notice Graham Fraser, our official languages commissioner, has criticized the government for failing to take steps to ensure that the superior court justices across the land are essentially bilingual, again as an equal access to justice question.

If legislation is not brought forward to address this in Parliament or in the provinces in question—I'm thinking of the Caron case in Alberta—then is this conceivably an issue that the court challenges program might address?

● (0910)

Mr. Yvan Déry: For the issue to be addressed by the language rights support program or the future court challenges program, it would have to be argued that the bilingualism of justices sitting on the Supreme Court bench is part of having access to your preferred judge on the Supreme Court as part of your charter rights. Currently, the Supreme Court has an obligation to be bilingual as an institution. Nowhere is it said that justices themselves have to be bilingual. A case could be tried or could be brought forward. The panel of experts on the language rights support program would have to decide whether it is a worthy case. The cause is certainly worthy, but legally is it sound? Michel Francoeur would probably have an opinion on that. If you can tie it to a charter right, to a language right, you can be funded by the program.

Mr. Michel Francoeur: I agree with Yvan. Indeed there are no constitutional provisions requiring that the justices of the Supreme Court of Canada be bilingual. That's the key criteria to get funds under the court challenges program and now the PADL since 2008.

Mr. Murray Rankin: All right. That goes to when you speak to the panel; that was one of my general questions. In a sense there's a built-in institutional bias, one could argue, whereby a government program is deciding whether to sue a government. In a sense you're trying to say, in the example of the Government of Canada, that services aren't available, based on some discrimination issue or language issue.

At a general level are you satisfied with the independence of the panel in that decision-making process? Are there steps that one should take to ensure that the panel is without that institutional bias?

Ms. Rachel Wernick: Obviously, the program was designed to have third party delivery, third party board and membership, and then on top of that an independent expert panel to review the application. Everything was put in place to provide that distance and impartiality. In modernizing the program we'll look at all aspects and whether that could be in force but there was no indication in the evaluations that there was a problem in impartiality.

Mr. Murray Rankin: That's what I wanted to find out, whether that was a criterion in the evaluation, and you've answered that. That's fine.

Ms. Rachel Wernick: We're always trying to do as well as we can.

Mr. Murray Rankin: I want to go to another general question. I don't know if there's a right answer to it but just in principle, we know how expensive litigation can be especially when you go all the way to the Supreme Court of Canada. Is it better in your judgment, over time, or perhaps through the evaluation you've answered this, to do a lot of little test cases or to do one gigantic, expensive test case? How do you do the balance given your limited budget in a given year?

Ms. Rachel Wernick: I don't think we decide that in the sense that it's a responsive program, and so it was responding to what applications came forward. But I'll let Erin speak to that.

Ms. Erin Brady: As I understand it—and my colleagues from Canadian Heritage can jump in on this as well—the corporation itself or the program itself set caps on how much funding it would give to a particular case at the various stages to which the case might move: at the trial level, at the appeals level, whether or not it was an intervention. I think there was also an overall cap on the amount of money that could be allocated to a particular case.

As I understand it, this was built in to the way the corporation itself designed the program. Some of those, I guess, might have been little cases in the sense that they might not have proceeded, for example, all the way to the Supreme Court, whereas others might have used more of the funding to proceed to higher levels of appeal.

Ms. Rachel Wernick: I think it's fair to say that the caps helped the program maximize the budget; you make sure you're saving some money for as many cases as possible.

For case development, the cap was $15,000; for case funding for litigation, the trial level was capped at $60,000 and the appeal level at $35,000, so you can see that there were caps put in place.

● (0915)

The Chair: Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): With respect to the program being terminated in 2006, can you confirm for me whether it was because they found there was no use for this program anymore or because it had met its capacity?

Ms. Rachel Wernick: The termination was part of the expenditure review process. With all expenditure review processes there are trade-offs and decisions made about where cuts will be made.

Ms. Iqra Khalid: What was the impact of the cancellation in 2006?

Ms. Rachel Wernick: The biggest impact, obviously, was that FCFA pursued the government on the grounds that the cancellation of the program was not respecting official language rights. There was an out-of-court settlement, and the PADL was created and continues.

That's the most immediate impact. We can't measure what cases didn't come forward because the program wasn't there, but fundamentally test cases weren't being funded anymore.

Hon. Rob Nicholson: Test cases weren't being funded by the government, but there were test cases that continued to be....

I'm sorry. I didn't mean to interrupt.

Ms. Iqra Khalid: I guess it would be safe to say, then, that there were cases that did not come forward that should have come forward, I assume, with respect to testing the charter rights.

Mr. Michel Francoeur: The only thing I wish to add with regard to language rights is that there was a period during which there was no court challenges program for language rights. It was between 2006, when the program was cancelled, and 2009, when the new program to assist with language rights came in,

[*Translation*]

the Language Rights Support Program.

[*English*]

That program came into force in 2009 and covered all the same constitutional provisions regarding language rights. There was thus a hiatus of three years for language rights during which no new cases could be funded, but in 2009 with the new program, new demands could be made on the same grounds.

Ms. Iqra Khalid: While the program was still in effect, can you describe what kinds of organizations or individuals came to use the program?

Ms. Rachel Wernick: There was a variety of rights-based organizations. There were 290 groups that received funding. We tried to look at the top groups. The highest number of cases, representing about 20% of the total caseload, was for the Women's Legal Education and Action Fund, Egale Canada, the African Canadian Legal Clinic, the Center for Research-Action on Race Relations, and the Council of Canadians with Disabilities, but it spanned a lot of groups.

Ms. Iqra Khalid: My final question is with respect to the court challenges. Was there a lot of international coverage as well with respect to relationships between Canada and international human rights per se that related to the program and the cases that were brought forward?

Ms. Rachel Wernick: I guess there's one way I could answer that. I recently went to Geneva to appear before the UN Committee on Economic, Social and Cultural Rights. That's an example of one the international treaties that Canada has signed on to and where in the past they have commended Canada for the CCP. In their most recent report, they called for its reinstatement.

Am I answering your question? The international dimension, I guess, would be the international treaty obligations that Canada has signed, and this could be seen as supporting our fulfillment of those obligations.

● (0920)

Ms. Iqra Khalid: Has there been funding provided for a test case that had international elements to it?

Ms. Rachel Wernick: No. I don't think that would meet the eligibility criteria.

The Chair: In the Ford case in the 1980s on the language of signs, there was a UN judgment saying that Quebec's ban on English signs violated the UN International Covenant on Civil and Political Rights. Was that not a funded case that then did have international implications? There was a judgment at the international level after the notwithstanding clause was invoked.

Mr. Michel Francoeur: You're right. The issue of signage in Quebec in the Charter of the French Language made its way in Canada all the way to the Supreme Court of Canada, which struck down the provisions, at least those that prohibited the use of any language other than French on signage. The Bourassa government of the time decided to use the notwithstanding clause to enable the use of other languages inside the businesses, indoors, as long as French was predominant in comparison to other languages.

Pursuant to that bill, the matter ended up before the Human Rights Committee of the United Nations on the basis of the International Covenant on Civil and Political Rights. It's important here to say that those conclusions of the Human Rights Committee are not binding in law in Canada, but nevertheless, the committee did conclude that the Charter of the French Language, by prohibiting the use of other languages, was contrary to some provisions of the International Covenant on Civil and Political Rights.

The Chair: We've finished our first round of questioning. We're now going to move to the second round.

In the second round, just for everybody's knowledge so that you have your order, there's a Liberal intervention, a Conservative intervention, a Liberal intervention, a Conservative intervention, and then an NDP intervention.

I'll be as flexible as I can be if the NDP needs more time.

Mr. Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): My question has to do with the groups that were under-represented among the users of the court challenges program. Which groups were the most under-represented among the users of the program? In other words, which groups used the program the least?

Ms. Rachel Wernick: I'll answer the question indirectly by giving you the data that I have. We have it grouped by issue and then the number of cases.

The highest number of cases was under colour, race, ethnicity, and nationality at 71, and then it was sex and gender equality at 60, sexual orientation at 40, linguistic at 39—the first linguistic says “various” and the second one is linguistic education—aboriginal at 27, poverty at 27, and then disability at 20. So I guess on some level the answer would be “disability”, but in terms of just the number of cases. It's not a judgment on the impact of the case or the narrowness or the broadness of the scope of the case. It's just the areas.

Is that helpful?

● (0925)

Mr. Ahmed Hussen: Sure.

Also, why do you think certain groups are more likely to use the program than others? Is it a question of knowledge of the program, accessibility issues? What, in your experience, leads to some groups being more likely to mount charter challenges than others?

Ms. Rachel Wernick: That's a very good question.

As I mentioned earlier, we have the broader issue of financial barriers, so that may be represented there to some degree. The NGOs play a role in helping individuals to navigate the program and the system, so if there's an organization that can help them, they're probably more likely to bring it forward.

I don't have more specific data on which areas would have had particular barriers.

Mr. Ahmed Hussen: Finally, could you speak a little more on the financial barriers? You don't have to be specific, but can you elaborate a bit on the financial barriers that you touched on?

Ms. Rachel Wernick: I think it's just in the general sense that the biggest barrier to accessing the justice system is financial. If there's a program that provides some financial relief to pursue a case, then you're going to be helping people who would not have otherwise pursued it because they didn't have financial support.

Mr. Ahmed Hussen: Thank you.

The Chair: I try not to intervene too much, but I want to understand. I'm going to try to follow Mr. Hussen's comments to perhaps try to boil them down a bit differently.

With respect to the program for equality rights, when it did exist, and, today, with the new, more defined language rights program, which could theoretically be part of a broader court challenges program, I think what he's saying is that probably more groups than individuals have made applications because they have greater knowledge about the program.

What I think he's trying to come down to is that if the court challenges program were reintroduced, what could be changed to make more Canadians who are individual litigants, and groups that may not have applied very frequently because they don't really understand the program and don't have specialists, more aware of the program and more able to apply for it?

Ms. Rachel Wernick: That's a very good question and another important area to explore as we do our option development and policy development.

I do think it's the rationale behind the activity stream that was around promotion and awareness. There was dedicated funding to promoting the program itself. Obviously, that's often a challenge in government. If people don't know the program exists or they don't understand it, they're not going to use it.

It's another area where times have changed. When you look at the old reports on the program, its brochures and pamphlets, maybe in the modern context of social media and the web, we'll be able to explore different avenues for promoting the program and ensuring that more Canadians understand that it exists, what it is, and how to access it. It's definitely an area to continue to push in terms of modernization.

Mr. Yvan Déry: In fact, both programs have had this promotion element. It's as much a promotion of the program itself: what help the program can bring to groups or individuals seeking redress of their rights. It's also a promotion of the rights themselves. The new program, the language rights support program, is using the web extensively. You're welcome to go to the website. You have little capsules where people are explained their rights, what recourse they have. They talk about the different types of rights that they do cover.

On top of that, they organize forums; they organize colloquiums. They participate in colloquiums around the country. That does cater to a much more precise, let's say, type of stakeholder. The idea of promotion is out there. The new program is doing a great job on that, so the next program will do even better.

● (0930)

The Chair: Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): In 1985, when section 15 came into effect, a House of Commons committee that was tasked with examining the implications of section 15 cases noted that there were basically individuals up against government departments and agencies. That committee concluded that there were barriers to individuals pursuing section 15 litigation.

What we have seen in terms of the litigation around section 15 since 1985 is that in many cases it has been advanced by groups, not individuals. Perhaps you could confirm that the vast majority of cases that were supported by the court challenges program were groups and not individuals.

Ms. Rachel Wernick: I think as I indicated in the presentation, the data we have is that between 1994 and 2006 about 53% of the applications were from groups and 47% were from individuals, so it was fairly balanced.

Mr. Yvan Déry: If I may add something, often it's a group that will go to court. They are a group; they have resources; they have a board and they can make decisions, but, ultimately, the decisions that they gain from the courts are applicable to individuals.

In the language rights world, a sizable number of cases revolve around education. Often you have parent associations that will speak for school boards and they will go to court so that children will have access to an education of equal quality, etc. The school boards have the right to make decisions as to who does and who doesn't get into, in this case, a francophone school.

With all these decisions, albeit spearheaded by groups such as parent associations or groups of that ilk, the ultimate goal is to get decisions that will have an impact on individual parents or individual children. So the vehicle to get a court decision is often a group, but the impact goes beyond the group that is going to court.

Mr. Michael Cooper: So, again, a clear majority of cases were by groups and not individuals. Shortly, thereafter, it's my understanding —and you can correct me if I'm incorrect—the court challenges program began to fund outreach programs to not only support groups or individuals who were putting forward section 15 cases but in many cases establish certain groups or promote certain groups to in turn instigate litigation. I think somewhere in the neighbourhood of 15% of the budget of the court challenges program was directed to that as early as 1989.

Could you maybe comment on that?

Ms. Rachel Wernick: First, to come back a little to what we were talking about under the promotion and access stream of activities, I think that's what you're referring to. We're talking about small amounts of funding that were made available for organizations to carry out case development or impact studies. I think this is what you're referring to.

Mr. Michael Cooper: Yes.

Ms. Rachel Wernick: That was a part of the program. Again, fundamentally, the rationale behind it was to improve awareness of and access to the CCP. It was to ensure that individuals who were experiencing some kind of an issue with their rights could advance cases through the work of these activities.

Mr. Michael Cooper: I believe you had indicated, Ms. Wernick, that one of the primary barriers to advancing litigation was the cost of litigation. Isn't that the case for all groups? Why are groups, for example, that promote substantive equality rights uniquely disadvantaged in that regard?

● (0935)

Ms. Rachel Wernick: Again, I apologize, as I'm not understanding the question. I think if an individual faces an issue with their rights, sometimes they will turn to these organizations. So if I'm a person with a disability—

The Chair: Ms. Wernick, sorry. I don't know if this is a role of the chair, but I just want to clarify Mr. Cooper's question. He's asking whether, when the court challenges program existed, groups that were fighting for substantive equality rights could have benefited from government funding.

Other groups are out there also challenging federal statutes. I believe he's asking why these groups are philosophically entitled to government money that other groups are not.

Ms. Rachel Wernick: It comes down to it being a constitutional or a charter right. It's not about the group per se. It's about the right they're pursuing. There might be other groups that are pursuing litigation but not that involving constitutional or charter rights. Does that answer the question?

Mr. Michael Cooper: Yes.

Now, you had also cited a few different groups, such as LEAF, Egale, Council of Canadians with Disabilities, and I believe one other. You cited four groups that had often received support from the court challenges program. Were those four groups the leading four groups?

Ms. Rachel Wernick: As I said, we're talking about 290 groups that receive funding, so we had to go through all of that and we were able to find the groups.... The five groups that I mentioned accounted for.... As an example, of the 846 cases, the Council of Canadians with Disabilities brought forward 20, which accounted for 2.4%. The ones I mentioned fall into the category of being 2%, 3%, 4% of the cases, but on a total of 846. We're just trying to find you some examples of organizations. We took the ones that were a bit more common, but it's not 50% or something extremely large in terms of proportion.

The Chair: Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): In my humble opinion, this has been an excellent program that has benefited many groups and advanced rights across the country.

Has there been any discussion as to empowering an organization or removing the ability of a future government to cease funding so that it would continue beyond? Has there been any talk or discussion of how a program could be structured so that this could continue into the future, or independently of government?

Mr. Michel Francoeur: The only way, really, would be to put it in the Constitution. Short of that, even if you put it in a bill or a statute, the same government or the next government can repeal the statute, Parliament being sobering. The only way to really make it almost impossible, or difficult, to abolish the program would be to have a constitutional amendment protecting the program. Mind you, doing that could require lots of work; it might not be easy. The constitutional amendment formula would have to be applied. Whether it's to protect the program by putting it in the Constitution, or taking it out of the Constitution in the case where it is in the Constitution, both cases would be difficult to do.

Mr. Chris Bittle: It wouldn't be fair to make it impossible, but to make it more difficult, could the organization be endowed and provided with more stable funding in the future so it could be self-sustaining? Ultimately, a future government could act, but it could be self-sustaining in that way.

● (0940)

Ms. Rachel Wernick: I do think that is a perspective that's been raised in the past, that an alternative model would be to establish a foundation. Again, I do think that's on the table in the work on modernizing the program. It's an alternative model for sure.

Mr. Chris Bittle: You talked about the biggest barriers to the court system being financial. We've heard from one of the biggest advocates, the chief justice, who mentioned that our system works very well for the very rich and works well for the very poor, but not so much in between. The system, especially on the civil side of things, has not gotten better, so advancing an application can prove to be much more challenging.

You mentioned caps on funding in response to questions from Mr. Rankin. Were those sufficient to advance cases or were lawyers expected to provide a great deal of pro bono work in a file?

Mr. Yvan Déry: We have had experience with the language rights support program that was created after the elimination of the CCP back in 2006. The CCP cap for a litigation for the first court was $60,000. When we started the LRSP we put that cap at $85,000. After one year the panel of experts recommended that amount be brought up to $125,000 per case, so we had more than doubled the amount we were offering per case for litigation from 2006 to 2010.

We just had a program evaluation and this amount is still considered on the low side of what a litigation does cost. A litigation such as the Caron case has been reported to cost between $800,000 and $1 million. It could even be more than that.

Everyone who was interviewed for the program evaluation said this $125,000 was not symbolic. Support by that program adds credibility to a case because it's not just someone, somewhere going to court and suing the government. Instead you had a panel of experts and leaders in that field who approved the litigation. There's that aspect that will help the litigant as well.

Many of the lawyers in that field are known to do pro bono work, and that becomes part of the equation.

Yes, the cost of court cases has exploded over the last number of years. I'm sure my colleagues from Justice can talk about that. We're trying to catch up in a way, but the plan was never to pay in full for those litigations. The plan is to bring the first $100,000 to kick-start things, but never to pay in full, and hence the idea that it's groups and not individuals that bring these cases forward. You have to be solid to be able to sustain that type of burden for the long run if you're paying for it yourself.

The Chair: Mr. Falk.

Mr. Ted Falk (Provencher, CPC): I'd like to ask a few questions about the funding models that were in place for the court challenges program. What would be the funding criteria that you would need to establish approval for funding a particular case?

Ms. Rachel Wernick: For individual cases?

Go ahead.

Mr. Yvan Déry: In the case of the language rights support program, which has taken a page from their old program, it has to be a constitutional right listed in the contribution agreement that we have with the program. In the case of languages it's your constitutional right to education; the right that flows from the provision of services in French and English from federal institutions; and section 2 of the charter, which is the freedom of expression if it has a language aspect. Mr. Housefather was talking about the Ford case, which was against Bill 101 in Quebec. A provincial law cannot be attacked by the program, but because those elements of Bill 101 were talking about freedom of expression, which is guaranteed under the charter, it became something the program could help with.

The first test is the list of charter rights that are recognized and for which the program can be applied.

The second test, in the case of the language rights support program, is that a panel of experts will decide whether this case you're bringing forward is a test case and is the best case they should fund with the money they have available. With a cap of $125,000 per case, and roughly $700,000 put towards litigation per year, you can see they have to make some choices. The program is there to fund the best cases possible and not to fund them all.

● (0945)

Ms. Rachel Wernick: I would add it's fundamentally the same on the equality side. The case had to address the constitutional charter provisions that we went through already—federal law, policy, or practice—and meet the criteria for a test case.

I think it's important to mention it had to not duplicate cases that had already been funded, or had been attempted, or were before the court currently. There were some measures to ensure we were focusing in the right areas and not duplicating or overlapping.

Mr. Ted Falk: When I'm envisioning access to justice, and I'm thinking that the program would be useful in establishing that access to justice, in the case of individuals, I could see where funding would be required. In the case of groups, often they have substantive funding available to them.

Is there a financial criteria that needs to be met before groups can access the funding? What kind of cost-sharing ratios do you consider, or do you fund 100% to certain thresholds? Tell me a little bit more about your fee schedules.

Further to that, are there hourly rate restrictions when counsel is retained, and what are those? I'd really be interesting in cost-sharing. When a group has the ability to pay for a challenge, and because there's a government program available, chooses rather to go that route, I'm wondering what your criteria is in establishing those.

Mr. Yvan Déry: The short answer to that is this is a program run by a third party. It was and it still is. We have a contribution agreement that is fairly detailed, but we don't go into that level of detail. If the case is accepted, the program extends the limit that has been discussed—$125,000 in the case of the language rights support program—for the litigant to pay for his legal fees. I'm not aware that the program establishes thresholds for hourly rates or other types of activities. All the cases that I know that have been to court have cost much more than the money that was offered by the program.

Ms. Rachel Wernick: There were maximum rates, but I agree with Yvan that it's third party delivery. The program, its board, its independent members decided these under the contribution agreement, but I have information here that, for example, the program established maximum rates for applicants to seek reimbursement for administrative fees, legal research and consultation fees, legal drafting, and photocopies. They were only allowed 20 cents per page.

There were specific limits put on all of these areas by the program in order to manage this.

The Chair: Mr. Falk's time is up. I want to just follow up on that. Would you be able to furnish the committees with copies of the contribution agreements so that we could see what they actually say?

Ms. Rachel Wernick: Most definitely.

The Chair: Thank you very much. That would be appreciated.

Mr. Rankin.

Mr. Murray Rankin: I'd just like to pursue the Caron and Alberta case a little as another example of the linguistic rights issue that I talked about before.

As I understand it, in November the Supreme Court ruled that Alberta is not required to legislate in both languages, which has an impact according to the languages commissioner on the legislation, including administration of justice in that province, appointments to the bench, access in one's language of choice in a province like Alberta.

Is that something that the CCP could take on? Is that the kind of case that could be funded conceivably?

● (0950)

Mr. Yvan Déry: It is one that has been funded, and it is a settled case.

For the program to be involved in a way, one would have to find a new angle to bring to the courts. It would have to be decided that yes, it falls within the constitutional rights that have not yet been clarified. Caron was a very interesting case for clarification of constitutional rights. So far it has been tested.

Mr. Murray Rankin: Right, but could it be tested in another province, for example? Does your criteria suggest that, well, we've had this issue resolved—frankly not the way one would have hoped, let's say—in a particular province, so let's go and try it in British Columbia, for example? Is that how you proceed, or is the precedential value such that you would say the benefit-risk equation doesn't work?

Mr. Yvan Déry: I know that Michel is eager to respond to that.

In fact, that Caron case was applicable to Saskatchewan, Alberta, and the Northwest Territories, and in fact, to parts of Manitoba and even parts of other provinces that were at one time part of the Northwest Territories, which never included British Columbia. Basically, the decision has been set for all this land mass that used to be part of the Northwest Territories—

Mr. Murray Rankin: But it has no precedential value for British Columbia in that example.

Alright, it's been resolved.

I know that every case is different. I know that the legislation at issue is different, but could you say, "Well, hold on, there's not much sense in proceeding with that example in another province. We're going to put our eggs in a different basket"?

My question is about how you prioritize your cases and make decisions.

Mr. Yvan Déry: We do not prioritize those cases. It's done independently by a panel of experts. If you want to, you're welcome to invite the language rights support program's administration to answer those questions more directly.

The idea is that we have a panel of experts who will decide the worth of the case. In the theoretical case of B.C., for example, one would have to look at the material that people have found upon which they want to base their case in order to decide whether it has a chance of success, look at other cases that have been submitted that year, and decide which ones are the most interesting.

Mr. Murray Rankin: Tell us a bit more about the nature of the panel and its decision-making process. Does it make a recommendation to the government as to the expenditure of funds? How does it actually work?

Mr. Yvan Déry: In the case of the language rights support program—and there are differences between the way the CCP was run and the way the language rights support program is run—the panel is composed of four lawyers who have experience and knowledge of language rights issues, one expert in ADR, or alternative dispute resolution, who is also normally someone with a legal background, and four representatives of minority communities.

The program was established, as you know, from an out-of-court settlement with the Fédération des communautés francophones et acadienne du Canada, so the angle of option language minority rights is pretty strong in the program, but it covers all kinds of language rights.

That panel is sovereign, in a way, in the decisions that they make on cases. The program staff and analysts will bring a case forward and write a précis. Then the experts will sit and look at all of that, look at the budget they have available, and decide which cases they will support.

The language rights support program produces an annual report that describes most of the cases that have been supported. Should a litigant decide that he or she doesn't want the fact that he or she is supported by the program to be known, there is a confidentiality clause. We don't even know, if they don't want us to know, which case they support. The litigant has the right to be discreet, in a way.

It's run totally independently. We have the reports. Most of the information that we shared with you today is drawn up from the old reports of the CCP or the reports that have been made available to us by the language rights support program, but it is independently run.

● (0955)

The Chair: Thank you very much.

Basically, we've gone through two rounds of questioning. We don't really have rules related to any further questioning. I'd like to ask each of the different groups if they have further questions or if they'd like to wrap the meeting up.

Are you all good? Are the Liberals good? Is the NDP good?

Mr. Colin Fraser: Mr. Chair, may I just ask one question?

The Chair: Sure. One final question from Mr. Fraser.

Mr. Colin Fraser: Page 6 of the deck that was circulated indicates in point 2 that most unsuccessful applications did not meet the eligibility requirements.

I'm just curious about “most unsuccessful”. Which ones that meet the requirements wouldn't have been successful, and why?

Ms. Rachel Wernick: The eligibility requirements are linked to federal policy, the criteria for the test case, not duplicating a former... those were the primary reasons funding applications weren't successful.

I would imagine that a very small number would have been unsuccessful because they were incomplete or didn't provide enough information. They weren't eligible applicants.

Mr. Yvan Déry: In the case of the language rights support program, the applications that were not funded might very well have been so because the panel chose the best cases that they had in front of them, and some cases had to be left out because of the lack of financial resources.

Mr. Colin Fraser: So they do examine the merits, then?

Mr. Yvan Déry: They do. If they are receivable, if they address a right that is covered by the program, they are examined, and the best ones are chosen.

[*Translation*]

The Chair: I would like to thank all the witnesses who appeared before us today. You were very good witnesses and I greatly appreciate your contribution to the committee's work.

[*English*]

As we assess the court challenges program, I'm sure we'll becoming back with our recommendations, potentially including how contributions work and what's eligible. We appreciate your attention to our recommendations when we come up with them.

Have a great day, and thank you very much.

Ms. Rachel Wernick: Thank you.

The Chair: So for members of the committee, we're reassembling on Thursday morning at 8:45. We'll be talking about the supplementary estimates (C) with members of the department, and then the subcommittee will be meeting with respect to witnesses and court challenges after that.

The meeting is adjourned.