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Chair

Mr. Anthony Housefather

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● (0845)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I would like to welcome everyone to this meeting of the Standing Committee on Justice and Human Rights.

We have a distinguished panel of witnesses to hear from this morning. I would like to introduce, from the Canadian Bar Association, Sarah Lugtig, who is the chair of the access to justice committee, and Mark Power, who is the special adviser to the former French-speaking common law members. I know they're accompanied by Tamra Thomson, who's the director of legislation and law reform, even though she's not at the table. Welcome to all of you.

We have Gerald Chipeur, who is a partner at Miller Thomson LLP. We have the Canadian Civil Liberties Association, which is represented by Cara Zwibel, who is the director of fundamental freedoms program.

Welcome, all of you. We will start with the Canadian Bar Association.

[*Translation*]

Ms. Sarah Lugtig (Chair, Access to Justice Committee, Canadian Bar Association): Good morning.

Mr. Chair, ladies and gentlemen members of the committee, the Canadian Bar Association appreciates this opportunity to comment on the Court Challenges Program, which is closely related to our mission.

The Canadian Bar Association is a national association representing 36,000 jurists across Canada. Among the association's primary objectives are to improve the law and the administration of justice. It is in that context that we wrote to you. The committee has in its possession the letter we sent it about the program.

[*English*]

The court challenges program is as important today as it was when it started, if not more important. By giving vulnerable individuals and groups the tools they need to exercise their basic rights, the program makes these rights real and not just words on a paper.

In renewing the program, it's critical the government reinstate the elements that best support this aim. In our view there are four.

The first is administration of the program by an organization that's independent from government.

The second is to continue, at its core, support for historically disadvantaged groups and official language minorities to enforce their equality and language rights under the Constitution through the courts.

The third important element of a reinstated program is to only fund those cases that have a systemic impact and that promise to improve conditions more broadly for the individuals and groups these rights are intended to protect.

Finally, it's extremely important the program continue to provide for meaningful and informed input into the development of the cases by the communities that will be most affected. This is done through support for consultation, as well as support for access to the program, and spreading information about the program and the rights it protects.

We've provided further detail on these important elements of a reinstated program, and we would invite you to review our submission.

With that said, the other major point we wanted to make today in the time we have respects this question of expanding the mandate of the program. We understand that is under consideration. We considered this question in light of the commitment by the government to reinstate the program in terms of equality and language rights, and to modernize it. It was in the spirit of understanding the framework that we considered what might be potential expansions to the mandate that would support that underlying rationale.

Our first recommendation, and the CBA has long made this recommendation, would be to extend equality rights funding to support cases that challenge provincial or territorial law or policy. These cases can be important precedents in their own right, with broad impact, and that has long been a limit that many have critiqued the program for.

Secondly, we advocate expanding the mandate to include complaints under the Official Languages Act, and it's for similar reasons we recommend that.

We also recommend, and this is our third potential addition to the mandate, that the program be flexible enough to support the entirety of a case that may raise or be based on other charter rights in intersection with equality rights. This is increasingly becoming common. A recent example is the Carter case, where not only section 15 but other charter rights were raised. I think it's evidence of the complexity of the issues that can raise equality issues in Canada today.

A fourth potential addition to the mandate would be to support systemic complaints against government under the Canadian Human Rights Act. This would be complaints before the Canadian Human Rights Commission. We have recently seen a case, the first nations child caring society complaint, that was an equality test case. They need support at the early stages. We would advocate that you consider extending the program to provide that support.

● (0850)

Finally, with respect to mandate expansion, we would urge this committee to strongly consider recommending that funding be provided to support test cases raising aboriginal rights, treaty rights, and the responsibilities of the federal government to indigenous peoples. We recognize that this would likely entail additional funding, an additional budgetary commitment to what is currently being committed, and that it would need to start with consultation with indigenous communities. However, we think this is an important addition that needs to be made.

That's all we will say on the issue of mandate expansion. Again, we would invite you to read our brief.

In closing, we would say that the objectives of the program are as important today as they were in 2006 and in 1986. Canadians still need the court challenges program to make equality rights and language rights real for the people those rights are intended to protect.

We really appreciate this opportunity to share the best advice that our members have for this committee and wish you the best in the important work that you have to do.

Thank you.

[*Translation*]

The Chair: Thank you very much, Ms. Lugtig.

We appreciated your presentation a great deal.

[*English*]

We're going to go on to Mr. Chipeur.

Welcome.

Mr. Gerald Chipeur (Partner, Miller Thomson LLP, As an Individual): Thank you very much for the opportunity to discuss with you my experience and my recommendations regarding federal government funding for charter litigation challenging federal law, and based upon what my colleague has just said, maybe more than just federal law.

There are three reasons for my opinion that such a funding program would be ill advised. First is the issue of bias. The application process and the decision-makers under the original court challenges program were biased.

I had personal experience with the program, and for reasons of solicitor-client privilege I cannot go into the details. However, I can just tell you what I saw as I made application for funding on several occasions.

The bureaucrats took the position with respect to my arguments that the arguments were not going to be funded because, in their view, they did not have a reasonable chance of success. When I asked them, "How did you form that opinion?", they said, "We contacted a law school dean or a law school professor, and it was their opinion that they didn't like your argument." On the basis of a prejudgement of the arguments that I was going to present, the funding was never provided to any of my clients as we participated in the charter challenges program in the first iteration of that particular process.

In my view, the test should not be reasonable chance of success and law professors should not be the gatekeepers. If reasonable chance of success were the test, then Carter would never have been funded if it had come to the court challenges program for funding, because, of course, Carter was challenging a direct precedent against the position that Joe Arvay was arguing, and that was the Rodriguez case.

In my opinion, the previous court challenges program was almost unconstitutional because it was administered in a manner that was not consistent with the rule of law. Money was distributed on the basis of the opinions of individuals and not principles of law equally applied to all applicants for funding.

I have a second reason to oppose going into another court challenges program funded by Parliament, and that is Parliament's responsibility to get the law right in the first place. Public resources should be expended in Parliament and not the courts to ensure that all laws are charter compliant.

It may have been desirable 30 years ago to test old laws, but after three decades that argument no longer seems reasonable. Today, the work of the Attorney General, cabinet, the House of Commons and Senate committees, and three readings in each House, should give adequate opportunity to scrutinize the law and ensure that it is charter compliant. Funding for a charter lawsuit after this process is in a sense hypocritical and wasteful. It would be more prudent to measure twice before cutting once.

Furthermore, to fund charter lawsuits is to imply that Parliament is somehow subservient to the courts. Parliament should not assume that its opinions are any less important or valid than those of the court on the subject of charter compliance. Parliament would show a lack of confidence in its own judgment if it were to fund lawyers to challenge the hard work of parliamentary committees just like this committee here today.

Finally, the challenges program is redundant. In those rare occasions when a charter challenge is justified and is important to the public, the Supreme Court of Canada has shown the willingness to order public funding. That is what the Supreme Court of Canada said in Carter about cases that should receive public funding. I won't take the time to read the quote for you, but if you were to go to the Supreme Court of Canada decision 2015, at paragraph 140, you find the test that the Supreme Court has set for funding public interest litigation like Carter.

● (0855)

In light of this new practice in the Supreme Court of Canada, a renewed court challenges program is redundant. If Parliament nevertheless determines that it is in the public interest to fund charter litigation, I recommend that the law prohibit bias and require compliance with the rule of law. This means that a new program should include the following 10 rules, at the very least.

One, the opinions of bureaucrats, politicians, academics, former judges, and others should not be a factor in allocating funding. Two, the only rules that should be applied are those that are based on law. Three, no funding should be provided to re-litigate a question decided by the Supreme Court of Canada since adoption of the charter. Four, no funding should be provided where a litigant does not have facts that disclose a cause of action. Five, no funding should be provided where litigation is frivolous and vexatious. Six, no funding should be provided for a colourable or fraudulent purpose. Seven, no funding should be provided to another level of government. Eight, no funding should be provided to a non-resident or non-refugee of Canada. Nine, no funding should be available where the litigation is duplicative of litigation that is already before the courts. Finally, 10, funding should be provided equally on a first-to-apply basis to all otherwise qualified litigation proposals.

Thank you very much for your time this morning.

The Chair: Thank you very much. We really appreciate that.

Finally, we're going to go to the Canadian Civil Liberties Association, with Ms. Zwibel.

Ms. Cara Zwibel (Director, Fundamental Freedoms Program, Canadian Civil Liberties Association): Thank you.

Mr. Chair and members of the committee, on behalf of the Canadian Civil Liberties Association I want to thank the committee for this invitation to participate in your study on access to the justice system.

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, non-governmental organization working in the courts, before legislative committees, in the classrooms, and in the streets protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution. CCLA's major objectives include the promotion and legal protection of freedom and personal dignity, and for the past 51 years we have worked to advance these goals.

CCLA has a deep and long-standing commitment to access to justice and views this issue as a major priority that, frankly, Canada has failed to sufficiently address. We appreciate that this study is examining a number of issues, including the newly reinstated court challenges program, access to legal aid, delays in the administration of justice, and section 4.1 of the Department of Justice Act. All of these issues are worthy of study, and we will be submitting a written brief to the committee outlining our position on each of these issues in the coming weeks.

Today, however, I intend to focus my comments on section 4.1 of the Department of Justice Act, and more specifically, I would like to address the committee on steps that can and, in our view, must be taken to address critical accountability and transparency gaps in our law-making process.

As you all know, section 4.1 of the Department of Justice Act requires the Minister of Justice to examine every bill introduced in or presented to the House of Commons by the government and report to the House if any of the provisions of the bill are inconsistent with the Canadian Charter of Rights and Freedoms.

You will also probably be aware that currently this provision is interpreted in a way that does not require a report to Parliament unless the minister is of the view that there is no credible argument that can be made for the consistency of the legislation with the rights guarantees. As a result of this standard, not a single report to Parliament has ever been made, yet, as we all know, many government laws have been struck down by our courts or are the subject of fierce constitutional concerns by legal experts.

In our view the current approach and standard are woefully inadequate.

CCLA has been concerned for some time about the interpretation and effect of section 4.1. We were the only intervenor in the federal court case brought by former Department of Justice lawyer Edgar Schmidt, who challenged the current interpretation of the section. The Schmidt case highlighted some of the weaknesses in our legislative process.

Our current system, in our view, does not ensure that you, as members of Parliament, those elected by the people and charged with passing our laws, are in a position to fully appreciate your constitutional obligations or how legislation may impact protected rights.

CCLA's work on this issue has extended well beyond the intervention in the Schmidt case. In late 2015, CCLA launched our #CharterFirst campaign, and since that time we've been engaged in consultations with some of Canada's leading constitutional law scholars and political scientists to consider how our legislative process can be improved. The goal of these consultations and of the project more broadly is to ensure systematic, meaningful, and transparent consideration of a proposed law's constitutional vulnerabilities. In other words, we want there to be a real and substantive discussion of which rights may be affected by a proposed law and whether any infringement or violation of rights is reasonably justified.

Nearly a thousand Canadians have already joined our campaign, so there's clearly an appetite for change among the Canadian public.

I'm going to talk about identifying the problem and developing solutions. In terms of the problem, the simple fact is that the current approach under section 4.1 of the Department of Justice Act is not working. In our view, every elected representative has an obligation to respect and uphold the Constitution; however, we appreciate that members of Parliament will not always have the information they might need to assess the impact of legislation on constitutional rights. While the government benefits from a large team of legal advisers in the Department of Justice, the legal resources that members can access are often quite limited.

The current interpretation of section 4.1 may actually have a perverse effect. When no report is made by the Minister of Justice, the government may take the position that there are effectively no constitutional concerns for Parliament to worry about. This is not only misleading, it impoverishes the level of debate and discussion on a bill.

● (0900)

I can't articulate the problem any better than has been done by Professor Janet Hiebert, a political scientist who's written extensively on this subject. She says:

> In Canada, the practice of non-reporting to the House of Commons that Bills are inconsistent with the Charter occurs because the Minister of Justice has concluded that a credible Charter argument can be made in support of the claim that the Bill is reasonable. But this denies Parliament the information or assumptions that led to this conclusion. The absence of any explanation also denies Parliament relevant information for assessing whether or not the government has been overly risk-averse or cautious in its legislative decisions. Parliament should not be placed in the untenable position of having to either pass legislation that may have a high degree of risk of subsequently being declared invalid or, alternatively, having insufficient information to assess decisions that avoid ambitious objectives or comprehensive means because of governmental and bureaucratic attempts to manage or avoid Charter risks.

The consequences that flow from the current approach are not confined to what happens in Parliament. After a law is passed, avoidable constitutional challenges often follow and these challenges cost taxpayers dearly. They consume precious judicial resources which could be better spent on other things. Laws that are passed, even though they may violate constitutional rights, can have a direct and very negative effect on people's lives.

To take but one example, the last government passed legislation that changed the timing of parole eligibility for certain offenders and made that change retroactive. Every court that considered this law, including the Supreme Court of Canada, found it to be unconstitutional. While that case made its way through the courts, the applicants in the case, and many others no doubt, spent additional time in jail, in one case an additional close to two years. If we can prevent an unreasonable and unconstitutional loss of liberty by improving our legislative process, it is in our view incumbent on us to do so.

In terms of our solutions, as part of our #CharterFirst campaign, CCLA will be delivering detailed policy proposals on how we believe this issue can best be addressed. Our proposals will aim to enhance the roles of both the legislative and executive branches of government to better ensure that the laws we pass comply with constitutional obligations.

To be clear, the goal is not to ensure that there are no more constitutional challenges or even to reach a consensus on what the Constitution requires. Rather, we want to enrich the debate, make the government's rationale in proposing laws more transparent, and provide members of Parliament with the tools to hold government accountable and make informed decisions about legislation. Our proposals are being developed as we speak, but are based on our consultations with the experts that I mentioned earlier.

We understand the Minister of Justice has recently announced an intention to table in Parliament the government's charter justification underlying Bill C-14, the assisted dying bill. We are anxious to see what this statement looks like and hope that it will allow for enhanced debate and discussion on this important and contentious bill.

The minister's decision to do this is a good step forward, but in our view these kinds of discussions can't be contingent on a decision by the minister introducing a bill. We need systematic and proactive measures in place, codified in legislation, to ensure that every bill that's ultimately passed by Parliament, including private members' bills and bills originating in the Senate, has received the time and space for truly informed debate on constitutional vulnerabilities.

We look forward to working with the committee on this issue going forward and certainly welcome any input that you may have on this important project.

Thank you.

● (0905)

The Chair: Thank you very much. I appreciate, again, all the witnesses and their testimony.

I want to give you a brief overview. While it is correct that we are looking at all of these issues, we are actually preparing a first report on the court challenges program. We will definitely take your views on section 4.1 into consideration when we reach the discussion on section 4.1.

I'd also invite you, in your written submissions, to comment on the court challenges program because that is our first, most immediate study.

Ms. Cara Zwibel: We certainly will and I'm happy to answer questions about that.

The Chair: Thank you very much.

We will begin Mr. Nicholson.

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

To the Canadian Bar Association, thank you for your compliment that we're doing important work. You do important work in this country on so many different issues and thank you very much for that.

One of the things that you pointed out in terms of expansion of the mandate is this whole area of provincial jurisdiction. It's a pretty tricky business as you can imagine, any government trying to explain that it is now going to be funding groups to go after specific provincial legislation. There's some legislation where it basically covers both areas.

We were just talking about that the other day. Like family law, it's a little difficult to start splitting it between federal and provincial, but nonetheless, could you address that? Do you think that it is truly feasible for us to expand this to provincial jurisdiction cases?

Ms. Sarah Lugtig: Yes, we do think it would work, but we recognize that it would likely have to progress in consultation with provinces and territories.

The idea of family law being an example of a potential area to start in is interesting, because I think what you've identified there is that there may be priority areas where there's an intersection between federal and provincial law. That may be a place to start.

We recognize that there's complexity to it, but it is such a significant gap, and that is why we are recommending that this issue be studied more, obviously in consultation with provinces and territories.

Thank you for that question.

Hon. Rob Nicholson: Thank you for that.

One of the areas that you said we should focus on—I think I have it right—is the groups in society that are most vulnerable. That's a bit of a shift in terms of what this originally was all about back in the 1980s when the court challenges program was instituted.

Much of the discussion was due to the fact that particularly in legislation like the Criminal Code.... Some of those provisions in the Canadian Criminal Code were almost 100 years old, but in fact many of them were 50 or 60 or even 100 years older than that. Updating laws that sometimes were somewhere between 100 and 200 years old to make them compliant was a huge task for the courts, for Parliament, and for everyone.

Are you saying that we've moved beyond that and we have to focus more specifically on individual groups and organizations that need help? Or is that still part of what we have to do?

● (0910)

Ms. Sarah Lugtig: What we would say is that this would be an evolution of that original intent. That original intent continues to be valid today, as we see. We still see equality cases and language rights cases going before the court. On the need that was identified early on, I think potentially the wish was to resolve most of the issues, but what we've discovered through the years with the program is that there continue to be important issues to be brought before the courts.

I think we would just say that there's the same initial impetus, in a sense, but respecting the modern reality that these issues continue to require litigation.

Hon. Rob Nicholson: Thank you very much.

Mr. Chipeur, thank you very much for your comments. You're not the only person who has said that we have to make sure there is no bias in terms of who gets funded and who doesn't.

You made an interesting comment, though, and you had a long list of individuals who should not decide whether the case goes forward or whether there's a reasonable chance of success or, indeed, if that should even be one of the considerations. I'm not quite sure, then, who would make the decision if you put the application. If we eliminate that long list of people that you indicated, just how would it happen?

Mr. Gerald Chipeur: The idea when I mentioned the individuals —bureaucrats, law professors, and others—was to say that their discretion would not be the basis for making the decision, but the law would be. Obviously, there would have to be an official who would compare the law to the application and determine whether the application fit all the check marks. I'm not saying that you would not have an individual in that position. You would, but—

Hon. Rob Nicholson: Is this somebody who would be connected to the court challenges program? Is it somebody appointed by Parliament?

Mr. Gerald Chipeur: It could be. I think so. I haven't given much thought to whether it should be outside the Department of Justice. Maybe it should, because the Department of Justice is going to be defending most of these.

Maybe it should be someone who Parliament appoints and is responsible to Parliament. Maybe it's someone who is part of the finance department, since this is money. Maybe it's added onto a bureaucracy that's already there, such as the ombudsman's office or one of the other individuals who already has responsibility for interpreting and applying the law.

Hon. Rob Nicholson: Thank you very much.

Ms. Zwibel, with respect to the Canadian Civil Liberties Association, you talked about the legal advice that goes into these bills. A case can be made that those departmental officials advising the justice minister have the same solicitor-client privilege as most people who receive legal advice.

Wouldn't you agree that a parliamentary committee such as this one, which is hearing individuals like yourself or others and analyzing various bills, is helpful? You probably wouldn't agree that it's a substitute, but it certainly gives the opportunity to members of Parliament to have a look at the constitutionality of these bills, which is obviously one of the components of every piece of legislation. Don't you think that's a reasonable comment?

Ms. Cara Zwibel: I think that the appearances of witnesses, including legal experts, to comment on constitutional concerns is certainly helpful to members of Parliament. I don't think it's a substitute for the legal opinion, but I appreciate the concerns around solicitor-client privilege.

The proposals that we're thinking of would not necessarily do anything to affect that privilege. One of the possibilities that's been suggested is that the minister would make a statement of compatibility. Rather than there being an obligation to report an inconsistency, there would be an obligation to comment on compatibility in a substantive and meaningful way, not necessarily revealing legal advice but a statement of compatibility that might then be assessed by someone independent who would be reporting to Parliament. It's not necessarily trying to change solicitor-client privilege, although I have to say that many of the experts we've talked to have raised concerns about transferring the notion of solicitor-client privilege to lawyers in the Department of Justice, who are certainly advising clients, in terms of the minister and the government, but also intend to uphold and protect the rule of law and to serve the public.

There is a concern that the public should have access to some of this information, but we're aware of those concerns and considering different ways that we might address this to give Parliament the information that it needs, while still protecting the role that Department of Justice lawyers play in advising the minister.

● (0915)

Hon. Rob Nicholson: Your organization is looking into this, and you'll be presenting something.

Ms. Cara Zwibel: Yes.

Hon. Rob Nicholson: As the chair pointed out to you, most of what we're talking about is the court challenges program, and it's somewhat specific, but let's say there are broader considerations and even other issues.

Ms. Cara Zwibel: Yes, certainly.

I apologize. I think when I wrote to the committee expressing an interest to appear, section 4.1 was one of the issues we really wanted to address, but we certainly have views on the court challenges program. I agree with much my friends from the Canadian Bar Association have said in terms of expanding the mandate, particularly concerns around intersecting rights and expanding beyond the strict confines of section 15.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much.

[*Translation*]

I thank the witnesses who appeared before us today.

[*English*]

I really appreciate your being here and sharing your thoughts with us.

My first question is for Mr. Chipeur, just with regard to what you were alluding to on the merit of cases. A reasonable chance of success, in your opinion, shouldn't be one of the criteria being looked at when these applications come forward. Should merit ever be a consideration in looking at these applications?

Mr. Gerald Chipeur: Only when there's an absence of merit and a court would take the position that it is a frivolous and vexatious case. That's the test that a court would usually apply to throw out a case. If an argument cannot meet that minimum standard, then it should be set aside. Otherwise, the Carter case tells us that if you were to apply that test to many of the cases that have been successful in the Supreme Court of Canada, they would not have received funding. The Supreme Court, in the Carter case, not only thought that it was a meritorious argument but gave it millions of dollars in funding for the litigation.

I'm saying it is a dark hole to go down that has no bottom. In other words, once you get into that area you are into the laws of men and women and not the rule of law. It is important for this committee to very clearly give direction to the decision-maker, so that the decision-maker is not making a decision based on what they think but rather on whether this case should ever go before a judge, because it's the judge's decision that really matters in these cases.

Mr. Colin Fraser: Obviously some person has to make this decision based on their judgment with regard to the merit of the case reaching at least the threshold of not being vexatious and frivolous.

Mr. Gerald Chipeur: That's my recommendation, yes. Thank you.

Mr. Colin Fraser: All right. Thank you.

To the Canadian Bar Association, Mr. Chipeur had mentioned the fact that the program is biased in the way that it had been previously instituted, and that applications would come before the person making the decision, and they would impose their own bias on whether or not that matter would proceed. I know that last week we heard from another group that said a similar thing regarding their applications that went before it.

Could you please comment on what you think of the allegation or the suggestion that the program was biased as instituted, and please help us understand what your position would be on that?

Ms. Sarah Lugtig: Our position would be based on what our members have told us. We have 36,000 members across the country, jurists across the country, with a broad range of expertise who have worked with the program, both in terms of the language rights and the equality rights aspects of the program. I have to say this was not an issue that was raised in our deliberations regarding the court challenges program. It may be there are individual cases where individual organizations or groups are not happy with the results, but we haven't heard anything indicating there is a systemic problem in that regard.

I don't know if my colleague has anything to add to that.

[*Translation*]

Mr. Mark Power (Special Advisor, Forum of French Speaking Common Law members, Canadian Bar Association): Mr. Fraser, I am going to address the Language Rights Support Program.

[*English*]

The language rights component was re-established by the Conservative government in 2009 and has worked very well. It's been evaluated internally by the Government of Canada during the previous government, and the conclusion was that it worked very well with no bias. I respect Mr. Chipeur's position, but I don't think it's a tenable or a serious concern that should prevent this government from acting quickly to re-establish the equality side of the program.

● (0920)

Mr. Colin Fraser: Would you agree with me that one of the main purposes of the court challenges program is access to justice, but also to give voice to those who may not have the ability to bring a challenge forward, in order to expand rights, and to breathe life into the charter itself?

Mr. Mark Power: Of course, that's a basic Canadian value, the CBA would say, and the previous court challenges program did wonders in helping that progress. The current language rights support program is doing the same, whether it be federal or provincial.

On that point, Mr. Nicholson I think is concerned about something that is not a problem. The fact is, the previous government's court challenges program on the language side has been funding challenges to provincial education legislation. It has been doing that since 2009, and it has been doing it well. The results are tangible on the ground for language communities, be they Quebec anglophones or francophones outside of Quebec. I think it's working very well, Mr. Fraser. The issue from the CBA's perspective is, let's get it back and let's get it set up again quickly, please.

Mr. Colin Fraser: One of the suggestions we hear sometimes when talking about access to justice, and the fact the court challenges program spends a lot of money on this, is that lawyers should take things on pro bono and do this work. Do you feel that work would get done if the court challenges program wasn't there?

Ms. Sarah Lugtig: What we would say in response is that with the court challenges program, in its former incarnation on the equality rights side and today with the language rights program, lawyers already contribute a significant amount of pro bono and what we call “low bono”, which is when you receive lower fees than you normally would be able to and need to subsidize those from other work. That has always been a significant component of the program. We say that should continue to be the case, but at the same time the cases are very expensive, increasingly so, especially complex ones. There needs to be a sustainable financial and other support there, along with whatever pro bono support is provided to ensure that, as you say, the program can breathe life into the rights in the charter.

Mr. Colin Fraser: You had mentioned the court challenges program is as important or maybe more important than ever before with regard to access to justice, I presume you were thinking.

Ms. Sarah Lugtig: Yes.

Mr. Colin Fraser: Can you talk a bit about the cost of litigation, about bringing something before the Supreme Court of Canada, and how those costs have risen over the years?

Ms. Sarah Lugtig: Yes, what we did in our consultations with members who are involved in these kinds of cases is establish that costs have raised exponentially, and certainly my colleague may wish to comment in terms of language rights cases. Things like expert witnesses are increasingly required. The evidence required to establish a prima facie, or first violation of equality rights, is significant. There's complex policy legislation involved today in these cases. What we heard was that they always cost more than you think they will. We're always subsidizing them, sometimes out of pocket, for disbursements as well as through pro bono hours, and we expect that this will continue. Our members recognize the full costs of litigation will not be supported by the program, and because of the importance of access to justice and our commitment to that important fundamental democratic value, we still would like to see it reinstated.

Mr. Colin Fraser: Can I ask one more quick question?

The Chair: A very short question.

Mr. Colin Fraser: To Ms. Zwibel, with regard to private member's bills being subject to scrutiny, charter compliance, and this declaration of compatibility from the government, at what stage would that happen if the bill were before Parliament?

Ms. Cara Zwibel: That's the tricky bit that we're still working out. We appreciate that there might be a waste of resources if we do that for every private member's bill that gets introduced, so I think it would have to pass a certain phase. I have to admit that in terms of looking at the flow chart of where that occurs, that's something we're still working out. It wouldn't necessarily be every private member's bill that gets introduced. There would need to be a threshold to anticipate that we're getting close to passage.

Mr. Colin Fraser: Thank you.

[*Translation*]

The Chair: Thank you very much, Mr. Fraser.

Mr. Rankin, you have the floor.

[*English*]

Mr. Murray Rankin (Victoria, NDP): I want to thank all the witnesses for their thoughtful presentations. I have questions to all of you, if I may, in the short amount of time available.

First of all to you, Ms. Lugtig, a structural question. You mentioned, for example, in your fifth suggestion on expanding the mandate, that we consider funding for test cases raising aboriginal treaty indigenous rights and you suggested it may be important to house it in a separate arm of the program. We've heard on the minority languages issue a similar suggestion that we create essentially a separate arm of the program to deal with those rights. Is it a concern to you that it could get unwieldy if we have various arms, and what about leaving it as it was before 2012 with an aboriginal test case funding program housed in a different department?

● (0925)

Ms. Sarah Lugtig: We have had discussion of this question because we're aware of these discussions. As far as the Canadian Bar Association is concerned, in some ways these will be administrative details that need to be worked out because of the granular nature of some of the considerations that need to be taken into account. Most critical to us is that there be separate envelopes of funding: equality rights funding, language rights funding, and if possible, funding for the types of cases that you've just described.

In terms of the structure, I think we would leave it to the government to best determine what would make the most sense from an administrative perspective, taking into account these positions from the communities that would be served.

A key change with respect to the aboriginal cases, though, is first of all that it be administered independently from government, because it was part of the Indian and Northern Affairs department. What we have heard from our aboriginal law members, those who practise in that area, is that the independence, which is so important for the other aspects of the program, would be critical, and that it must have available to it some of the other supports and expertise that was available to the other funding pieces.

Mr. Murray Rankin: Mr. Chipeur, I appreciated your thoughtful presentation as well. I have a couple of questions on the issue of bias, which is a great concern you've put your finger on. One of the questions that I don't think you directly answered Mr. Nicholson on was whether or not somehow a person has to make the initial cut, if you will, independent of government, i.e., appointed by Parliament or within, perhaps, the Department of Justice. Under Mr. Nicholson I think there was a program created, the special advocates program, doing sensitive national security immigration work, and that was housed, in a sense, within Justice, but with a lot of safeguards for its independence.

Do you see that being a potential model, or do you think this person ought to be appointed by Parliament in order to ensure some separation from the government of the day?

Mr. Gerald Chipeur: Coming from the standpoint that I, first of all, do not think the program is advisable, if we take that off the table, it's hard to then answer the question of which one is better—

Mr. Murray Rankin: Fair enough.

Mr. Gerald Chipeur: —but let me just say I would be comfortable with either. What I'm opposed to, strongly opposed to, is consultation with law school deans and law school professors. They do not have any of the responsibility of government, they have their own pet project they're going to be studying, and they have opinions based upon their particular perspective. They've been elected by nobody, and they're not employed by anyone who is elected. Whoever it is that makes these decisions needs to be accountable, and I simply don't think that consultation into the private sector is the way to go, which was the standard under the other program.

Mr. Murray Rankin: In your exchange with Mr. Fraser, on the issue of whether there was a reasonable chance of success, I think you rejected that as a category and think it needs to be beyond frivolous and vexatious, and over that standard. Isn't that likely to lead to pet projects, no matter who has to make the first cut? In terms of limited government resources to fund anything, if we had a program, which I know isn't your view, to not consult widely in order to see what people with expertise in an area think, doesn't that leave it to the whim of a particular individual to decide thumbs up or thumbs down, based on what?

Mr. Gerald Chipeur: In my view, if you're going to go down this road, you have to go all in. I think you have to fund everything. Meritorious programs that you can't afford today will just have to wait. That's what's happening now. You will have a better program than having nothing, but if you replace what is in place now, which is nothing, with a program that is biased because you do this consultation, then you don't assure yourself of a program that will yield Carter-like decisions. Remember, if the “reasonable chance of success” test was there, Carter would never have been funded.

It seems to me that you need to just...first in, first out.

Mr. Murray Rankin: I think you're absolutely correct in saying Carter would never have been funded, or Rodriguez, and here we get a unanimous court decision 20 years later. That's an excellent point. Yet in your 10 criteria, number three was that we should provide no funding to re-litigate. How does that square?

● (0930)

Mr. Gerald Chipeur: My view is that we should respect precedents.

Mr. Murray Rankin: We shouldn't fund a case that might have reversed it, in the Carter context?

Mr. Gerald Chipeur: That's right.

I'm opposed to a funding model that would exclude Carter because of the reasonableness standard, and I am opposed to any re-litigation. I know these positions seem inconsistent, but they're not. That's my position. You may disagree with it, but that's my view: precedent matters.

Mr. Murray Rankin: It does seem inconsistent.

Mr. Gerald Chipeur: It's why I still disagree with the nine judges who—

Mr. Murray Rankin: It does seem internally inconsistent, but I'll leave that in the interests of time so that I have another opportunity to ask a question.

On this issue I agree with you entirely, and this is that more resources should be spent on the prior review, before we get to litigation at all. You mentioned section 4.1 of the Department of Justice Act, as Ms. Zwibel did as well.

Sadly, the last government was accused, rightly or wrongly, of providing a very low threshold of 5%, 10%, certainly less than 50% was okay, and we saw the results. There were many cases in which government legislation, probably despite the Department of Justice review, was struck down in the courts. I think you've put your finger on an important issue.

Why is it either-or? Why don't we say we need courts to do a better job at the front end through a standard that's more meaningful for review by Department of Justice lawyers, and at the same time, acknowledge that any well-meaning and good faith effort of legislators is going to be sometimes subject to necessary judicial review? It's not an either-or proposition, surely.

Mr. Gerald Chipeur: If we have the resources, then I think your point is well made.

Let me make one other comment. With all due respect to the former attorney general, I don't trust the Attorney General or his department to give opinions to me, or to you as members of Parliament. Here's what I would trust. I would recommend that all members of Parliament be funded so that they could hire their own lawyer, to get their own opinion from a lawyer they trust, as other democracies do. I would suggest you send someone to some other democracy south of the border and in Europe. I think we spend way too little money on individual review by you as members of Parliament, and you need more funding. Each of you needs more funding.

There's nothing wrong with the Attorney General putting a statement down, but I don't think it's worth the paper it's printed on. I think an opinion from a lawyer, your lawyer, is going to be much more valuable to you as a decision-maker.

Mr. Murray Rankin: Can I ask one more?

The Chair: One more short question, Mr. Rankin.

Mr. Murray Rankin: Thank you.

I have a specific question, perhaps to both of you. When you cited that Supreme Court of Canada decision, Mr. Chipeur, I wasn't sure, but was that the advance cost order type of provision?

Mr. Gerald Chipeur: No. This was a decision at the end of the appeal. It was a decision where the court said, “You've asked for costs. We're giving you costs because you meet this test.”

Mr. Murray Rankin: Ms. Lugtig, in the aboriginal context, there have been some successful advance cost orders, where lawyers, in advance of winning or losing, have been given a significant amount of the costs up front. Should it be a condition, sometimes, that you get an advance cost order before a court challenges program is funded?

Ms. Sarah Lugtig: Certainly the advance cost is a positive development and is relevant in equality cases as well as aboriginal cases.

What we would say on any policy question like that, such as whether advance costs should be required or that a request for costs should be made, is that careful consideration should be given to any policy to ensure that it's not undermining the basic rationale. Does it create, for example, additional barriers for litigants to make such a request before they can obtain funding from the program? Certainly it's a question to consider, and there will be other policy questions like that.

We urge this committee to think carefully about how this would play out in practice, whether it would create a barrier that would interfere with the underlying rationale of the program.

The Chair: Thank you very much.

We're going to go to Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): For the record, I should say that the previous attorney general wasn't such a bad guy.

Some hon. members: Hear, hear!

Mr. Chris Bittle: I'd like to open it up to the Canadian Civil Liberties Association. We're discussing the court challenges program and I know you're going to present us with information afterwards, but is there anything you'd like to speak to now? I'll just open the floor to you to discuss that.

● (0935)

Ms. Cara Zwibel: Thank you for the question.

As I said, there's much that the Canadian Bar Association said that I agree with, and with respect, much that Mr. Chipeur said with which we disagree. The view certainly is that the court challenges program needs to be reinstated. We support expanding the mandate to address challenges to both provincial and territorial laws. Certainly, a focus on equality is not misplaced, but we need to understand equality in a broader sense. We agree that trying to fit a case within the confines of section 15, on all corners, may not be the best approach. Many equality cases have elements of section 7, the life, liberty, and security of the person protection.

In terms of the rights of incarcerated people, this is a very significant concern that we have. They represent a population for whom it's very difficult to access the justice system. Some of those challenges might come under other provisions of the charter, so we're certainly in favour of that kind of expansion.

The other thing I would like to respond to is the question that Mr. Rankin asked about, advance costs. It is important to appreciate the amount of work that would need to go into a case before even bringing a motion for advance costs. I think it's one of the reasons why setting a bar like that might be very problematic. For both the client and the counsel involved in that case, there would have to be a great deal of resources that go into it before the case would be ready for that. I should say that, despite the fact that there have been some good decisions on advance costs, and some good decisions after the fact where costs are not ordered in public interest cases, it's a significant risk for the client and the lawyer taking on that case. You often don't know it's going to happen until it's all said and done, which might be years later.

Mr. Chris Bittle: Thank you.

I'll turn to the Canadian Bar Association, perhaps just to clarify in my mind one particular part of your submission regarding embedding section 15 arguments with other sections of the charter. Does that lead to an artificial mixing? Do you have opinions about whether other sections should be funded independently of section 15, such as section 2 or section 7, or is the position of the Canadian Bar Association that they should be embedded with section 15?

Ms. Sarah Lugtig: The position of the Canadian Bar Association is that, if they meet the necessary threshold, however that is articulated, those cases where equality rights intersect with other charter rights should be supported completely, when one determines the essential basis of the charter issue involves multiple charter rights that include equality rights. What happened under the previous program, and what we heard, was that there were some artificial kinds of distinctions made, that equality arguments might get funded but not the other arguments, and that it actually created some artificial ways of developing cases.

In fact, this approach would respond to the concern that you've raised and better support cases as they come forward.

Mr. Chris Bittle: I'll open it up to everyone who wants to comment.

Does anyone have any view as to whether changes or reforms could allow those groups that may not have benefited under the previous program to partake in a better or improved court challenges program?

Ms. Sarah Lugtig: I don't know if we would answer the question exactly as phrased, but certainly, with regard to the desire to have the program extended to provincial law and policy in terms of equality rights challenges, part of the concern there is that there are certain issues, particularly issues affecting poor people, people of low income, or socially disadvantaged people, which are more often under provincial jurisdiction. In that sense, it would affect a significant group of people whose issues are not necessarily being addressed under the current program.

Mr. Gerald Chipeur: On the issue of disability and access to the public square, if you will, access to justice for those who are disabled, I think that a court challenges program may focus our attention just to the charter on human rights when I think that, in fact, Parliament and the provincial legislatures should be looking at their building codes and looking at other areas of law because the cost of litigation and the cost of going to the Human Rights Commission is expensive. If, instead, we're focusing on legislation that is much broader and actually much more important to those who are disabled, I think you would find that the money we spend on governing would be much more effective for those who are impacted.

● (0940)

Ms. Cara Zwibel: I'm not sure I have much to add, maybe just the group that I mentioned in terms of those who are incarcerated. That's certainly a population that faces significant barriers in accessing justice. We frequently hear from inmates who.... I know it's not a population that tends to breed a lot of sympathy, but people who are denied access to health services they need, people who are denied accommodation for disabilities they might have, and people who are denied religious accommodations have issues that I think deserve to be addressed.

Mr. Mark Power: I could add that geographic distribution was an important consideration under the old program and is under the current language rights program. We can't have all equality challenges coming out of Toronto or Montreal. There have to be some cases coming from across the country. I think that's an important public policy objective, as a federation.

I think there is a link there, Mr. Bittle, with Mr. Rankin's question. Advance cost awards would be certainly a second best because government can't ensure that geographic objectives, for example, are taken into account. If government takes the lead with the court challenges program, then it can better control where that money is spent and include or impose parameters as to how that money is spent. If it's advance cost awards, then government is always responding, and I think that's not an advisable way, or it's too much of a risky way, to try to implement public policy.

The Chair: Thank you very much.

We've completed this round of questions. If it's okay with the panel, I just want to mop up two questions that were asked before. I didn't catch the answer and I just want to understand.

To the Canadian Bar Association, I'd like to clarify that what you are saying is that equality cases—assuming it's section 15 or assuming that we expand it to section 7 and section 2 as well—should be treated the same as language rights cases with respect to the fact that, if they violate the charter right, we can challenge provincial laws based on the violation of the charter right, which is allowed for language cases and not for equality cases. Is that what you're saying?

Ms. Sarah Lugtig: Yes.

The Chair: Good.

Professor Chipeur, I am a bit confused also on one question that I think Mr. Rankin asked you.

With respect to the issue of the Carter case that you cited several times with respect to costs that were awarded by the court under Carter, under paragraph 140, I think you said, they awarded costs against the Attorney General of Canada and the Attorney General of British Columbia. The court set a four-pronged task that was incredibly limiting in terms that it had to be an incredible public policy issue that benefits all of society, and the case can never have been litigated otherwise, etc., and you would only find this out at the end of the case, meaning that you'd have to go before a judge on this incredibly unusual case to award costs.

I don't quite understand how you are arguing that this is a substitute for court challenges that allows a case to go forward from the beginning, as opposed to waiting until the end to get these very unusual costs. Could you just explain that?

Mr. Gerald Chipeur: There are two points. The first is that, when you have limited resources within the Department of Justice to spend on making sure the laws are compliant with the charter, my recommendation is that you spend the money here in Parliament rather than in the courts. That's the first point.

The second point is that when you do spend money, for example, in a case where, if you had a charter challenges program similar to the language program.... In British Columbia there were some challenges based upon very thin evidence. The Government of British Columbia has spent probably millions of dollars defending against a case where there wasn't a lot of evidence. So if the federal government does put some money out there for lawyers, lawyers are going to take it and run. You need to keep in mind that there are cost consequences to everything you do.

My position is based upon my view that this is where you should make those decisions if you're going to spend the money, and yes, that means I'm opposed to any program. That's why I can live with the limited Supreme Court of Canada view, because I'm of the view that there should be no program.

● (0945)

The Chair: We're going to recess until the next panel, and I want to thank you all so much for coming.

[*Translation*]

Thank you very much.

● (0945)

(Pause)

● (0945)

[*English*]

The Chair: I'd like to ask the people for the next panel to come forward.

● (0950)

Ms. Margaret Parsons (Executive Director, African Canadian Legal Clinic): Good morning. Thank you very much for the opportunity to present before this panel.

This submission has been prepared for the purpose of communicating the African Canadian Legal Clinic's interest in supporting the Government of Canada's decision to reinstate and update the court challenges program.

The ACLC is active in the area of constitutional equality and strongly supports the reintroduction and modernization of the court challenges program as a critical means to enhance access to justice for the African Canadian and other racialized communities. Access to justice is a critically important value to African Canadians as a historically marginalized community.

Along with indigenous peoples and European settlers from France and England, African descendants are a founding people of Canada. African descendants have always had a meaningful presence in Canada, from the early 15th century up to Confederation and into the present.

After 206 years of legalized enslavement of Africans in what is now Canada, slavery was abolished, and African Canadians had to contend with slavery's afterlife by being forced to face legal and de facto segregation in housing, schooling, and employment, and exclusion from public places such as theatres and restaurants. These racist practices were reinforced by a justice system that often served to keep African Canadians in their place.

The black experience continues to be one of extreme marginalization and disadvantage: restricted access to housing; discriminatory victimization by education and child welfare systems; social criminalization; high levels of unemployment; disproportionate and alarming rates of poverty; and near total exclusion and chronic devaluing of African Canadians in all areas of Canadian social, economic, political, and cultural life.

After 12 years of the Harper government, we have only seen these conditions worsen for blacks in Canada, as publicly funded support for precedent-setting challenges of laws, policies, and practices that facilitate and deepen black marginalization almost entirely evaporated.

● (0955)

The Chair: We'll pause for a second to let them take their seats. Please, join us.

Don't worry, Ms. Parsons. Your time has stopped for the moment.

Welcome, Ms. Levesque and Mr. Rae. It is a pleasure to have you here. We are in the middle of statements. To allow you time to gather yourselves, we are starting with Ms. Parsons, then we'll go to Mr. Mia, and then we'll come back to you.

Ms. Parsons, please continue.

Ms. Margaret Parsons: Thank you, sir.

Reinstating and modernizing the court challenges program will serve to enable long-standing inequities facing the African Canadian community to be more fairly, effectively, and correctively addressed through the Canadian court system. This is particularly true when considering that a disproportionately high number of African Canadians live on the margins of social and economic inclusion, are impoverished, precariously housed, and dramatically overrepresented in all levels of the criminal justice system, including provincial and federal prisons.

To address these conditions, it is critical that a modernized CCP not be embedded with procedural hurdles to obtain access to the resources it can avail. In other words, where there are cases, for instance, where one or more individuals from a historically disadvantaged group is facing a significant limitation or loss to their life, liberty, or security of the person, partly in connection with their charter-protected identity, unduly onerous procedural and eligibility requirements should not bar access to support from the CCP.

The following are also considerations that the Government of Canada should take very seriously as it undertakes to reinstate the court challenges program.

First, access to justice must include providing resources to support the enforcement of charter-focused remedies and decisions of our courts. For instance, racial profiling and illegal searches of individuals continue to take place at alarming rates, despite the existence of jurisprudence that forbids the continuation of these practices.

Gathering sufficient Canadian-based and focused social science evidence to support equality rights challenges is an extremely costly exercise. Undertaking community consultations and hiring expert witnesses to produce reports and provide testimony on pressing issues like anti-black racism comes at a prohibitive cost to the overwhelming majority of black African Canadian individuals and organizations.

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

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

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

To ensure stability and continuity of the CCP, the Government of Canada should establish an endowment for the program through a legislative framework. This is to ensure that subsequent governments cannot so easily dismantle this vital access to justice program as was done by the Harper government.

The scope of the CCP should be extended beyond federal jurisdiction but should also include matters that have systemic impact across provinces. This, we feel, is instrumental to helping the court challenges program fulfill its potential to address the equality deficit facing African Canadians and far too many other historically disadvantaged groups.

In conclusion, to support our submission's call for the aforementioned enhancement to the court challenges program, I refer to the following Supreme Court of Canada's jurisprudence. In Tranchemontagne the court stated the following, “Human rights remedies must be accessible in order to be effective.”

In another Supreme Court decision, Hryniak, the Supreme Court also stated that, “Ensuring access to justice is the greatest challenge to the rule of law in Canada today.”

Finally, in Fischer, the Supreme Court also recognized the existing barriers when it stated the following:

> The sorts of barriers to access to justice...may relate to either or both of the procedural and substantive aspects of access to justice. The most common barrier is an economic one, which arises when an individual cannot bring forward a claim because of the high cost that litigation would entail in comparison to the modest value of the claim. However, barriers are not limited to economic ones: they can also be psychological or social in nature.

● (1000)

Reading these Supreme Court decisions together, the ACLC argues that access to justice is a fundamental charter value that has not been effectively extended to the African-Canadian community.

Through modernizing the court challenges program in the ways proposed above, the Government of Canada would be making an historic leap forward toward comprehensive recognition and correction of the centuries of systemic anti-black racism that has imperiled the prospects and well-being of far too many African-Canadians in our country.

Thank you very much.

The Chair: Thank you very much for that very clear presentation.

Mr. Mia.

Mr. Ziyaad Mia (Member, Legal Advocacy Committee, Canadian Muslim Lawyers Association): Thank you, Mr. Chair.

I'm glad to see there's no snow here, but it is a little chillier than Toronto. It's good to be here.

Good morning, Mr. Chair, members of the committee and fellow witnesses. My name is Ziyaad Mia and I'm a member of the Canadian Muslim Lawyers Association. I'm with the legal advocacy committee. I used to run that committee for a number of years and I was also on the board of this organization in the past.

The Canadian Muslim Lawyers Association is pleased to have this opportunity to contribute to the study of access to justice, and in particular, the restoration of the court challenges program.

Our organization is a national organization of more than 300 lawyers now. It started in the late 1990s with a few lawyers in Toronto that began, as any lawyers' group does, as a social networking group trying to find opportunities for business. That grew as 2001 hit with national security legislation coming forward. We got very active on human rights, national security, and civil rights.

For the last 16 years we have been very active in the discourse on human rights, national security, and civil liberties. We've appeared and I myself have appeared many times at parliamentary committees on various issues, most recently last year on Bill C-51.

I believe you have our brief written submission, but I'll take a few moments today to talk about what's in that submission and some of the rationale behind what we're recommending and why we think restoration of the CCP is important for the country and also for ensuring access to justice.

As a starting point for our organization, our fundamental touchstones are the Charter of Rights and Freedoms and the values that it holds. They are the ground for our organization, its values, and the work that we do.

The other piece is the rule of law in Canada. As we know, we see chaos in many parts of the world. I think it goes to those very issues, that there's a lack of rule of law and fundamental values where government can be held accountable. For the CMLA that's very important because it really undergirds the liberal democracy that we have here that functions well, that we can sit here and respectfully debate and hold government to account and improve our legislation.

The third piece for the CMLA is really the dignity of all persons in Canada, and to promote those values in human rights, in national security, and in other ways. Certainly, we will speak when Muslim Canadians and Muslims in Canada are adversely affected by national security law and in terms of discriminatory impact where they practice their faith, those sorts of things. But that is not exclusively our focus. We see that as a subset of the dignity of all persons.

As many of you in the room are lawyers and parliamentarians, you know that the adoption of the charter was a landmark in our nation's history and further ensured that the rule of law and fundamental rights became a part of our legal culture and political tradition.

The core of the charter stands for two things. Number one, it is an entrenching of fundamental values and a public expression of those values and rights to the citizens, to the politicians, to the courts, to the institutions, to everyone in society that these values are important.

The second important piece of a charter or a bill of rights type of mechanism in all societies that have that, and where it functions well, is that it is a check on government. That is what the charter is designed to be, and when government acts it needs to be respectful of those fundamental rights and values. It's subject to scrutiny and justification. That's essentially what the charter does and how it operates. It holds government to account. For citizens, that is an important piece, because without that and the courts...you know, no disrespect, but even well-meaning governments can make mistakes. We do need courts and the rule of law to hold governments to account.

Is the CCP relevant, and is the charter relevant? That would be the bigger question. I think the charter is more relevant today than it was in 1982, for the precise fact that it is a check on government. Because the modern state has grown significantly in those 30-some odd years, I think it is more relevant today than it was when it was introduced.

That's where I come to the charter litigation as an access to justice item. Charter litigation is a key piece of access to justice. You've heard it from other witnesses today and in previous hearings you've held. It's a key piece in holding government to account. Certainly, there is the media and there are other pieces in civil society that hold government to account, but in terms of access to justice and the legal system in our division of powers, this is an important piece.

● (1005)

This is where our concern is. Without the CCP, vulnerable and disadvantaged persons and communities in Canada may not have the resources or the capacity to hold governments to account. Where their rights are infringed or threatened by government action, they may not be able to access the courts, because as we know—many of us are lawyers—it's a costly business to go to court, and it's an increasingly costly business to go to court.

At the end of the day, those disadvantaged people in Canada may then become invisible to the justice system itself, and the court's doors essentially will be closed to them. What's the effect of having that happen to those people? Over time, that lack of access to justice will really distort the contours of charter jurisprudence.

What you're going to have is a society where some people just can't exercise their rights and where those who are well-heeled and can afford to exercise their rights will go to court. You're going to get this lopsided jurisprudence. You're won't be getting a reflection of the real concerns that are out there in society.

That's why we think the CCP is crucially important. It's not the only piece in access to justice—don't get me wrong—but it is an important piece in making that happen. We think it's important to not have a lopsided jurisprudence with respect to the charter, and that's essentially why we support the restoration of the program.

In terms of restoration, we would like to see the restoration of the essential elements of the old program—we don't get into details, but I'd be happy to answer your questions—such as equality rights, for sure, and language minority rights, on which there has been some discussion about whether they're parsed off. We're not wedded to a particular model, but certainly we're interested in having those things preserved, as well as independence from government, for sure.

Also, the Canadian Muslim Lawyers Association is asking for the mandate and scope to be expanded to include section 7 of the charter, not to be a subsidiary right to section 15. I'm being clear. With all due respect to my colleagues from the CBA, I appreciate that perspective and I agree with where she's going with that, but I would like to see section 7 stand alone.

I don't want a disadvantaged community or individual turned away for a section 7 claim where they don't have a neat fit into an enumerated or analogous ground, because that would actually just be a bureaucratic way or an unforeseen circumstance. If our goal is to have disadvantaged people have access to justice and their charter rights, we don't want to tell them to go away because they don't fit into one of those neat boxes.

Let's take the Carter case, for example. We could say that's a disadvantaged class of persons who suffer and who may need to access that right to die, but those people cross every faith community, different economic boundaries, sex, and religion—I mentioned that—so it could cross a lot of the enumerated grounds, and they may technically be knocked out of a charter challenge program.

The other piece, the section 7 substantive "right to life, liberty and security of the person", holds a lot of promise for litigation. In particular, a lot of people have talked about socio-economic rights. I don't know whether it's in there or not. Courts will decide, but this is the point of having test case litigation, and this is the reason why we need to have charter support for those cases.

We'd like it extended to provincial law and action as well, for the very fact that it is not about jurisdictional battles or politics. This is about the charter, and the charter applies to all government action. It is a check on government. That's the lens we should look at in terms of application.

We would like the program to be independent of government and funding to be sustainable and stable.

Those are my submissions. I look forward to your questions. Thank you.

● (1010)

The Chair: Thank you very much, Mr. Mia.

Madam Levesque and Monsieur Rae.

[*Translation*]

Ms. Anne Levesque (Chairperson, Human Rights Committee, Council of Canadians with Disabilities): In fact, my colleague Mr. John Rae is going to speak first.

[*English*]

Mr. John Rae (Second Vice-Chairperson and Chairperson of Social Policy Committee, Council of Canadians with Disabilities): Thank you, Mr. Chair.

Good morning, my name is John Rae. I'm second vice-chair of the Council of Canadians with Disabilities. I appear with Anne Levesque, who is chair of our human rights committee.

We appreciate being invited to be here today. Being included in these proceedings is important for our work, and the court challenges program has been very important to the litigation side of our work. That's only part of what we do, however. We are a national organization, a consumer organization, and the primary voice of persons with disabilities at the national level.

You've heard the adage "nothing about us without us". That's where we come in. We are that voice. We are involved in lobbying for legislation, in trying to improve public attitudes, and in trying to shape government policy. One of the things we do best is bring our community together to help government in its policy development role. Occasionally we get involved in litigation, particularly as intervenors, and we have participated in cases that have gone as far as the Supreme Court.

When we think about the historic division of powers in this country.... It is the same in every human rights commission, every year. The largest percentage of cases that are received fall in the prohibited ground of disability, and generally in the area of employment.

That is why we also support the expansion of the court challenges program to cover government actions at the provincial level. The extent of discrimination, exclusion, and oppression that is the reality of our community continues to be widespread, and we need the opportunity for more systemic responses to this kind of widespread exclusion and discrimination.

Similarly, at a human rights level, we often deal with one person's issue, one case at a time. That's too slow. The charter and human rights legislation, in our view, promised us something different. We've come further up the road in terms of being equal before it under the law, but we're a long way from realizing the charter's promise of equal benefit of Canadian law. This is why the court challenges program is important.

It's one thing to have good law in this country, and I think we have pretty good law. As citizens and organizations, if we do not have the resources to be able to test and try to expand what that law covers, then it's just not achieving what we need. This is where the court challenges program is important, has assisted us, and we look forward to its return.

Ms. Anne Levesque: Thank you so much.

[*Translation*]

My name is Anne Levesque. I am the chairperson of the Human Rights Committee of the Council of Canadians with Disabilities. The committee is mainly made up of persons with disabilities. Our committee guides the council's legal intervention strategy.

As my colleague Mr. Rae pointed out, our strategy in this regard is often not to undertake legal proceedings. That is why the council is in favour of restoring the fund created under the Court Challenges Program to support negotiations with government. That being said, we are opposed to binding arbitration.

Today, on behalf of the council, I will address two aspects. First, the funding of human rights litigation. Secondly, the increase in the funding envelope for community consultation created under the previous program.

Let's begin with human rights. The human rights legislation and system in Canada is sometimes the best forum to advocate for the equality of persons with disabilities. The objective of human rights legislation throughout Canada is to eliminate discrimination. By filing human rights complaints, persons with disabilities support and enhance the parliamentary intent and objective to eliminate discrimination. In our opinion, that is a valid objective that should be funded by the government.

In this regard, let me give you the example of a case the council participated in. This case is unfortunately not mentioned in our brief, but it is quite well known. It is the Hughes, James Peter v. Elections Canada case, a case argued before the Canadian Human Rights Tribunal in 2010. This case dealt with polling stations that are not accessible.

As you can see, this was not theoretical. In this case, the person's right to vote, the most fundamental democratic right, was jeopardized for discriminatory reasons. Mr. Hughes filed a complaint with the Canadian Human Right Tribunal. The council was granted interested party status, which is equivalent to intervenor status before the court.

The tribunal granted a range of very interesting, varied and multidisciplinary remedies. These remedies were obtained in consultation with the council. This shows that it is not necessarily just a matter of proceedings between adversarial parties, but that sometimes the council and the complainants work together to bring about better policies.

In this case it was determined that Elections Canada had to consult the council and the population of persons with disabilities so as to make the Canadian electoral system more accessible. In addition, this decision was in keeping with Canada's international obligations to persons with disabilities, which are to ensure that Canada promotes participation, equality rights, dignity and independence. This type of very innovative and progressive remedy might not have been possible in the context of a court case invoking section 15.

Currently, it must be said that the human rights system in Canada is not accessible. In Canada (CHRC) v. Canada (A. G.) the council intervened before the Supreme Court to argue the fact that human rights complainants who win their case should be entitled to compensation for their legal costs. The Supreme Court did not accept that argument. So, a complainant who wins his case and obtains systemic improvements that affect all persons with disabilities will not be compensated for court costs. Often, there is no financial advantage to pursuing a case. In the Canadian human rights system, damages are capped at $20,000. In the case of Ms. Mowat, legal costs amounted to $100,000.

To summarize the issue, the battlefield is neither equitable nor equal. You have certainly heard about professor Blackstock's case dealing with aboriginal children.

● (1015)

The system is not equitable. The Council of Canadians with Disabilities believe that the reinstatement and modernization of the Court Challenges Program should be accompanied by a new strategy regarding court cases at the Department of Justice. When that department deals with groups who advocate for equality, groups that have been historically disadvantaged in court, it should perhaps attempt to create a more level playing field.

I would now like to discuss the consultation funding envelope and the involvement of groups that promote equality.

The old program granted funds for consultations. In our brief we ask that this fund be extended so that consultations may be carried out throughout a court case. A sum of $5,000 is not sufficient to conduct accessible and bilingual consultations with persons with disabilities throughout Canada. Here again, the purpose is to see to it that Canada complies with its international obligations stating that court proceedings should take place in a manner that promotes the participation and independence of persons with disabilities.

Thank you.

● (1020)

The Chair: Thank you very much for your presentation.

I also want to thank all of the witnesses.

We will now have our question and answer period.

[*English*]

Mr. Falk, please go ahead.

Mr. Ted Falk (Provencher, CPC): Very good. Thank you, Mr. Chairman.

Thank you to our witnesses for attending committee here this morning.

Mr. Mia, I'd like to begin my questions with you. You made some references to charter relevancy. I know, having read your written submission, that you're also an advocate of expanding the current mandate of the program to include section 7, as some of our previous witnesses are as well. That isn't lost on this committee.

You talked about there often not being resources available to pursue access to justice. Can you expand a little on a funding model? You didn't talk at all about what kind of funding model you would envision with this new program that is being proposed. Have you given it any thought? If so, can you elaborate on it?

Mr. Ziyaad Mia: Thanks, Mr. Falk.

We haven't given it much thought in depth. In the previous model, the litigation piece, it was case development, the litigation funding, and some negotiation dollars. I think for the pure litigation side that's important. I think the old program also had money for outreach and some impact studies. I think those pieces are important as well. In our view, the heart of it is the litigation funding, but that's not all. It isn't just the dollars for litigation. That's important for sure and we would like to see it. But part of it is also education and outreach.

Our society is arguably one of the richest societies in the history of humanity. But when you're disadvantaged, you don't have a lot of time to access Parliamentary committees, to go and seek out lawyers to take your case. You just tough it out in life, so part of it is the outreach, getting the message out to people who may have their rights infringed upon. We need to tell them they have a resource they could use to explore their rights, or to enforce their rights, against government action that's disadvantaging them. That's important.

The program also did a lot of work on capacity-building and researching the impact of decisions. It looked at future challenges and explored issues. At its heart, the CCP is a test case program. This is the reason we would like to see section 7 in there—it is rife with test case activity. It may fail. It may not. We don't know. That is for litigants to bring forward and for courts to decide. But to explore the contours of the charter, to fulfill the rights of disadvantaged and vulnerable people in this country, I think it's important to do all those.

I looked at some of the dollars in the old program. I've worked in the public sector a lot. I've worked in private sector. It's not a lot of dollars to fund the litigation, the amounts that the program did cover. It wasn't that they were writing a blank cheque to someone. It wasn't just an invitation to sue the government. It was really an encouragement model. It showed that there was other funding available and that this would top you up and get you capacity support and advice on strategy.

I believe it was Mr. Chipeur in the previous panel who said there was bias in selection. We're all humans. I guess there's always some bias. The issue is that there does need to be some vetting. The old program had about $2 million to $3 million annually. If I'm running that program, I'm not just going to hand over $50,000 or $60,000 to each one that comes in the door on a first-in basis. I want to fund the ones that have a chance of success in pushing the law forward, so this is important.

Without giving you dollar amounts, I'd say the funding needs to be increased, especially given that times change and litigation is costly. I'd say increase that funding, and make it stable and sustainable. I know my colleague and friend Mr. Bhabha was here recently. He talked about whether there was a constitutional right to charter challenges. That's an interesting point. If you think about it, disadvantaged people in this country can't access their rights. By virtue of being disadvantaged, the discrimination in the access process is itself a charter violation. He raises an important point. It's something you should think about in securing funding that is stable and bulletproof, as bulletproof as you can get it. It should be independent of government for sure.

● (1025)

Mr. Ted Falk: Thank you for that answer. It partially answers my question.

Should applicants have to demonstrate that they actually require funding? In the past, there have been some very well-heeled organizations that have applied for and received funding. At the same time, some folks that are legitimately in need of funds to pursue access to justice haven't qualified. Should there be a demonstrated need for funding? Should there be some kind of cost-sharing built into the program? Have you thought about that at all?

Mr. Ziyaad Mia: The previous program was sort of cost-sharing, because the litigant had to put substantial money forward. I think it was only tens of thousands. When you're looking at charter litigation, it's not a lot. The bulk of the money was still funded by the litigant or the organization. I agree with you that we want to fund those who can't. That's the whole logic of it. If you can't get there, we want to assist you in making your case if you have a good one. If you can get there, then arguably you shouldn't be accessing this program.

Mr. Ted Falk: That's good. That's all I wanted to hear. Thank you.

I think I'm out of time, right?

The Chair: If you want to ask one more question, because he spoke quite at length for the first question.

Mr. Ted Falk: Thank you, Mr. Chair. That's very considerate.

Some hon. members: Oh, oh!

Mr. Murray Rankin: That's not surprising.

Mr. Ted Falk: It's not surprising, no.

Ms. Parsons, you talked a little bit about alternative dispute resolution. You're not a fan of that?

Ms. Margaret Parsons: I am a fan of alternative dispute resolution. It does have a place in our legal system—

Mr. Ted Falk: Thank you. Okay.

Ms. Margaret Parsons: —but I think that when we're talking about equality rights, we're talking about systemic change and systemic impact, and alternative dispute resolution doesn't lend itself to that.

Mr. Ted Falk: Thank you.

Thank you, Mr. Chair.

The Chair: You're saying that because it resolves the case for the individual litigating—

Ms. Margaret Parsons: For the individual...it's individualized.

The Chair: —you're not getting a societal decision.

Ms. Margaret Parsons: It's individualized, absolutely.

The Chair: Go ahead, Mr. Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you, Chair, for allowing me to ask these question.

I'd like to begin with Mr. Mia. Thanks for coming in.

You mentioned that the new program should be as independent as possible from government. It's related to another question I'll ask about funding. Do you think that the new program should be created by an act of Parliament to make it much more difficult to abolish it in the future? If so, if you agree or not, what are your views on that?

Mr. Ziyaad Mia: As I said, we want to ensure that this program is stable and solid. Part of being independent from government is that it can't be cancelled at the whim of the next government when things change, and then the program's gone.

I don't have a particular opinion on how you go about doing that, but if one way forward is to have legislation that creates and entrenches the CCP and then lays out the fundamental principles, we'd be interested in looking at that legislation. I think that's one way to go, certainly, in achieving stability.

Mr. Ahmed Hussen: If anyone else has an opinion on that, I'm happy to hear it.

Ms. Anne Levesque: When the program was cut in 2006 and equality-seeking communities were looking at the possibility of a charter challenge, the strength of their legal arguments was a bit more challenging to establish than in the case of the language rights community.

I think one thing that would be very helpful, something that equality-seeking groups have been saying since the beginning and something that the treaty bodies consistently say, is that the court challenges program is a way to put in force section 15, and it is a way for Canada to comply with its international obligations under CEDAW, under CERD, under various international treaties. If that was said in the preamble, it would be very helpful in future litigation. In that way, when the government makes an announcement of the future program and the announcement clearly says that this is, in the government's view, a program that is in keeping with section 15 and that there is an obligation to fund it, just building that record would be helpful.

Equality-seeking groups have been saying that. They've been appearing before treaty bodies, but to have the government make that statement would really bolster a case if ever the program should be cut in the future.

● (1030)

Mr. Ahmed Hussen: This question again is related to the independence of stable and sustainable funding contributing to the independence of the program and its sustainability. How do any of the panellists feel about a public-private funding model, moving forward, to ensure sustainability and stability?

Ms. Margaret Parsons: No. I think that doesn't ensure stability. Public-private funding requires you to be in the goodwill of the private sector. In terms of stability, we strongly support a legislative framework, an endowment or a foundation similar to what was done with the Canadian Race Relations Foundation, and that this be supported by government. That will ensure the stability of the program going forward and lessen any possibility of it being cut or defunded in the future.

Mr. Ahmed Hussen: I just have one quick question for Ms. Parsons. Any of the panellists can jump in, but I'd like to begin with you.

In my experience, the communities that need these sorts of programs the most are the least informed of their existence or of the processes to access their benefits. In your experience, how do we ensure, even if we have a more robust, expanded program, that as we move forward and possibly reinstate the program those communities will be well informed about it?

Ms. Margaret Parsons: One way of doing that is ensuring that the program isn't all about lawyers and all about litigation, and that communities are aware of their equality rights, their charter rights, and what equality rights mean.

Mr. Ahmed Hussen: How do we do that?

Ms. Margaret Parsons: One way of doing that is through consultation, by increasing the funding for consultations, and consultations at a national level and throughout the case. We found in our experience at the ACLC that this was very important.

It's also important in our experience as well to fund interventions into cases. That was a way to bring community coalitions together to be able to understand the importance of a case going up to a court of appeal, the Federal Court, the Supreme Court, and the impact it can have on their communities.

It was also important in terms of the impact study. If we got a positive decision and/or a negative decision, the community was involved in understanding the case, the impact it could have on them, and the potential outcome. It would be a part of developing the impact study, in participating in the impact study.

One of the things that we're advocating for in the inclusion of the new program is an element for training, an element for training of young lawyers, so that they also have the skills and the capacity and the abilities to be able to build and develop a test case, because the skill involved is very unique.

On outreach to the communities, I don't think the outreach dollars were really utilized a lot because they weren't very significant. Outreach to the communities and education to the communities on equality rights are significant if you really want to bring the community into the process.

I would say that the court challenges program as it is, from its previous iteration, and even recently in the consultation we held this weekend is very community based. They really make an effort to ensure that communities, the voice of communities, organizations representing communities on the ground are involved and drive the court challenges program.

● (1035)

The Chair: Thank you very much.

Mr. Rankin.

A voice: [*Inaudible—Editor*]

The Chair: No, sorry, we're out of time. Mr. Rankin may be able to ask you a question that allows you to comment, but I need to pass because the time is limited and we have to get through all the questioners.

Mr. Murray Rankin: Thank you to all the witnesses.

I'd like to start by building on something that Ms. Parsons said, and to acknowledge the work of the African Canadian Legal Clinic. It's really quite excellent.

You talked in your presentation about housing, schooling, and employment as historical discrimination against African Canadians, and I think we would all agree, most of that being provincial in nature, and therefore your first recommendation.

The one that you just talked about I wanted to explore further with you. You talked about the need to make communities aware. You talked about outreach being inadequate in the past in terms of dollars, and money for consultation was the second point. In your presentation you said essentially whatever you do, don't house this within a university context. Is it because of the very things you're talking about, the inability for the community to access it?

Ms. Margaret Parsons: Absolutely. I think perception is important. There's a perception communities may have where they feel it's not accessible. That may or may not be the case. But I think also in terms of what can sometimes be a bureaucratic structure within universities is very problematic.

It's important that the court challenges program, if it is a stand-alone organization, has the administrative dollars to operate properly. No one is getting rich off this program, and in the past they struggled. Currently it's set at a 25% fee, but they have to have those resources. It has to be within a setting, a climate.... If we want to encourage community and we want to bring in community and we want to involve community, how it's structured and where it's placed is very important, and it being stand-alone is very important.

Mr. Murray Rankin: I understand.

One of the witnesses we had earlier, the West Coast LEAF, has a new women's legal clinic, and their objective is to do real problems for real people but to use that as the laboratory from which to find cases that call for systemic relief.

I just wanted to ensure that's essentially what the African Canadian Legal Clinic does. You choose cases that might have more systemic importance.

Ms. Margaret Parsons: Yes, absolutely.

Mr. Murray Rankin: So you'll be able to generate things that a court challenges program would assess.

Ms. Margaret Parsons: Absolutely.

Mr. Murray Rankin: Thank you.

I want to ask Mr. Mia a couple of questions, if I may. First of all, I would like to congratulate you on all of the work you personally did on C-51. We're very grateful to you that we did excellent work on that. I was surprised, therefore, that you didn't spend any time in your presentation talking about the Charkaoui case, and cases like that, so I'll give you an opportunity to talk about the court challenges program in that context.

Mr. Ziyaad Mia: Thank you for the compliment. A lot of people worked on Bill C-51, there were various community advocates and lawyers who were quite active on it.

In terms of national security issues, let's focus on the Muslim community impact. For whatever reasons, Muslims in Canada are disproportionately affected by the national security file and the war on terror, globally, and in Canada as well. That can sometimes have discriminatory impacts directly.

So you have cases where we've had the security certificate issue where Muslim men were detained without charge, without access to counsel essentially, and with secret hearings because they didn't even have a trial per se. In that case, in the Charkaoui decision, the Supreme Court ruled in that instance.

That I believe was funded by CCP on a section 15 issue—and I still think there's a section 15 issue there—and they lost on that issue but they won on section 7. It's just fundamental justice that in Canada and in our system having essentially a secret hearing is antithetical to our system of justice and the rule of law. The special advocate model was created as a result of that decision.

That's one instance on particular communities, communities that my organization has experience with, or take, for example, the Arar issue. There wasn't legislation per se, but the charter can challenge government action, so what actions the Government of Canada took to lead to Mr. Arar's horrible situation in Syria. Those are the sorts of situations where national security can come up.

There's what I've sort of coined as trickle-down discrimination after national security. You have the front-end national security disproportionate impact on Muslims and those who are thought to be Muslims, and then you have the trickle-down effect.

● (1040)

Mr. Murray Rankin: But the trickle-down effect may be discrimination and therefore section 15, but your argument, unlike those of many of our other witnesses, is that section 7 should be the basis of the stand-alone ability to access the court challenges program, not in conjunction with the section 15 claim. You're standing by that based on Charkaoui, and Carter, and other cases.

Mr. Ziyaad Mia: Charkaoui is a classic example because the CCP funded the section 15 argument, but not the section 7 one, and they won on section 7. So who knows if they had funded it what arguments could have been made on 7 in that security certificate context.

Arguably on section 15, religion is there, so if Muslim Canadians thought there was an intersection of religion and national security discrimination that would come up, but it's the socio-economic rights that section 7 is also pregnant with that we would like to....

Mr. Murray Rankin: Right, and section 7 may be a section for, you, Ms. Levesque. It could give you an opportunity to perhaps expand on the last answer.

That would be a section where socio-economic issues come to the fore. Your colleague, Mr. Rae, I thought helpfully brought to our attention that equality before and under the law is one thing, but equal benefits of the law, he pointed out, is another thing. However, so are socio-economic impact, housing, people who can't access the legal system, and section 7 will likely be the basis for that so I presume that you would agree with Mr. Mia.

Ms. Anne Levesque: Yes, with a certain maybe nuance.

I think there's a lot of opportunity for section 7 to advance social justice for the most vulnerable. I'm thinking of socio-economic rights, violence against women—I think that it's a violation of women's security whether it occurs in the private or public sphere—and reproductive rights for women.

However, section 7 has also been used to advance the rights of the most privileged to cut health care queues, so I would be very careful in expanding the scope of the program to include section 7. There should be some kind of requirement that it is nuanced and that it must be based out of historic disadvantage or have an equality lens. Section 7 has been used to undermine the rights and social programs that people with disabilities and vulnerable people really need to be fully engaged in Canadian society.

The Chair: Thank you very much.

Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you.

This is a great discussion and I want to thank all of the panellists for coming in and expressing your views.

I'm just being cognizant of the time. I will keep my questions somewhat brief.

I want to start with Mr. Mia and I will ask the rest of the panellists to give their views.

A number of witnesses have come in and have indicated that there is a need to expand the CCP to include cases involving provincial jurisdictions as well. Given that budget 2016 allows for $5 million per year to fund the CCP and thinking that we don't really want to open the floodgates in terms of accessing that dollar amount, in your opinion then do you think that provincial law and action could be limited to only those cases that have a national implication?

Mr. Ziyaad Mia: Thanks for the question.

It's hard to say, because you could have a case starting in provincial law on government action and it's not funded, but we don't know where that case will go or what implications it will have. Take, for example, an administrative tribunal in Ontario. A charter issue arises, they rule on it, and it goes through some Ontario courts at the lower level. But then a B.C. court picks up on that decision and uses it. Now you have two decisions deciding, and it might set a national standard. You've basically set in stone a principle or a precedent, and there hasn't been an opportunity for that disadvantaged group to inject an interest at that first stage.

I don't know how you'd be able to say that this one or that one will have national implications. On that ground, practically it's hard to know, and on principle, the charter is meant to be a check on government action. It is not meant to be a check on federal government action. It is meant to be a check on all government action. That is why we think it should apply to both federal and provincial law and action.

Knowing that obviously there are political complexities in terms of how you roll it out and all of that, certainly we were happy to work with you in doing that. But I think as a first principle, yes, it should. How do we get to the point where we design a program that does, and where you don't ruffle too many provincial feathers and they're on board? That needs to be thought out for sure, but it doesn't dilute from the principle.

If I may take one second to address Ms. Levesque's point, I fully concur with her. I don't want to be misunderstood. Section 7 should be focused on assisting those who are disadvantaged. Our whole position is on disadvantage.

● (1045)

Ms. Anne Levesque: I would just add that with regard to the cases with systemic implications, the program as it's currently structured has panels who are appointed by members of the community. They have legitimacy in the grassroots community as people who are able to select cases that have that systemic implication. The program has the capacity to do that. It's been doing it since it was founded. The structure does that.

Venturing into the provincial realm, the program as it is has the expertise to decipher which cases ought to be funded based on national importance. The CCD does it in its own interventions. We only intervene in cases that we feel, given our limited resources, will have a national impact. The court challenges program has made that assessment with its scarce resources, and has the capacity to do that. Expanding to the provincial sphere will not be a problem.

Mr. John Rae: As an additional parameter, the focus should be selecting cases that seek to expand equality, which I think is what was done in the past. That should be a parameter of selection.

Ms. Margaret Parsons: The ACLC's position on section 7 is that it should not be stand-alone—sorry, Mr. Mia—because of the floodgates issue. While we support provincial jurisdiction, we support section 7 if it's linked to section 15, in terms of the provincial jurisdiction as well, and if it has national implications, not just within the provincial context.

However, if the recommendation is to have section 7 as a stand-alone or provincial jurisdiction, even if the impact is just within a particular province, you cannot do that within the current funding model or dollars. You have to give it the funds it requires, the resources it requires, to really make that effective.

I think what we have to recognize, in trying to stay within the original intent and mandate of the court challenges program, is what it was meant to achieve around systemic issues, around trying to make systemic change and systemic impact in the area of equality rights, both equality and language rights, opening it up to understanding the floodgates piece, and giving it the resources to be able to do that.

The Chair: Thank you.

Do you have one small question?

Ms. Iqra Khalid: In terms of assessing which cases would be granted funding, can all of you just briefly let us know what you think of a panel or deciding committee on how funding should be provided in terms of making it fair and equitable for all?

The Chair: There is thirty seconds each for an answer.

Mr. Ziyaad Mia: I'll cede my time to my colleagues.

Ms. Margaret Parsons: It is important to note the experts that are on those panels and the credibility they have. They have done a superb job in picking cases that have a wide, national, and systemic impact. The way the program is structured and the organizations that are involved, it is a culture of consensus. It's a culture of learning. It's a culture of respect.

I have never seen where we have battled for resources. It's very much a learning environment. Being involved in the court challenge program, I have grown and learned so much about other equality rights issues.

I really concede to the panels, both on the language and equality rights side. They are very knowledgeable. They know what they're doing. They know the issues. They work very hard and they have done a superb job.

● (1050)

The Chair: Thank you.

Ms. Levesque, Mr. Rae, have you anything to add to that?

Mr. John Rae: Yes. If the community is directly involved, we can work together with other equality seeking groups. I believe we've done that in the past. I have full confidence that a range of cases will be selected that do have national implications, and certainly, if the make up of the program is nationally focused, so that all parts of the country are represented, no part of the country should feel disadvantaged. That is a possibility. Cases from all parts of Canada need to be given equal consideration, and with the community involved, I am confident that will happen.

The Chair: Thank you very much.

I want to thank all the witnesses. It was a pleasure to hear from each and every one of you. All of you added something to our debate.

I'd also like to thank Mr. Kmiec for coming to the meeting. It was his first meeting with our committee.

The meeting is adjourned.