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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. Welcome to this meeting of the Standing Committee on Justice and Human Rights.

I very much appreciate our witnesses coming to speak to us today about the court challenges program. Today we're welcoming the Congress of Aboriginal Peoples, which I understand is in the process of rebranding itself as the Indigenous Peoples' Assembly of Canada. We have here Jerry Peltier, the senior adviser; and Kim Beaudin, the president of the Aboriginal Affairs Coalition of Saskatchewan. I'd like to thank both of you gentlemen for coming.

I'm going to turn the floor over to you to make your presentation.

Mr. Kim Beaudin (President, Aboriginal Affairs Coalition of Saskatchewan): Mr. Chairman and members of the committee, good morning. Thank you for inviting me to appear before you today.

I first want to acknowledge the Algonquin people on whose traditional ancestral homelands we are assembled here today.

My name is Kim Beaudin. I'm a status Indian from Alberta.

I want to add a little bit to this. My original reserve is number 132. It was known as the Michel band and Callihoo reserve. We are the only reserve in Canada to be expunged by the federal government, in 1958. There's quite a bit of history there.

I'm also the president of the Aboriginal Affairs Coalition of Saskatchewan. I've been there for the past seven years. We're a regional affiliate of the Congress of Aboriginal Peoples.

I also do outreach work with STR8 UP. It's a program for ex-gang members. It's the only program of its kind in Canada. When it comes to a grassroots perspective, I'm definitely into that mode.

I was also a justice of the peace for the Province of Saskatchewan for five years. I worked within the criminal justice system. I got quite a bit of experience from that.

I'm here with Jerry Peltier, former grand chief of Oka Mohawk community, a Mohawk nation territory in Quebec. He's the senior adviser to our National Chief Dwight Dorey. As you know, Dwight Dorey couldn't be here today as a result of the Supreme Court ruling that's coming down this morning, a very important ruling for Métis and non-status Indians.

Let me tell you a little bit about our organization.

The Congress of Aboriginal Peoples is one of the five national indigenous organizations recognized by the federal government in Canada and by the provincial and territorial governments, as well as the the international community.

For over 40 years, since 1971, CAP, formerly known as the Native Council of Canada, has, as a national indigenous representative organization, represented the interests of Métis, off-reserve status Indians, and non-status indigenous people living in urban, rural, remote, and isolated areas throughout Canada, including the Inuit of southern Labrador. We represent more than 70% of indigenous peoples across Canada.

The congress works closely with the provincial and territorial organizations, known as PTOs, and other indigenous organizations and advocates on their behalf on a national level. Each PTO is a provincially or territorially incorporated organization. Affiliates provide research and advocacy support to their members and carry out a wide range of programs and services for their constituents.

The board of directors is composed of the national chief, the vice-chief of CAP, our elected leaders of the PTOs, and the national youth representative of the Congress of Aboriginal Peoples, the National Youth Council.

The national chief and vice-chief are elected every four years at the annual general assembly by delegates chosen from each of the affiliate organizations, the national executive, and a youth representative from each of the provincial affiliates. Delegates at these assemblies discuss issues and proposals and develop policy platforms related to off-reserve indigenous peoples.

Recently we rebranded ourselves as the Indigenous Peoples' Assembly of Canada, known as IPAC, because we found the word "indigenous" to be more inclusive, and it resonates with today's international standard.

Today we are here to discuss the importance of access to justice and human rights for indigenous peoples and representative organizations.

I must say that I was encouraged by the Prime Minister's words in his mandate letter to the ministers. He said:

> No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.

To the Minister of Justice and Attorney General of Canada, the Prime Minister said:

> In particular, I expect you to work with your colleagues and through established legislative, regulatory, and Cabinet processes to deliver on your top priorities:
>
> You should conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes [or]...other initiatives to reduce the rate of incarceration amongst Indigenous Canadians....
>
> Work with the Minister of Public Safety and Emergency Preparedness and the Minister of Indigenous and Northern Affairs to address gaps in services to Aboriginal people and those with mental illness throughout the criminal justice system...[and]
>
> Support the Minister of Canadian Heritage to restore a modern Court Challenges Program.

● (0850)

I must caution that, traditionally, indigenous aboriginal peoples in Canada have identified themselves as specific nations, such as Mi'kmaq, Maliseet, Mohawk, Ojibway, Seneca, Chipewyan, Carrier, Dakota, Nootka and onward, as one of the 60 or so indigenous nations of Canada. This is a definition of nation to nation geared toward band councils and Indian Act bands and chiefs. There are some issues with this definition.

As you are aware, the United Nations Declaration on the Rights of Indigenous Peoples is a most comprehensive international human rights document, which addresses indigenous economic, social, cultural, and political rights and outlines minimal standards of dignity, survival, and well-being of indigenous peoples.

Governments must use the declaration in combination with consultation of indigenous peoples as a basis for reviewing and reforming laws and policies, to ensure that all indigenous peoples' rights are upheld without discrimination.

I am not sure how many of you are aware of a *Macleans* magazine headline reading, "You'll Never Get Out". The article said:

> Canada's crime rate just hit a 45-year low. It's been dropping for years—down by half since peaking in 1991. Bizarrely, the country recently cleared another benchmark, when the number of people incarcerated hit an all-time high.

If you dig a little further into the data, an even more concerning picture emerges. While admissions of while adults to Canadian prisons declined through the last decade, indigenous incarceration rates were surging, up 112% for aboriginal women. Already 26% of the women and 25% of the men sentenced to provincial and territorial custody in Canada are indigenous, a group that makes up just 4% of the national population. Add in the federal prisons and indigenous inmates account for 22% of the total incarcerated population.

We need to change this. The justice system must be reviewed.

Mr. Jerry Peltier (Senior Advisor, Congress of Aboriginal Peoples): But in order for us to address access to the justice system and in order to help us to help our regional affiliates and our front line workers, we need funding, we need human resources capacity. We need these dollars in order to have the expertise to do our job and do it right.

Now I'd like to turn my attention to the Daniels case and the court challenges program. We have been at the forefront of this issue, which matters to most off-reserve indigenous issues, for many years, too often in courts stating our case.

IPAC knows all too well all about navigating the costly and complicated court system. In 1999 CAP entered into the 17-year battle, Daniels v. Canada. The government continues to try to have the case thrown out of the court. For that reason, the court ordered costs, and IPAC was able to proceed with the case.

The Daniels case is about fairness and equity. We believe that the government should not have the authority to arbitrarily choose who is indigenous and who is not. In short, the Daniels case is about obtaining a declaration stating that the Métis and non-status Indians be recognized as Indians under subsection 91(24) of the Constitution Acts, 1867 to 1982, and as such are owed a fiduciary duty and have a right to be consulted and negotiated with.

After 17 years of waiting, we finally will get a verdict today. We hope that the Supreme Court will rule in CAP's favour to protect our rights as indigenous peoples.

The Daniels case provides evidence of the value of the reinstatement of the court challenges program. It is clear that the Métis and non-status Indians have suffered the indignity of discrimination for far too long. It is integral that the court challenges program in its reinstated form remain open, fair, and just. It must operate beyond the letter of the law and more in the spirit of the law.

It should be clear now how important the court challenges program is and how important it is that it operate with distance from the Department of Justice, so that the program is impartial in both theory and in practice. It is critical that indigenous peoples be able to challenge the government when they feel that their constitutional rights have been infringed upon. Financial restraint should not be used as a barrier to justice.

There is a value to supporting access to justice. It will clearly impact the future of Canada's democracy and indigenous peoples.

On that note, my friends, we look forward to answering your questions.

● (0855)

The Chair: Thank you so much. I very much appreciate it.

To explain to you what will happen now, you're going to receive questions from the different members of the committee. We'll start with six minutes of questions from the Conservatives, then you'll have six minutes of questions from the Liberals, six minutes from the NDP, and six minutes again from the Liberals. Then we'll see what time we have left at that point.

I'll now turn it over to Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Thank you, Mr. Chair, and thank you to Mr. Beaudin and Mr. Peltier for coming this morning to make their presentation. I understand that today is a very important day for you.

I want to ask a question about one of the issues you've raised in your report here. You talked about the incarceration rates. First of all, you say that the crime rate has hit an all time low—a 45-year low—and it's actually down by half since 1991. Then you say that the admissions of white adults to Canadian prisons has declined, but indigenous incarcerations have been going up. You actually used the word “surging”. For me there's a disconnect. It would seem that if the crime rates are going down we're on the right track to something, but you're indicating that the system needs to be changed. Help me understand what I'm missing.

Mr. Kim Beaudin: I can give you quite a bit of experience from my role as a justice of the peace in Saskatchewan. For example, Saskatchewan spends $600 million a year on justice, and the Canadian government spends $660 million. Those are huge numbers when you look at a small province like Saskatchewan spending that kind of money.

What I found is that the biggest issue is administrative justice. What I mean by that is, for example, the number of conditions that are put on people, particularly aboriginal people, who make up the largest majority in Saskatchewan, unfortunately. Those conditions are set up to fail. I mean, two jump out right away. Take the example of drinking. What they do in the court process is to attach 30 days to a condition. The court will add that condition, and then what happens with somebody who has a drinking problem, which we know is a disease or a health issue, is that there's a definite expectation that they're going to fail. That's a huge one.

The other issue is that a lot of our people have mental health issues and they, unfortunately, go through the system as well. Again, they're set up to fail with respect to those conditions that are put on. When I was working in the justice field there, you'd see upwards of 25 conditions put on somebody. A lot of times they would just sign on to get out. It's costing us millions and millions of dollars as taxpayers, when we could address that issue. There are certain ways we could do it. We just need to roll up our sleeves and get to work.

I believe that we could save millions and millions of dollars. I'm concerned, for example, that Saskatchewan could hit a billion dollars in spending on justice within the next few years, and that's a lot of money.

● (0900)

Mr. Ted Falk: I guess my question wasn't quite answered. I was simply wondering what the connection is with lower crime rates. You're saying that has to change, although I think all of our desire is to have crime rates decreased. If it means that incarceration rates are going up, I think we're probably meeting part of the objective of what we want to do. Ideally, we'd like to see incarceration rates go down as well at the same time.

I'm going to change my question a little bit. You've referenced the Daniels case, the decision on which the Supreme Court will issue today. Can you tell me specifically how the court challenges program was involved in that case?

Mr. Jerry Peltier: When the challenge was first made, there weren't any funds available for us, so we had no choice but to use the court challenges program to pay for our legal counsel. In midstream that funding was cut-off and we had to go to court. It was the Federal Court that said this case was too important and that the government must pay the costs. So that's how the funding was reinstated. For us and other Canadians who need the support when their rights are violated, they need this kind of financial assistance.

Mr. Ted Falk: Is it the court challenges program funding that has been funding the case after that as well—

Mr. Jerry Peltier: That's right.

Mr. Ted Falk: —or is it funding from a different source?

Mr. Jerry Peltier: No, just the court challenges program.

Mr. Ted Falk: Has your group used the court challenges program for any other constitutional challenges?

Mr. Jerry Peltier: Not at this point in time.

Mr. Ted Falk: You've indicated a bit about how the court challenges program has benefited you. If that program is supposed to be reinitiated, are there any specific changes when they revamp the program that you'd like to see implemented?

Mr. Jerry Peltier: Yes, we'd like to see the program less controlled by the government, so we don't run into the same problem in midstream when a minister or the Prime Minister can cut it off. It has to be administered through a body...we don't know, and we don't have that solution. We know what we went through, and we want to make sure it doesn't happen again to anyone.

There is also a deconsultation process that's going on right now. We heard there was a press release that was sent to our office. It's an online consultation process. That's fine, but I think if the government is going to use the word “consultation”, we also need to have a face-to-face meeting with those people who are reviewing the court challenges program.

● (0905)

The Chair: Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Chair, and thank you, gentlemen, for appearing before us today and giving us your submissions.

I want to build on what Mr. Falk was talking about. Indigenous peoples have brought forward important perspectives in discussions about human rights, including interdependence between implementing their rights to self-determination and full enjoyment of individual human rights. This is reflected in the United Nations Declaration on the Rights of Indigenous Peoples, in particular, articles 1 and 2. This understanding of the interdependence of all human rights also reflects broader international human rights principles applying to all peoples.

In respect of the court challenges program, it's clear there's much work to be done here. Focusing particularly on the court challenges program, could you expand on how you think the court challenges program could be expanded, if you think it should, or enhanced to better support the requirements that you see of it. Also, you spoke of an independent program. How might you see this proceeding in a more independent manner from the government?

Mr. Jerry Peltier: We are reviewing the program right now and the way it's being implemented. That's why we will participate in this online consultation process, but we need to go further into it and take a look at some of the pitfalls our people have had, not only at the national level, but across Canada when they try to utilize the court challenges program.

There are still not enough resources put into the program. In our case, our legal counsel had to accept a drop in fees in order to use the court challenges program. I can't give you an answer at this point. We are working on that. We're willing to provide details of what kind of changes we would like to see once we do our consultation process with our people at the grassroots level.

Mr. Ron McKinnon: At the risk of putting you on the spot, if there was one recommendation you could ask us to make on how we go forward on this, would you be prepared to suggest such a thing?

Mr. Jerry Peltier: One of the ones we're looking at is to have this legislated in a different way, like an independent body, to make sure the court challenges program is not controlled by a minister or Prime Minister. I don't know what those mechanics are. We're looking at it, but that's one of the recommendations we'd like to see.

Mr. Ron McKinnon: Do you have any idea how to build independence and impartiality into that process?

Mr. Jerry Peltier: That's the kind of consultation process we've got to deal with first with our indigenous legal counsels, because they have much to offer in this field. We're not legal experts, so we're going to have to consult with them first.

Mr. Ron McKinnon: Thank you. Those are my questions.

The Chair: Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, gentlemen, for appearing today and for your presentation and all your work on this important file.

You mentioned in your statement that there are a number of indigenous communities across Canada. Obviously, in my understanding, each would have its own unique character. I'm wondering if you can elaborate on what differences there might be in accessing justice for some of those communities, between different parts of the indigenous community, and how the court challenges program could be tailored to ensure that those differences are taken into account in accessing justice.

Mr. Kim Beaudin: One of the biggest issues I thought about when coming here was indigenous people's right to access justice. I believe it should be a right. Unfortunately, what I found within the court system itself, and I'm sure it's the case all over Canada, is that it tends to be territorial. For example, they have different regions within the court system and one issue won't apply to the next. Those things should be broken down. We have the technology now, for example, to address people's issues via satellite from all the way from La Loche, for example, in Saskatchewan, to way up north, to Inuvik, or what have you. I don't know if we're taking advantage of that. Those kinds of things could save a lot of court costs. They would also provide opportunities for indigenous people to truly, I don't want to say participate, but certainly be part of the process in a fair and just manner. I think we could do a lot of things from that end, and you do make a good point.

● (0910)

Mr. Colin Fraser: Thank you.

The Chair: You have time for one more short question.

Mr. Colin Fraser: With regard to issues facing indigenous communities, things may still need clarification from the courts, and given that we're looking at reinstatement of the court challenges program, what issues do you see as still needing clarification from the courts as they relate to indigenous communities?

Mr. Jerry Peltier: First of all, access to the funding program is not clearly stated out there. In the past, Indian and Northern Affairs Canada, which is called Indigenous Affairs Canada now, used to have something similar to what the court challenges program had. We used to utilize that when we were dealing with our land claim challenges. But in our case, indigenous peoples who are living in isolated communities away from big cities must have a better way of accessing or understanding how this program operates. I think a report was put out by an organization called the Canadian Forum on Civil Justice, which talked about some sort of platform that could easily be accessible online so that people would understand their rights and where they could go and how they could access support to challenge the justice system and protect their rights.

Mr. Colin Fraser: So one of the challenges—

The Chair: Sorry, you're out of time. We'll come back.

Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you, and welcome to both of you. Thank you very much for coming.

I'm going to try to build a little on what Mr. Fraser asked, but first of all I wanted to say that I found your written presentation very interesting when you distinguished the nation-to-nation relationship, which you say is geared toward band councils or Indian Act band chiefs, from the problems facing you, indigenous people who are living off-reserve, Métis, and the like. Then you referenced the UN Declaration on the Rights of Indigenous Peoples. Do you perhaps see the possibility of a challenge that the court challenges program might be part of that could assist you in maybe putting meat on the bones of the UN Declaration of the Rights of Indigenous Peoples and get away from the nation-to-nation language, which seems to hobble you in some of your legal dealings?

Mr. Jerry Peltier: First of all, we've had discussions with the Canadian government and the ministers on this terminology of "nation-to-nation". We support that. There is no question. That is the way to move forward. However, we cautioned the government on that.

I come from a community, a Mohawk community. We don't call ourselves the Mohawk nation community. We are a community, we are a reserve, but we belong to a Mohawk nation. That's the nation. Then we have the Algonquin nations in Quebec. There are nine communities in that Algonquin nation. In British Columbia you have the Nisga'a, and you have the Shuswap, but there are different communities, different reserves, within those nations.

We're just fearful that down the road, when history is written, the newcomers will be misled that in 2015-16 Canada entered into this new nation-to-nation relationship with the first nations or the indigenous peoples of Canada, which is not the case. The government is engaging at the community level, which is good. I think this should have happened a long time ago. However, the word "indigenous" in the declaration certainly is broad enough and supported enough for us to use without having to challenge anyone. It's the will of the Canadian government that they must use it. They must adopt it.

● (0915)

Mr. Murray Rankin: Adopt it and put it into law, you mean, if it's considered to be part of our domestic law.

Mr. Jerry Peltier: That's right.

Mr. Murray Rankin: Mr. McKinnon flagged the independence issue and the need for a court challenges program administration to be independent of the government, whose actions of course might be challenged. We've had witnesses talk about the need for separation—for example, francophone and minority English language rights being different from the equality rights that women's organizations or the like may wish, and having a separate stream.

How would you see indigenous rights being administered? Do you have any thoughts on how a court challenges program might make sure that indigenous rights are considered in an adequate way?

Mr. Jerry Peltier: No. For us, with regard to indigenous rights, rights are rights are rights. We'll see, at the end of the day, in about an hour from now, that definitely some other questions on rights will come out of the federal Supreme Court decision. So I'd rather discuss that at another time.

To us, rights are rights are rights. We have treaty rights and we have aboriginal rights.

Mr. Murray Rankin: If this committee were to accept that what I'll call linguistic rights are administered separately from equality rights, would you be content to have your interests addressed by this group through the equality channel, if you will, rather than a separate indigenous stream? We're talking about different streams, perhaps, as we administer this program, and I wondered if it made a difference to you how indigenous rights at the court challenges program administration would be addressed.

Mr. Jerry Peltier: No. It's both. We have our indigenous rights, which are enshrined in Canada's Constitution. We want to be treated equally, like other Canadians, but we have to make sure that the treaty rights that are enshrined in treaties are not diluted in any way.

Mr. Murray Rankin: Mr. Beaudin, you especially talked with Mr. Falk about incarceration rates, which are a tragedy. Do you see then that some sort of court challenges assistance would be possible to address that problem, given that we're usually talking about equality rights, not day-to-day justice issues where an individual is before the courts, but really systemic problems? That is possibly, quite properly, a systemic problem, so is this a challenge that you could see the court challenges program address?

Mr. Kim Beaudin: That's a really good point with respect to systemic problems, because it is. Within the system itself, when people enter the court process, particularly indigenous people, they don't have the resources to address any of the kinds of things that have been levelled against them by the police. Because of that, you have a system in which you have different programs where the government is working for the government. Legal aid, for example, is a really big one. The way it's set up, it's certainly not fair to the person who's involved in that process and, unfortunately, it usually takes a turn for the worse.

That's what I don't understand. You have legal aid defending an individual, but those in legal aid actually work for the government. It's not really separate, when you think about it. Their job is just to get people through the process. I think it could end up being a challenge at one point. It could end up being a human rights issue. It's quite concerning to me.

● (0920)

The Chair: Thank you very much.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): In your opinion, do you feel that the court challenges program should be expanded to include other rights apart from section 15, which is equality rights and language rights, and if so, do you know what sections that it should be expanded to include?

Mr. Jerry Peltier: That's a good question. As a matter of fact, we've been discussing that with our legal counsel right now, who's championing the Daniels case. What are some of the gaps? We will be making that kind of report once we do the consultation process with Canadian Heritage.

Mr. Chris Bittle: Regarding the previous program, as the court challenges program existed where the focus was on equality and language rights, what would you say was the percentage of indigenous applicants, if you know or if you have any information on that?

Mr. Jerry Peltier: We wouldn't have that information, but Canadian Heritage might be able to provide you with that data.

Mr. Chris Bittle: You discussed the preference that a renewed court challenges program be as independent as possible. What are your thoughts if the government would endow an organization with regard to that and make it independent, with a sum of money that would then allow it independence going forward? Do you have any thoughts on that?

Mr. Jerry Peltier: I think that's one of the ideas that's being tossed around. Like I said, we are engaging in our own internal consultation. We're working with our front-line workers, and our regional representatives get to come up with a recommendation on the independence of the program.

Mr. Chris Bittle: This government has talked a great deal about reconciliation and true reconciliation. We see the Charter of Rights and Freedoms and other pieces of legislation before the government, but indigenous peoples don't seem to have access to that or don't seem to be able to receive the full rights that maybe other Canadians enjoy. Is better access to the justice system through a court challenges program part of reconciliation? If I'm overreaching, I apologize, but is that a piece of a very large puzzle?

Mr. Jerry Peltier: However the Truth and Reconciliation Commission's call for action recommendations are implemented, if it help our indigenous people get access to justice and, finally, to alleviate this overrepresentation in jails, it's going to be welcome. We're anxious to see how the government is going to move forward in those recommendations from the Truth and Reconciliation Commission.

Mr. Chris Bittle: Even beyond the commission itself and the specific recommendations, which the government has committed to address in a meaningful way, does the court challenges program, in your mind, build upon that and build upon that spirit of reconciliation?

Mr. Jerry Peltier: First of all, we're certainly pleased to see it reinstated the way it is right now. We will look at the parameters and at how far we can use the court challenges program to take a look at some of those recommendations that are in the truth and reconciliation report. If we need to use that avenue to help us put a case forward, we will do it, but we'll have to take a look at it more closely.

Mr. Chris Bittle: I'll go back to what Mr. Falk was discussing in terms of the incarceration rate of indigenous peoples, it being nearly a quarter of individuals in custody in our prison system, which is shocking.

Can you perhaps talk a little bit about what's happening upstream? Mr. Falk wanted to focus more on the incarceration rates, suggesting that the system is working and the crime rate is being reduced.

But can you discuss the issues upstream that the court challenges program may be able to assist, which may lead to indigenous peoples not having access to charter rights?

● (0925)

Mr. Jerry Peltier: First of all, I'd like to go back to your question about the numbers that we had in our report. Those came from *Maclean's* magazine, and it was Nancy Macdonald who put out that information. Mr. Beaudin is the one who shared that information with us. Those are numbers that we got from *Maclean's* magazine, which we're quoting from.

If you go to Saskatchewan, I think in Prince Albert the number of indigenous people who are incarcerated is about....

Kim, what would you say?

Mr. Kim Beaudin: Unfortunately, the number in Saskatchewan of indigenous people in corrections is 85%. It's quite the number.

One thought I did have is that our organization represents 70% of people who live off reserve, and the majority live in urban centres across Canada. They come to urban centres to change their life. They come for employment, for educational opportunities, those kinds of things.

For example, we just went through a provincial election less than a month ago, and the biggest issue to me was that indigenous people are not included in the economy. That can go right across the board in Canada. What happens is that when you don't have a job, things start to spiral. I found in a lot of cases that even people who went to school and have an education still have a difficult time getting a job.

We rely a lot on corporations to employ people within Canada. For example, Cameco in Saskatchewan is one of the largest employers. I'm finding that we're just not getting those opportunities the way other Canadians are. I believe that if we break those barriers down and focus on those areas, you'll also see the incarceration rate drop significantly in Canada.

Again, I stress the economy, because I graduated from the Gabriel Dumont institute in Regina a few years ago—I won't say the date and date—and I can't believe we're still talking about these kinds of issues 30 years later. I'm concerned that when I ride off into the sunset, we'll be talking about it another 30 years from now, and somebody else will be sitting here talking to another government.

I believe we can change things.

Government can play a huge role in that as well, whether federally or provincially. It can certainly happen. It doesn't matter what stripe of party you are, we can do these things if we roll up our sleeves and get to work.

Mr. Jerry Peltier: Mr. Chair, can I just add another comment?

The Chair: Yes, absolutely, Mr. Peltier.

Mr. Jerry Peltier: In regard to the sentencing of our indigenous peoples, a decision came down a while back called the Gladue decision. We found throughout our study that many judges are not receptive to using that process. Our lawyers have to really fight hard to convince the judiciary that the Gladue decision process should be used more often.

That concerns us.

The Chair: I want to thank the witnesses very much for appearing before us. We very much appreciate your testimony today and your agreeing to appear before this panel. We're going to take a short recess to change panels.

Thank you again so much, gentlemen.

● (0925)

(Pause)

● (0935)

The Chair: We are going to resume. I would very much like to welcome our next group of panellists. I would like to introduce Cynthia Petersen, who is a partner at Goldblatt Partners. She is presenting as an individual. Thank you so much for coming.

We have Gwen Landolt, who is here from REAL Women of Canada as the national vice-president. Thank you for coming.

From West Coast Women's Legal Education and Action Fund, we have Kasari Govender and Rajwant Mangat. Kasari is executive director, and Rajwant is director of litigation.

We have Diane O'Reggio, who is the executive director of Women's LEAF, and Elizabeth Shilton, who is a member of the board of directors.

Thank you all so much for coming, ladies. I have explained to you how this works. We are going to go in the order that I have on the list, so we are going to start with Ms. Petersen.

Ms. Cynthia Petersen (Partner, Goldblatt Partners LLP, As an Individual): Thank you.

I am here as an individual. I want to make it clear that I am not here representing a particular organization. I appreciate the invitation to come and speak to the committee. I understand that one of the reasons an invitation was extended to me is that I am a lawyer in practice, and my clients had extensive experience with the court challenges program in the 1990s and the early 2000s.

I want to speak a bit to that experience, speaking as a lawyer who is a constitutional litigator, who does a lot of charter litigation, and who witnessed first-hand the value of the court challenges program and also the deficit that was created when the court challenges program was ended, in terms of access to justice for communities that are seeking to obtain the protection—and meaningful protection—of the Charter of Rights and Freedoms.

I also wanted to say that I am a member of Canada's LGBT community. I use that expression loosely, because, of course, there are many LGBT communities across Canada, but for the sake of abbreviation, I'll simply say “the LGBT community”.

I was involved in more than a decade of litigation under section 15 of the charter on behalf of LGBT communities to try to seek equality rights, and ultimately to obtain equality rights, at least legislatively, across the country. There is still, I think, a lot of work to be done on behalf of the trans community, but certainly in terms of the recognition, for example, of same-sex relationships, treating them equally with heterosexual relationships, that was an achievement that was largely gained through litigation, unfortunately. Of course, there was a lobby of governments and there were public education campaigns, which were all concurrently moving forward the civil rights movement, if you will, for LGBT communities, but litigation was key, and the court challenges program was really instrumental in being able to fund some of that litigation—not all of it, because that program, as you know, had restrictions. For example, the funding had to be only in the federal jurisdiction. There were a number of LGBT cases—key, groundbreaking cases—that were argued in provincial jurisdictions, and those were not funded by the program.

I just wanted to speak to some of the cases that were funded that you may not be aware of, because they are cases in which I was involved and clients of mine received and benefited from funding.

The Egan case, for example, was the first case the Supreme Court of Canada heard involving section 15 of the charter and sexual orientation as a ground of discrimination. It was a landmark case, in which a majority of justices of the Supreme Court of Canada ruled that gays, lesbians, and bisexuals are entitled to the protection of their equality rights without discrimination based on sexual orientation. That case did receive funding. The litigants and a number of intervenors—I represented an intervenor in that case—received funding from the court challenges program. When you think about it, the individual litigants who started that case were a couple of seniors. They were impecunious. They were seeking equal treatment under old age security legislation. They clearly would not have had the means to mount such a case without some assistance from the court challenges program.

The court challenges program also provided funding, I know, to many other cases as well, but in terms of my personal experience, to clients of mine in the Little Sisters case, which was another case at the Supreme Court of Canada, involving customs legislation; to the Rosenberg case, which involved a challenge to the Income Tax Act and was argued in the Ontario Court of Appeal; and to numerous other cases involving equality rights and affecting women and other marginalized communities, not just the LGBT community.

There is no doubt in my mind that without the court challenges program, LGBT rights and the equality rights movement for LGBT communities in Canada would never have evolved in the manner in which it did. We might have eventually reached the point where we are now—I don't want to say that it was expeditious, because it was long overdue—but it would not have evolved in the way it did.

One of the things that people may not be aware of and that I wanted to bring to the attention of this committee is that the court challenges program not only funded cases—actual litigation, litigants, and intervenors. It also funded national consultations, which were extremely instrumental for LGBT communities to be able to come together to consult at a grassroots level with communities across the country and with legal expertise, and bring lawyers together from all over the country.

● (0940)

I participated in two of those national consultations. One of them was here in Ottawa. I believe it was in 1995; it might have been 1996. Another one was held in Toronto. I think it was in 2000, if I remember correctly. It might have been 2001.

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. Ultimately, the last case that I was involved in that received court challenges funding was the same-sex marriage litigation, which I'm sure everybody is familiar with. I was counsel to a number of same-sex couples in British Columbia who brought a case there. There were concurrent cases in Ontario and B.C.

My clients in that case would never have been able to bring the case forward without the benefit of some court challenges funding. In fact, that case received some extraordinary funding. As I recall, there were two different caps on the funding you could receive. In that case my clients received the higher cap because of the extraordinary resources that were required to put that case together. In case people are concerned about why the lawyers can't just do the work pro bono and why they should be funding this—that litigation lawyers can do it—I did want to say that the money does not simply go to line the pockets of lawyers.

I do a lot of pro bono work. At my firm, my colleagues also do a lot of pro bono work. I think it's important for the legal community to continue to do that. The funding that my clients received in those cases largely went to disbursements; very little of it actually went to lawyer's fees. Litigation is exceptionally expensive. There are court filing fees; there are fees for serving documents; there are extraordinary photocopying fees, which I'm hoping with the electronic age will start to reduce; there are fees associated with research and meetings, transportation, accommodation and so on. The money is frankly a drop in the bucket. It's seed funding. It's very helpful in getting a case of the ground, but it was never enough to fully fund the lawyers' fees, and it certainly didn't go into the lawyers' pockets.

As an example of one of the disadvantages of not having the program now, a couple of years ago I was involved in another LGBT case called Hincks, which was argued at the Ontario Court of Appeal. It involved a gay couple who had entered into a registered domestic partnership in the U.K. at a time when marriage was not available to same-sex couples in the U.K. They had entered into the only relationship that they could in the U.K., which gave them equivalent benefits to married couples. Then they relocated to Canada and separated. One of them wanted to get a divorce and to access the same entitlements that any other married couple has in terms of a division of their property and support payments, and so on. Yet, they were not legally married.

There was a question as to whether or not they could access the Divorce Act federally, and also whether they could access provincial family law legislation in Ontario.

At the trial level, ultimately it was concluded that they could, based on equality grounds and other grounds. That was appealed by the individual who didn't want to pay the spousal support and didn't want to engage in the division of property. The case went to the Ontario Court of Appeal, but the individual who had won at trial abandoned the litigation because he simply didn't have the means to continue it and couldn't continue to pay for the litigation. This very important case with national implications for the LGBT community was being argued at the Ontario Court of Appeal with not just an unrepresented party; he wasn't there on his own trying to represent himself without counsel. He couldn't even go to the hearing. In fact, he relocated back to the U.K.

I had a client in that case that intervened and effectively carried the litigation on that side of the case and, to my pleasure, succeeded in the case. I think it was an important victory that set an important precedent.

That's the kind of litigation that needs funding today. There are people who don't have the means to take these cases forward.

I do have a number of recommendations. I don't know if my time is up or if I still have time.

● (0945)

The Chair: You have another minute.

Ms. Cynthia Petersen: I'll go through them quickly and if people have questions, I can expand on them.

First, I'm delighted to hear that the government is committed to reinstating the program. I think it's very important to fund intervenors, not only litigants. That's one recommendation.

I think it's very important to fund consultations and strategic planning, and not just actual litigation. That's my second recommendation.

My third recommendation is that I don't think it should be restricted to equality rights. There are a number of reasons for that, which I can speak to later during the question period if people are interested, but I think it should be expanded beyond equality and minority language rights. I also think this committee should consider recommending that the program fund cases that are not in the federal jurisdiction if they have national implications. There are many such cases that I think would be deserving of funding.

I have two more quick recommendations. It's important when there's a precedent-setting case going forward and multiple intervenors are seeking funding for the same case that there be some process for a fair determination of how funding will be allocated so that it doesn't create divisiveness among allies. That was a problem under the previous program. There were times when numerous parties were trying to intervene in the same case. Some got funding and some didn't. It wasn't really clear. It was sort of those first past the post who got the money, which was a bit arbitrary in my view.

Finally, in terms of whoever makes the decision about which cases will be funded and which will not, I think it's very important for it to be a committee that is diverse and representative of the interests of a variety of communities across Canada, including the indigenous communities, LGBT communities, people with disabilities, and so on.

The Chair: Thank you so much.

Ms. Landolt.

Ms. Gwendolyn Landolt (National Vice-President, REAL Women of Canada): Thank you very much, Mr. Chairman. Thank you for inviting me. It's a pleasure to be here.

REAL Women was federally incorporated in 1983. We support the equality of women and human rights of women and their family members.

We have had long experience with the previous CCP and the panel on equality rights. Over the years we have closely followed the operation of the program, and although the concept of the CCP is commendable in theory, in reality, and from our actual experience, we know there are grave reasons why the program should not be reinstated. At the very least, the appalling defects in the previous CCP should be eliminated if it is reinstated.

The practical effect of the CCP was that equality rights were undermined by the program, and it became one of the most corrupt, discriminatory, and biased programs ever developed in Canada.

Although funded by the taxpayer, the program was not accountable to the public, did not report to Parliament, and was not subject to the Access to Information Act. The program, by its biased practices, was an embarrassment in that it, in fact, betrayed human rights and democracy.

The CPP'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.

The Specific problems with the CCP that we discovered included discrimination in the application of the definition of equality. All women believe in equality, but there are different understandings and interpretations of the meaning of equality. To suggest that all women think alike is to insult the intelligence and the integrity of women. Nobody would dare suggest that all men think alike, and yet the program only funded the feminist organizations. In fact, 140 cases were funded, but many of the cases that were funded were regarded by other women in Canada as both extreme and unreasonable. By only funding the feminist groups, whose views were not the views of all Canadian women, they were not helping women particularly, but were specifically helping the feminist lobby in Canada. They did not represent women, but only an ideology.

It was startling, therefore, when we read the evidence of the proceedings of this committee of March 8. It was stated that “there is no indication that the program was impartial.”

A possible explanation for this discrepancy would appear in the testimony given on March 8 by Mr. Yvan Déry, senior director of policy and research, Department of Canadian Heritage. He said at page 9 that the program was run by a third party and that they didn't go into the level of detail as to how it operated. Then he said that the only information they had of the program was from the reports the CCP had put out annually.

REAL Women has retained copies of the annual reports of the CCP over the years, and we can attest with certainty that none of these annual reports included information as to how the CCP actually operated. The reality is that one had to be directly involved with the CCP to understand how it worked. It is apparent that crucial information was not disclosed to the government officials who signed the contribution agreements with the CCP.

For example, there is questionable interpretation of financially disadvantaged groups and individuals. Many of those funded were not financially disadvantaged, as we listed on page 5 of our brief. For example, very affluent unions were funded by the CCP. Why? They certainly weren't disadvantaged.

● (0950)

There was a lack of transparency with the CCP. For example, on April 27, 2000, a prothonotary, a court official with the Federal Court trial division, declared that the CCP applications and funding contracts were to be be protected by solicitor-client privilege. As a result, the CCP ceased disclosing significant information to the public about its funding practices, and it was no longer made accountable for its actions. The CCP obviously is not a solicitor and the groups who received funding are obviously not clients. The decision by the prothonotary was patently absurd.

There also was an incestuous relationship between the CCP's board of directors, advisory committee, and the equality panel. The members of the CCP's board of directors were all included representatives who received funding from the program. For example, in the year 2006, four of the seven members of the equality panel were members of LEAF, the feminist organization, and the remaining three members of the panel were representatives of a homosexual organization. According to the proceedings of March 8, the largest number of cases that were funded were those of LEAF, and of the homosexual organization Egale. This incestuous relationship among the administrators allowed the CCP to easily direct funding to those organizations that controlled the program.

In the March 8 proceedings, the equality panel was described as consisting of a “panel of experts and leaders in that field which approved the litigation.” Well, they may have been experts in promoting their own organization’s agenda, but they could scarcely be described as impartial or objective experts regarding their funding decisions. Members of the equality panel served as watchdogs for their own organizations in order to channel funding to them. The panel also ensured that any organization with a different ideology was never funded.

In the CCP the whole concept was difficult because instead of providing economic benefits, for example, for disadvantaged people, the CCP in the name of equality became an instrument of social change by judicial fiat. As a substitute for the parliamentary process, the CCP enabled select special interest groups to access the courts by providing funding that financed only those who shared its agenda. Frequently, the same individuals in the program simultaneously had several jobs or capacities within the administration of the CCP.

There cannot be true equality when the court hears only one side of an argument. As a result of its tight control, the program became a national powerhouse directing traffic to and from the courts to change the direction of Canadian society in order to adapt to the views of the special interest groups who administered the program. The court challenges program, in effect, distorted the purpose of the charter as it was not used, as it was intended, for the protection of individuals from the state. But it was, in fact, to change a new social order.

We have many examples of how we and others who did not accept the ideology of the administrators were refused funding, but I'll just quickly give my recommendations.

We recommend, first, that in view of the difficulty in interpreting the word “inequality”, because most of us did not accept much of the equality funding, that the reinstated CCP be limited to issues involving economic inequality and language inequality, and aboriginal inequality, but not the ideological inequality that has occurred in the past.

There must be a financial means assessment of those who seek funding, so that those who are not disadvantaged will not be taking money from the program.

● (0955)

The administrators of the program must be impartial and objective in their assessment of those requiring funding. They should not be affiliated with any special interest group, as this provides a platform to advance their own organization. The program must be transparent, publicly accountable and answerable to Parliament, and it must be subject to the Access to Information Act.

Finally, we would like to recommend that if this reinstated program is to include equality issues, then both sides of the equality issue should be funded by the program so that the court will hear a balanced assessment and both arguments of what equality is, which the courts do not usually hear. That's why many of the changes happened. As said in the March 8 proceedings, one of the worst problems for our group is financial, to go to court, and REAL Women of Canada has never ever been able to break the barricade of the court challenges program because our ideology was quite different. We believe in equality, but have a different assessment of it.

Thank you very much.

● (1000)

The Chair: Thank you very much.

I'll go to West Coast LEAF now. I don't know who's going to be speaking.

Thank you.

Ms. Kasari Govender (Executive Director, West Coast Women's Legal Education and Action Fund): Thank you for the opportunity to present submissions today. We are both very pleased to be here.

West Coast LEAF's mandate is to achieve equality by changing historic patterns of systemic discrimination against women through B.C.-based litigation, law reform, and public legal education. Although we work closely with our colleagues at the other end of the table, here at LEAF we are separate organizations. We are separately governed, staffed, and incorporated.

West Coast LEAF has considerable expertise in access to justice, which we have detailed in our written submission. For example, two years ago we received funding from Status of Women Canada to conduct a cross-provincial consultation on how best to meet women's legal needs in the province.

This study culminated in the development of a model for women's legal services, which is a storefront clinic in Vancouver delivering a full range of legal services for women, with a primary focus on family law. It's the only model of its kind outside of Ontario, and I'm proud to say that the doors open in May.

We are appearing before the committee today to discuss two specific areas of concern to women in this country, particularly in B. C. First, I'm going to talk about an issue that hasn't been spoken about today, which is legal aid, and in particular, civil legal aid. Then my colleague will spend some time talking about the court challenges program and address some of what has already been raised today.

While the commitment to criminal legal aid funding in this year's federal budget is admirable and necessary, it is civil legal aid that is most woefully underfunded in many provinces, particularly in B.C. For women, it is civil legal aid, particularly for family law matters, that has the most direct impact on the respect and preservation of their rights.

There are a number of reasons for this difference, including that men are far more likely to be charged with a criminal offence than women, and therefore men are more likely to need the criminal legal aid system. Women also, statistically speaking, have lower incomes, particularly following relationship breakdown. They are therefore less able to pay for counsel.

Of course, where family law matters involve heterosexual couples, both the man and woman have to appear, but men are often more likely to be able to afford their own counsel. Women are more likely to rely on legal aid. This is borne out by the numbers of legal aid applicants in family law.

Women are also more profoundly impacted by an inability to access counsel. Women are more likely to be the victims of violence from their male spouses rather than vice versa, and therefore their safety and the safety of their children is more likely at stake during family law proceedings. Further, women are still predominantly the primary caregivers of children and so have more to lose when they are not represented by counsel. In other words, a failure to fund civil legal aid, particularly for family law disputes, has a disproportionate and detrimental impact on women.

Despite this need, B.C. has one of the lowest funding per capita rates for civil legal aid in the country, and Canada as a whole falls far behind other developed nations in ensuring that those who cannot afford counsel can still access the justice system. This fact has not gone unnoticed on the international stage. In 2008, the UN CEDAW committee, the Convention on the Elimination of All Forms of Discrimination against Women, noted in its report on Canada's compliance with that convention that it was deeply concerned that the lack of funding for civil legal aid, in particular in B.C.—they called out B.C.—was denying low-income women access to legal representation and legal services.

According to the World Justice Project, a project that measures and ranks countries around the world on rule of law, Canada is 54th in the world in providing access to counsel on civil matters. Fifty-three nations beat Canada in providing civil legal aid, which doesn't really match many Canadians' picture of what is supposedly a world-class justice system. If we can't access it, it's not much good that it's world class.

In conclusion on the legal aid piece, we highly recommend that the federal government commit to targeted legal aid funding for civil legal aid, including for family and immigration law matters. In fact, this change is required to ensure that men and women have substantially equal access to the justice system.

Such targeted funding would reflect a transparent commitment to an accessible justice system on the part of the federal government and would have a substantial impact on the lives of women and children in the country, as well as on rule of law more generally.

Thank you, and I'll pass it over to my colleague.

● (1005)

Ms. Rajwant Mangat (Director of Litigation, West Coast Women's Legal Education and Action Fund): Thanks, Kasari.

West Coast LEAF is pleased that this committee is discussing the reintroduction of the court challenges program of Canada as part of your study on access to the justice system. Alongside robust civil and criminal legal aid programs, funding for larger scale court challenges is necessary to support the enforcement and advancement of equality rights on a systemic level.

You've already heard from other presenters in past sessions, and earlier in this session, about the value of the court challenges program and its history, so I'm going to focus on West Coast LEAF's recommendations for what the renewed court challenges program should look like. I'll note that these are elaborated in our written submissions, which should be made available to committee members once they've been translated into both official languages.

First, reinstate the program's mandate to support historically disadvantaged individuals and groups seeking equality in Canada.

Second, expand the program to include provincial and territorial laws, so that it responds to and addresses those laws that most directly and most often impact the majority of individuals, such as family law and access to social services legislation.

Third, provide adequate, sustainable funding for the program, funding that is calibrated to the true cost of mounting systemic test case litigation, including funding for interventions in cases that are already before the court.

Fourth, the program should have a clear mandate and independent oversight.

Finally, funding for this program should not compromise existing funding, particularly funding that already exists for indigenous rights cases, for example.

I think an illustration from West Coast LEAF's past work will highlight how important the court challenges program is to enhancing women's equality. In 2010 West Coast LEAF played a crucial role in the polygamy reference case, in which the B.C. Supreme Court upheld the constitutionality of criminal prohibitions against polygamy. We intervened in the reference to successfully argue that the criminal prohibition of polygamy was constitutional and does enhance women's substantive equality rights. Our involvement in this case was a direct result of the former court challenges program.

In 2004, we received funding from the program to convene a national consultation on women and religious freedom, the outcome of which was the position that we then advanced at the polygamy reference case.

In this case our position was very different from that of other groups with whom we sometimes align ourselves, or with whom we often share perspectives. As you know, that is the nature of many constitutional cases, particularly when it comes to equality rights. The issues are complex and divisive, and courts can't make properly considered decisions without the benefit of views based on thoughtful evidence-based analysis and research, which in turn cannot be done without adequate funding for bringing together legal and social science experts with other witnesses to discuss what equality is and how it should look in particular cases.

As you've heard before, the program was a critical part of the development of equality rights law in Canada in the past, but there is much more work to be done to protect, promote, and enhance those rights going forward.

On that note, as Kasari mentioned, we have secured some funding for a women's legal clinic. My job as director of litigation is going to be to look at the individual cases that come through that clinic, identify systemic issues that may be ripe for challenging in the court, and then analyze whether litigation would be a useful means by which to seek that change. The renewed court challenges program would be indispensable in making that happen.

As my colleague pointed out, our recommendation for equality rights is to focus on sections 15, 28 and subsection 35(4) of the Constitution.

We look forward to your questions.

● (1010)

The Chair: Thank you very much.

We will now turn it over to LEAF.

Ms. Diane O'Reggio (Executive Director, Women's Legal Education and Action Fund): Good morning. On behalf of the Women's Legal Education and Action Fund, LEAF, we would like to thank the standing committee for this opportunity to discuss the proposed renewal and modernization of the court challenges program. I'm the executive director of LEAF and with me is Dr. Elizabeth Shilton, who is a member of the LEAF board of directors, but also co-chairs LEAF's law program committee.

LEAF is a national non-profit organization founded in April of 1985 to promote women's equality through test case litigation, law reform, and public education. Over the past thee decades LEAF has intervened in over 50 equality rights cases before the Supreme Court of Canada.

Our litigation work has been recognized internationally, and scholars have credited LEAF's work at the Supreme Court level with an important role in establishing a constitutional and legal basis for a comprehensive theory of substantive equality in Canadian law. From 1985 to 2006 the court challenges program made a very significant contribution to that work. LEAF was one of the most frequent recipients of court challenges funding. Louise Arbour, a former Supreme Court justice, has argued that both LEAF and the court challenges program have led the way for the evolution of the charter as a solid instrument of social progress in Canada.

Without the assistance of the funding from the program, it is fair to say that LEAF, among groups, would have been significantly less active in the courts to the detriment of the equality rights of women and girls across Canada.

Let me summarize LEAF's position on two key issues that this committee should consider addressing while looking at the renewal and updating of the court challenges program. Consistent with our mandate, LEAF's focus would be on equality rights.

First, the equality rights program of the court challenges program must be fully reinstated to facilitate compliance with Canada's Constitution and international obligations.

Second, the equality rights program must be properly resourced. The charter guarantees equality rights, and those rights cannot be realized for those disadvantaged groups intended to be the beneficiaries of that guarantee unless they have access to the resources necessary to enforce and protect them.

We also support expanding the criteria to include cases in provincial and territorial jurisdictions, which we address in our written brief.

I will now ask Dr. Shilton to briefly flesh out LEAF's position on these key points.

Dr. Elizabeth Shilton (Board of Directors Member, Women's Legal Education and Action Fund): You can tell by looking at my grey hair that I've been involved in this work for some time. I speak as someone who was involved in LEAF's litigation program from its earliest days, during which much of its work benefited from the support of the court challenges program. I returned in 2013 to LEAF as an organization that continued to do high-quality work, but with a much reduced capacity, linked closely to the absence of public support for equality work, including the loss of the court challenges program.

To speak first to the restoration of the program, the creation of the equality rights program coincided with the coming into force of section 15, the core equality rights provision of the charter. LEAF and the court challenges program grew up together. The program underlined the critical importance of equality guarantees to Canadian society and Canadian values. Public litigation funding recognized that individuals and groups intended to benefit from equality guarantees were often the least likely to have the resources to participate in litigation.

The government of the day, concerned to ensure that members of disadvantaged groups would also have a meaningful voice in the evolution of constitutional equality rights, made the responsible decision to provide modest amounts of funding to support their participation in key test cases.

That was then, this is now, and it might reasonably be asked whether equality rights have become so well understood by the courts that there is no more need for test cases. The answer to that question is a resounding no. The job that LEAF and other equality seeking groups set out to do, and the court challenges program set out to support, is far from finished. The Supreme Court's 1989 decision in Andrews, a case in which LEAF was involved, was an important and early breakthrough. The court adopted an approach in which equal protection and equal benefit of the law must take into account the real life situations of disadvantaged groups.

Since Andrews was decided, the Supreme Court's approach to equality rights has been far from consistent. Numerous important test cases came forward between 1985 and 2006. In many of these, LEAF interventions were assisted by funds from the court challenges program. The cases did not stop coming forward in 2006. In Canada, where the constitution is quite properly understood to be a living tree, there will always be test cases exploring its meaning in the context of current social conditions.

Funding for equality rights was crucial when the charter and section 15 were new, and it continues to be badly needed if individuals and groups traditionally excluded from power and from the courts are to have a realistic prospect of effective involvement. Overall, the equality rights program of the court challenges program was a great Canadian success story. Its loss has been a significant barrier to accessing the courts for members of the very groups section 15 was intended to protect.

Turning now to the issue of appropriate funding, the litigation of equality rights demands adequate resources. Litigation never comes cheap, and that's the very reason the court challenges program was instituted in the first place. Basic litigation costs have been climbing since the program's birth in 1985. There is concern throughout legal circles about the extent to which legal costs operate as a significant barrier to access to justice in general. Considerable policy energy is being directed to finding solutions. The cancellation of the court challenges program exacerbated the problem with respect to constitutional litigation, and its reinstatement is an obvious, if partial, solution.

The costs of test case constitutional litigation can be very high, particularly for cases that begin at the trial or tribunal level and are sponsored all the way to the Supreme Court of Canada. This is the ideal type of test case litigation, but over our 30 year history, LEAF has had to learn some hard practical lessons about how to carry out its mandate with scarce resources. Out of necessity, LEAF largely employs an intervention strategy, bringing its expertise in substantive feminist analysis of constitutional questions in cases brought by other parties at higher court levels.

● (1015)

This intervention strategy is considerably less expensive on a per case basis and allows LEAF to respond more nimbly to emerging issues. But good and effective intervention also does not come cheap. One of the consequences of intervention strategy is that it turns fact situations into abstractions. This is a serious problem in equality litigation since it's essential that courts understand how their decisions will affect real people.

To convey these realities to courts, LEAF has increasingly made it a practice to consult widely and to work in coalition with front-line organizations that have valuable experience and perspectives to share on the differential impact of legal analysis on diverse groups of women. This significantly enriches LEAF's ability to assist courts in understanding how the decisions might affect, for example, racialized and disabled women differently than they affect women in positions of relative social and economic privilege. But working this way takes more human and financial resources than traditional forms of legal work.

The old court challenges program deserves great credit for supporting this kind of collaborative litigation practice. The program provided direct funding for litigation, but it also provided crucial funding for case development, and follow-up funding or impact funding to address the results of court decisions. Studies show that the program was cost effective, well designed, and well managed. It unquestionably had a positive impact on equality litigation in Canada.

In discussing legal concepts of equality and constitutional jurisprudence, LEAF is acutely aware of the dangers of making legal concepts sound like abstractions. Let us conclude by emphasizing that LEAF's work has been anything but abstract. LEAF's cases have involved women's equality rights relating to issues of sexual violence, pay inequities, spousal and child support, reproductive choice, religious freedom, and access to justice among others. Much of this work was supported by the court challenges program. These cases name and place in a constitutional context the challenging and often brutal realities of the lives of Canadian women and girls. These realities persist.

In LEAF's view, an updated and properly resourced court challenges program will serve Canada well in the days ahead as our dynamic country and its communities grapple with the equality issues that will inevitably flow from changes in demography, language patterns, family status, and immigration, and evolving gender relations at work, at home, and much else.

We respectfully submit that Canada needs a restored and modernized court challenges program to continue the successful development and flourishing of our citizens' equality rights. The program began as a critical and innovative tool for access to justice in Canada. It can and should be again.

● (1020)

The Chair: Thank you very much, ladies. I'd like to thank you for the clarity with which you have presented your arguments.

[*Translation*]

We'll now open the floor to questions, beginning with the Conservatives.

Mr. Nicholson, you have six minutes.

[*English*]

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much for your testimony here today.

Ms. Petersen, you made some interesting comments with respect to the funding of these different applications and have had a considerable experience in this area. One of the suggestions you made was that a new court challenges program would fund discrimination cases or cases challenging provincial legislation. You've been involved with constitutional cases.

Do you see any challenges or any problems the government might have if it now comes forward and says they will start funding litigation against specifically provincial legislation? Do you think there are some problems with that?

Ms. Cynthia Petersen: My suggestion, to be clear, is that it fund those cases that have national implications.

I can give you an example of one that was not funded but which I was involved in, the M. v. H. case, which was argued all the way to the Supreme Court of Canada. It was an Ontario case challenging provisions in family law legislation in Ontario that discriminated against same-sex couples and that denied same-sex couples access to spousal support upon a breakdown of their relationship. Once that case was decided by the Supreme Court of Canada, laws in every province and territory were changed across the country. There was omnibus legislation in most jurisdictions to radically transform laws. It was a case that unquestionably had national implications.

When it started, the court challenges program was still in existence, but nobody made an application, to my knowledge, and would not have received funding, I presume, because the funding wasn't there.

Mr. Rob Nicholson: That's strictly provincial legislation.

Ms. Cynthia Petersen: Now, that's a historical example, and we've already heard from West Coast LEAF about some important initiatives in B.C. that could receive funding if the program were reinstated with the expanded mandate and that I think would also have national applications that would benefit people across the country.

Might there be some political criticism of the federal government? Yes, I acknowledge that; I'm not naive. But I think it's not terribly dissimilar from the way the Supreme Court of Canada decides when it will hear cases. It will hear cases out of provincial jurisdictions when there are national implications to the case. It will grant leave to hear those appeals. I think appropriate criteria would have to be in place to decide which cases would be funded. It would not be the only criteria, surely, but one of them would be whether a case has national implications.

Hon. Rob Nicholson: Fair enough.

I'll tie in one of the comments you made with something that Dr. Shilton said. There are, as we all know, increasing costs with respect to all aspects of litigation and court applications, but you pointed out something that most solicitors would know, which is that much of the cost is not just to pay lawyers' fees. There are the disbursements and, interestingly enough, as you would know, those disbursements —you mentioned some of them, such as the high cost of photocopying at courthouses and courts—are actually costs that are basically controlled by the provinces in their administration of justice.

Dr. Shilton, you said that there are examinations of solutions to reducing the costs. Do you know of any efforts, any lobbying, or any representations that are made to our provincial colleagues to reduce the costs of court applications by reducing the cost of the disbursements, which, as Ms. Petersen pointed out, are the greatest costs in bringing forward these cases?

● (1025)

Dr. Elizabeth Shilton: My reference was not specifically to.... I referred to a policy concern about access to justice and a lot of work that's being done on that. A lot of that work isn't focused on court fees and those kinds of disbursements, but there are significant disbursements that are unrelated to the provincial administration of justice policy. We have significant disbursements, for example, in connection with expert witness fees in cases that we sponsor from the ground up. Also, as Ms. Petersen referred to, a lot of our disbursements relate to consultations and coalition work. Those kinds of things include travel costs and meeting costs, which are also not controlled by the province.

I'd like to say just one thing on this question of the distinction between federal and provincial issues; that is, as equality rights litigation has evolved, often it's not as simple as attacking legislation. Drawing the line between cases that are within federal jurisdiction and within provincial jurisdiction is no longer as simple as we thought it might be back in 1985 when we saw these cases as "government versus the citizen".

Hon. Rob Nicholson: I suppose family law is a good example. With the Divorce Act being under federal jurisdiction and many other elements under provincial jurisdiction, we see the two of them.

Ms. Petersen—and I apologize, I wish I had those translated copies of all your presentations here today—I think you said that you were involved with 50 cases?

Ms. Cynthia Petersen: No, I think that was someone else speaking on behalf of LEAF.

Hon. Rob Nicholson: Oh, yes.

Of those 50 cases, do you know how many received funding from CCP?

Dr. Elizabeth Shilton: We planned to break that down in our brief. We'll be providing a list of the LEAF cases that were funded by the court challenges program, with a brief description of what those cases involved.

Hon. Rob Nicholson: Thank you, I look forward to that.

Ms. Landolt, thank you very much for your testimony as well. You said that those groups or individuals that had a different philosophy were never funded. I think is what you said. How many times did your organization make applications?

Ms. Gwendolyn Landolt: We applied four times, I believe, and we were refused. We were involved in over 30 cases, most before the Supreme Court of Canada, but we had to pay every penny ourselves. We faced great discrimination from the committee because we didn't go along with a lot of the LEAF or feminist philosophy.

Hon. Rob Nicholson: What's the basis of your saying that? Did they indicate that to you?

Ms. Gwendolyn Landolt: Oh, yes. If you read our brief, for example, in the case of Tremblay and Daigle that started in 1989, the court challenges program said that they could not fund us because there were no federal issue involved. Well, you can imagine our shock and dismay when the CCP funded LEAF in a case where they said there was no official.... We have the actual documentation showing that.

Hon. Rob Nicholson: You have the document saying that they wouldn't fund it because there were no federal implications in that?

Ms. Gwendolyn Landolt: Exactly, and we have the document saying that. We were shocked to find, in the annual report of CCP that year, that they funded LEAF, even though they said there were no federal implications.

Hon. Rob Nicholson: We're getting all kinds of documents. If you have that document, maybe you'd like to file that with us as well.

● (1030)

Ms. Gwendolyn Landolt: Yes. Well, I put that in our brief, and I gave the date of the letter and the correspondence.

Hon. Rob Nicholson: Okay.

The Chair: I think he means the actual letter received from the program refusing the funding. I know you put the fact in the brief, but I think Mr. Nicholson is asking about the letter.

Ms. Gwendolyn Landolt: You want the actual letter. We may have it in our office, but it will take time to get it. The National Archives has all our documentation. We gave all our documentation on the court challenges program to the National Archives. We can retrieve it, and we will get the letter. I gave you the date in our brief.

That was one example of utmost discrimination. Another example is one of our members. A brother and sister lived together, and the brother funded his elderly sister and looked after her. He said if M. and H., a same sex couple, could get funding and family benefits, why couldn't a brother and sister? He was looking after her. He was simply refused funding by the CCP. In other words, if you didn't fit the ideology, legal merit had no resonance with them at all.

We've tried and tried to say equality is different in different eyes. I can give you one of the earliest cases, Blainey versus the Ontario Hockey Association in 1986. It was the first really major equality issue. In that case a young girl wanted to play hockey in a boys' hockey team. She went to the Ontario Court of Appeal and the court said yes, she should be able to play hockey in a boys' hockey team. Well, I think she lasted maybe half a season because she was banged into the boards, and she found it discomforting. REAL Women's view was of course we should have equality in hockey, but having a girls' team and a boys' team was the rational thing to do. Because of this interpretation and the funding from CCP—and LEAF was involved in that case in 1986—we got this unusual idea that women should be able to play in mens' hockey teams. That's why we have separate Olympic hockey teams, male and female. That shows a different interpretation of equality. Those who don't fit the ideology of the administrators of the program are simply left out in the cold, and, as I say, we've had to fund over 30 cases ourselves because we didn't fit the ideology.

The Chair: We're almost at 12 minutes. It was a long answer.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you, ladies, for coming in and making these presentations. They were very informative.

To begin, I'm hoping, Ms. Petersen, that you'll be able to expand on one of your recommendations. You stated that the CCP should be expanded to include more rights, not just equality and language rights. Can you please let us know which rights you're referring to?

Ms. Cynthia Petersen: I do want to say that I think it's very important to have properly resourced equality rights funding reinstated as well, so it's not to diminish that in any way. But in my experience, many of the key cases the court has been hearing and will continue to hear either have an intersection with other rights—so there's an equality dimension to the case, or there are other fundamental rights at issue—or the strength of their legal merit is not necessarily under section 15. But it doesn't mean that they don't benefit vulnerable and disadvantaged groups.

I'll give you a couple of examples of recent cases that have been argued in the Supreme Court of Canada. The Bedford case a couple of years ago involved challenges to Criminal Code provisions that criminalized aspects of sex work. There are definite equality components to that case, and there was a section 15 argument—a small one, not very robust—argued in the case. It was primarily a section 7 case—life, liberty, and security of the person.

Most recently—it's been in the news again—was the Carter case on physician-assisted dying. There are important equality aspects to that case, but it's also fundamentally a section 7 case. So I think section 7, for sure.

Section 2 rights, when you think about freedom of religion, freedom of association, freedom of peaceful assembly.... I'm missing one.

● (1035)

Dr. Elizabeth Shilton: Freedom of expression.

Ms. Cynthia Petersen: Yes, freedom of expression, thank you.

Section 2 rights are really important, and I can see many ways in which equality issues would intersect with section 2 rights, and any indigenous rights. I was here this morning when the earlier presentations were being made by some of the indigenous leaders, who also think mentioned treaty rights and the importance of perhaps not restricting this to the charter, although I think it's important to have a robust charter and access to justice to enforce charter rights.

Mobility rights might also be of tremendous importance, section 6. Also, with respect to—sorry, I made a note this morning because I was anticipating the question, and I know I'm going to overlook something if I don't refer to my notes—cruel and unusual treatment and punishment, section 12, there might well be cases that are extremely important that would benefit from funding.

I don't mean to leave any out. I know that there are other rights, obviously, in the charter as well, but I think due consideration needs to be given to all of those.

This morning Mr. Rankin was talking about siloing so that there would be funding for equality cases perhaps, and then funding perhaps for indigenous cases or for section 7. I'm a bit concerned about that, because cases don't often unfold in that way. The intersection between them is common, and I think it would be difficult to administer if it were completely siloed.

Ms. Iqra Khalid: That's great, thank you.

My next question is basically for everybody who wants to comment on it.

Budget 2016 allots $5 million a year to fund a new CCP, which is a lot more than the former court challenges program. In the former court challenges program there were three areas that were provided funding. There was the test case work, the impact studies, and then promotion and access to the program.

Do you think that there are other areas that a newly revamped court challenges program should be putting money into, funding, with respect to building upon rights or ensuring that constitutional rights are maintained?

Ms. Gwendolyn Landolt: I don't think you can build on any more rights until you get the defects in the program corrected, so that there's fairness and a lack of discrimination in the program. Why would you fund other rights, when only special-interest rights are being funded and not general rank-and-file concepts? It's a waste of taxpayers' money to fund all these so-called rights, when only special people with special interests get funded. It seems to me that you can't make up more rights when only those are recognized by the program....

I would say no, until we work out what you mean by “equality”, what you mean by “disadvantage”, because there's utter discrimination, and you cannot fund anything more until we work out the basics of the program, which has such appalling defects.

Ms. Iqra Khalid: Sorry to cut you off, but could I hear from the other ladies as well, please?

Ms. Diane O'Reggio: I would respectfully say the current budget amount would probably just cover these three areas.

My understanding from reading the reference to this in the budget was that it was $12 million over five years, which would be approximately $2.5 million per year. There was a reference to other federal investments, and it would need to be clarified where those funds were coming from.

In terms of the priority areas, as we noted in our presentation, test case litigation is foremost in promoting equality rights. Having that opportunity for organizations to work together through a consultative basis would be very important.

The Chair: Okay, thank you. I think we're getting close on time.

[*Translation*]

I will now give the floor to Ms. Trudel, whom I welcome to our committee.

Ms. Karine Trudel (Jonquière, NDP): First of all, I thank all of the witnesses for their testimony.

In my riding of Jonquière, Quebec, I work with several women's groups. So it is a pleasure for me to listen to you this morning.

My question is divided into two parts, and is addressed to Ms. Mangat.

First of all, why do you need—

● (1040)

[*English*]

The Chair: She's asking you your first question—well, until you can get the earphone in.

Ms. Rajwant Mangat: Yes. I'm having a bit of difficulty.

The Chair: Thank you, Mr. MacPherson.

Ms. Karine Trudel: Sorry, my English is a little....

Ms. Rajwant Mangat: My French is terrible.

Thank you.

[*Translation*]

The Chair: Please continue.

Ms. Karine Trudel: Why do you need the court challenges program?

[*English*]

The Chair: Why do you need the court challenges program?

Ms. Rajwant Mangat: Why do we need the court challenges program? Thank you.

[*Translation*]

The Chair: I think it will work better if I translate the question myself.

Some hon. members: Oh, oh!

[*English*]

Ms. Rajwant Mangat: As several other people on the panel have said, litigation is expensive, and as you can imagine, constitutional litigation requires amassing a considerable evidentiary record from lay witnesses and expert witnesses. Even if you're able to secure pro bono lawyers, who are willing to do all of the legal work for free, there are all sorts of disbursements that you need to fund, such as bringing those experts together, paying for those experts to provide reports for the court, typically through three levels of court, and at the trial level. Inevitably these cases get appealed at least once, if not twice, to the Supreme Court.

The cost for us as an organization for bringing a case is quite significant, because it takes staff resources away from the other work that we do day-to-day in education and other parts of our mandate. We're already working with shoestring budgets. I believe it was Cynthia Petersen who had said that the amount of the funding was really seed funding. It's a drop in the bucket of the general budget for a big test case litigation challenge. For us, it's the fact that there is some dedicated money there that will allow the case to move forward. We won't have to depend on the vagaries of fundraising and different donor tendencies whether they will fund a particular case or not, as well as having to rely on the insecure and unstable process of seeking funds dollar by dollar to try to put together enough money to even launch the first part of it.

For us, it's very much a necessary part of doing that impact litigation that we think is important and that allows us to enhance and promote equality rights through the charter.

[*Translation*]

Ms. Karine Trudel: You talked about the costs. Can you give me an example of a typical case and give me some idea of the costs involved? Do you have that information?

[*English*]

The Chair: Can you provide the numbers for a specific case to explain your position?

Ms. Rajwant Mangat: Like how much it would cost...? West Coast LEAF has not launched a full-on test case before. Yet, as LEAF had mentioned in their submission, we typically have taken an intervention strategy wherein we intervene when a case is already brought by other organizations.

But I know from my work as a lawyer that a large constitutional test case can cost hundreds of thousands of dollars. That's for the organization bringing the challenge forward. The case is filed in the name of the organization and in the names of different individuals. So to take something like that to trial, especially where you're up against the government—federal or provincial, but let's talk federal—which has deep pockets.... Then typically, because these issues are all very intersecting federally and provincially, as Mr. Nicholson mentioned in the context of family law for example, you will have the provincial attorneys-general intervening in the case as well. So there are typically many groups and litigants involved in the case.

So I think hundreds of thousands of dollars is not an exaggeration for how much it will cost to bring one of these cases forward, and that's not including how much your pro bono lawyers would charge if they could actually get you to pay them.

● (1045)

[*Translation*]

The Chair: I think that Ms. Peterson also wants to speak.

Ms. Peterson, you have the floor.

Ms. Cynthia Petersen: I simply want to add that I support her comment. She is not exaggerating when she says that it would cost that much. However, I am also a practising lawyer, and my opinion is that this would only be at first instance. Preparing a case for Superior Court can easily cost a half million dollars. Then there is the appeal, and then the appeal before the Supreme Court.

Moreover, each appeal level always involves more interveners in the issues. I think this is a good thing, and I am not saying that to criticize the interveners, but it also increases court case costs. Indeed, every intervener has a written argument that is submitted to the court. We must answer all of the arguments from all of the interveners, and not only the arguments of the opposite side.

In my opinion, a half million dollars is thus a normal amount, but only in first instance proceedings.

[*English*]

The Chair: We're going to run slightly over—five minutes over—because I want to give everybody a chance to complete their remarks.

Mr. Hussen, you have the last questions.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you for coming in this morning. It's been very helpful.

I just quickly wanted to ask a question of LEAF. To what extent have you been able to continue to litigate equality cases since the cancellation of the program?

Ms. Diane O'Reggio: We have continued to litigate equality cases, but it's been at a significantly reduced capacity. Again, as mentioned by my colleagues, the support of pro bono counsel has assisted us to do that. But it has been significantly diminished.

Mr. Ahmed Hussen: This is for the panel.

Do you have recommendations on how to better provide equal access to funding by a new court challenges program?

Ms. Gwendolyn Landolt: One way to do it is to have an impartial CCP that is not involved in special interest groups so there will be a fair access. There was certainly no access to justice for anyone in Canada who didn't support the ideology of those managing the program.

Another problem was that there was never ever anything put forward so that people knew what was going on. Even the government didn't know what was going on. For the program to enable access to justice, you have to be able to account for what you're doing, and there was no accountability.

Those were the things that were missing. There's no access to justice—there never has been access to justice—under the old CCP for the simple reason it was bigoted, biased, and discriminatory. You can't have a program like that and call it “access to justice”.

Ms. Diane O'Reggio: To my understanding and reading of how the former court challenges program functioned, it functioned as an independent body. It approached cases professionally, with a high level of ethics and independence.

In terms of encouraging wider access, obviously ensuring that the criteria of how cases are funded is communicated would be important, as would be continuing to reach out to individuals and groups. A good part of this could be public education as well, so there's a strong understanding of how the court challenges program functions.

I have to say that in looking at the cases, not just by LEAF but other organizations supported by the court challenges program, I think that the equality panel and the language panel made very good, precise, and independent decisions on what cases would be supported to the benefit of all Canadians.

● (1050)

Ms. Rajwant Mangat: I would add to that very briefly, if I may. By having all sorts of different groups, historically disadvantaged groups and individuals throughout Canadian society, with some representation in the process in which decision-making happens, you wouldn't have what Ms. Landolt is concerned with—only one perspective as part of the decision-making. I think with a clear mandate and independent oversight, we may be able to address some of those concerns.

The Chair: Thank you very much.

I appreciate the members' forbearance.

I would like to thank the witnesses for their excellent testimony.

Have a wonderful day, everyone.

The meeting is adjourned.