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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (0850)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I'd like to bring the committee back into session.

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

[*Translation*]

We have the great pleasure of welcoming our very distinguished witnesses today.

[*English*]

I would like to welcome Maître Eric Maldoff, who is a long-standing pillar of Quebec's English-speaking community and who will be testifying.

I'd like to welcome two other pillars of the community, Kathleen Tansey, who is the vice-president of the board of directors of the Court Challenges Program of Canada, and Frank Verrillo, who is a board member and a former school board commissioner.

It gives me great pleasure to see all of you and to welcome you to this committee, and I know all of the members join me in welcoming you.

I'm going to turn now to Mr. Maldoff to start.

Mr. Eric Maldoff (Lawyer, As an Individual): Thank you very much, Mr. Chair, and members of the committee.

I understand I'm under a very tight leash in terms of time, so I'm going to speak quickly and breathe little.

I'd like to address three aspects of the question that's before you. One is the importance of court cases to our community in the past. The second is what I anticipate may be coming down the pipe in terms of a need for this. Third is some of the elements of what I think should be part of a renewed or reinstated program.

Very quickly—and I'll be happy to discuss it more in questions—there are a number of cases that have really made a difference for our community.

There was the Blaikie case and the Manitoba Reference case in 1979 and 1984 in which the Supreme Court upheld the bilingual courts and legislatures provision of our constitutions and struck down unilingual courts and legislation provisions in Manitoba and Quebec. This was vital to us, because courts and legislatures is a fundamental core to the whole practice of our democratic system.

In 1984 the PSBGM case, which was decided by the Supreme Court, broadened access to English schools from Bill 101, which stipulated that only children of English people educated in English in Quebec could go to English school. It was broadened to children of Canadians educated in English in Canada who could go to English school.

The community cannot survive if it cannot revitalize itself and if it cannot be a welcoming community. We're far from being in an ideal situation right now, but that case moved a long way in helping to stabilize the decline, rather than have us in free fall.

In 1984 and 1990 there were the Ontario Education Reference and the Mahé case. I think the Mahé case is compulsory reading for this committee. It's brilliant. It held that section 23, minority language education rights, include control and management for the linguistic minority. That, by the way, cleared the way for a constitutional amendment in 1997, which allowed us in Quebec to move from a confessional school system to a linguistic school system because of the constitutional guarantee that we received for the linguistic system replacing the confessional guarantee. That was important to allow us to have critical mass and to start focusing on a modern reality.

With the Ford case in 1988, the Supreme Court struck down the unilingual French signs law in Quebec and in that made a wonderful statement that: “Language is not merely a means or medium of expression; it colours the content and meaning of expression.” That was the beginning of the court really starting to elaborate its thinking on these things. The sign issue was important, because there was an attempt to deny our legitimacy, our visibility, and our presence in the province. We are not visitors, we are not interlopers, and we are not the extension of somebody else. We are a community that has been in this province for several hundred years. We have built the province, we are part of the province, and we are not going to be treated as some sort of passing, transient people who drifted in from British Columbia.

Then there was the Montfort Hospital case, which was very important. The Ontario Court of Appeal found an unwritten constitutional principle of a minority as having a right to some measure of control in their health services and health institutions. That case became very important to us in the restructuring of the health system—which just took place in Quebec and which was dramatic—where our own institutions that we controlled and managed were being wiped out. The threat of using Montfort to stop that at least got us to the table and enabled us to get some strengthening of the minority language guarantees within the system, although the control and management is still unresolved.

For the future, in the Mahé case the court said, speaking through Chief Justice Dickson: “minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional”. I couldn't say it better myself. Frankly, it should be said and understood clearly.

It's an uphill battle, and often it is a battle. It is important to have the ability to turn to the courts and say, if you don't want to listen, then we have somewhere to go to talk this through. Otherwise rights become dead letters. We will continue to need the courts in the spirit of what the court, itself, recognized, that the community is under serious pressure.

● (0855)

I want to make a distinction. The English language is not threatened. It's a global language, it's the currency language of business. It is not a threatened language. The community is threatened as a community, as a vital entity that can replenish itself, that can play an active and full role. We're an aging population. Our young people have been leaving in droves. There are concerns about how we will tend to the aged as years go on. Our institutions, which we built, don't have the critical mass of community to continue to support that, not because the community doesn't believe in the institutions, they stopped believing in the place. That's an important issue. The community got tired and is getting tired, because every day it's another battle. Looking to the future, we're going to need this program. We're going to need it for education. The government wants to wipe out the constitutionally protected school boards that we have. That will not go down easy. The Supreme Court in Mahé was clear about the roles that schools play in terms of being a focal point of community life, community identity, that education is essential for language, culture, and identity. That case will go to court unless the government decides to find a way out.

The bilingual legislative process that the Supreme Court recognizes must take place is not being respected in Quebec. Frequently laws are being adopted only in French and English translation delivered after they are set. They are probably invalid. But on top of being invalid, they're being translated by people who are not experts in translation in English. The result is that we're getting versions of a law that are incomprehensible or inconsistent with the French version, with the result that after that people say, you can't bother with the English version, even though our law say both versions are of equal weight because the English version often makes no sense or is contradictory. This has been brought up. It's been discussed. It's been for years and years, and it's one for which maybe at the end you have to move the yardsticks with the court.

With regard to health and social services, the reform has put much more more control in the hands of the bureaucrats who are exceeding their jurisdiction in issuing directives controlling the administration of our institutions. I suspect that if this doesn't stop and if we can't find a way to stop it, it will end up in court.

With regard to education, there is a new curriculum that's been brought out by the Government of Quebec in history. They wrote a history that by all accounts is a torqued history that is not a fair presentation of Canadian history. Mahé has held that curriculum is one of the essential elements of control and management of education. I expect that, in due course, if the government is not willing to fix the curriculum that again will be challenged. Furthermore, we get a lot of our texts and stuff translated from French two years after the French schools have had them. That's just not fair and it's not proper and it's not giving us equal access to education.

Public service is a *chasse gardée* of a certain group of people. Thirty years ago, less than 1% of the public service were English-speaking Quebecers. Thirty years ago government started promising that they would change that. Thirty years later less than 1% of the public service of Quebec are English-speaking Quebecers. Why do we care? They shape policy. They shape thinking. They guide direction. They give rise to the legislation that gets adopted under section 133. Without the input of the community there's a complete lack of sensitivity and understanding and, as the court says, it's not necessarily bad faith but it's happening and it happens all the time.

In health we have the Montfort case. We access to services but now what's happened is that we are getting directed that we can't put up bilingual signs that direct people to the services. At some point we're going to have to get people to understand that health services include access to the information about the services and where they are. Again, you talk and you talk and they ignore and they ignore. Then you have to do something, through a new program or a reinstated program.

As the Supreme Court found in Mahé, language rights are a separate class of rights. They are distinct from equality and multiculturalism rights, which they see as legal rights. That distinction is important and therefore we need a different panel or program or aspect of the program that is budgeted for that.

● (0900)

It has to be autonomous. It has to be properly funded. It has to be sustainable. It has to expand into federal laws like the Official Languages Act and it must be dedicated to research and proceedings. ADR should not be a precondition to access. Thank you very much.

The Chair: Thank you very much, Mr. Maldoff. I know the panel looks forward to questioning you on some of these points.

I'd like to appreciate the fact that Justice Bastarache has now joined us.

[*Translation*]

It is a great pleasure to welcome you here, Justice Bastarache. We will give you time to get organized. We will go to Ms. Tansey, and then we will give you the floor.

Mr. Michel Bastarache (Legal Counsel, As an Individual): Thank you for welcoming me. I apologize for the delay, but as you can see, I have a rather serious back problem. It is worse than normal this morning.

The Chair: Don't worry. I will give you time to get organized. We will go to Ms. Tansey, and then give you the floor.

Mr. Michel Bastarache: Thank you, but that will not be necessary.

Today, I want to talk about the Language Rights Support Program. The program up for reinstatement may well be somewhat similar to the one in place now. I do, however, think that it is lacking in some regards. I also think that the former program had some problems.

First of all, I think it needs to be a program that deals precisely with proceedings. Personally, I think that if we establish a program with a “research” component, a “public information” component and a “discussions for out-of-court resolution” component, it will no longer be the type of program we need.

Those things can be done in other contexts by other institutions. The Commissioner of Official Languages is responsible for raising public awareness about linguistic rights. Research is conducted in universities and if research is not directly linked to proceedings, it leads instead to publications, conferences and discussions. The problem, however, is that available funding for proceedings is drained. And those funds are always in short supply.

I have used both programs on several occasions, and I can tell you that it is extremely difficult, because the proceedings are almost always against the government, which has virtually unlimited resources in this area. Proceedings have been initiated against the federal government on the constitutionality of regulations under section 20 of the Charter. The government has four full-time lawyers and an outside office assisting it. On our side, we have a total budget of $150,000 which covers expert fees, travel, court fees, as well as our lawyers' honoraria. And the issues drag on.

It is not really a matter of adding money, but ensuring that available funding targets specific areas and is used as initially intended.

Then there is also the issue of administration fees. I don't know what the current program administration fees are, but the administrative component under the previous program was hard to understand, because the annual report stated that 35% of the funding was earmarked for administration.

I, myself, sit on boards for foundations, and I don't know any of them that spend 35% of the funds. Funding is limited and people are forced to try mediation; money is spent and conferences and meetings are held. I attend those conferences. The problem is that they bring together people who are already on side and who ultimately end up talking about the cases they are defending. I believe that can be helpful, but that duty lies with the universities and bar associations, not with an institution like that.

Firstly, the program's independence needs addressing. Why is that so important? Because the proceedings are constantly initiated against governments. If the program depends on the government, if the government is in a position to, at any time, threaten to withdraw funding, the program is not independent.

I believe that the best form of independence would be to set up a foundation so that it would not be necessary to seek out funding every year. Sufficient funding would therefore be available to maintain and administer the program in accordance with very strict rules regarding the spending of funds, for reports and audits. I truly think that is a possibility.

● (0905)

Second, there is the members' appointment. The University of Ottawa currently handles the program, though third parties believe that the program focuses on Ontarians and favours them. In addition, several University of Ottawa professors participate in the program.

I believe that the program should not have such ties and should be truly independent. It can be physically located in such an institution. However, if we want to go down that path, I believe that the programs—because you're planning for two, one for section 15 or general rights and the other for language rights—should be housed in the University of Moncton. At that university's law faculty, there is the International Observatory on Language Rights that has a research branch with the participation of foreign experts, etc. It would be the logical choice for this program as there could be co-operation in research, in conferences, and that kind of thing. I know that at the University of Ottawa, several chairs and institutions address the issue of human rights; we could therefore place the other institution there.

Of course, we would have to set up a board of directors though without necessarily having too many members, as we are talking here of management, and not the management of hundreds of millions of dollars. We could therefore have a structure that represents every region of Canada, and simply ensure that members have a certain level of management skill.

There would have to be a science committee that would analyze requests. It is not difficult to identify potential members on that front, in the field of languages, who are specialized and sufficiently skilled. I think that we can count their numbers on our fingers. We are not talking about finding people who do litigation, but members who are aware of the importance of language rights. They must above all be realistic and must realize that these processes have a direct impact on Canadians.

As it stands, the vast majority of subsidized cases are linked to section 23 of the charter, which is about the right to education. However, a clause in the program is incompatible with this, as it says that it will fund cases that will lead to case law. If everywhere in Canada, the issue is that provinces refuse to fund building schools, does that therefore mean that we will only be funding one school in the whole of Canada and that the others do not count? This goes against logic.

Moreover, people will have to turn to ADR, which is essentially an attempt at mediation. Can a fundamental right truly be addressed through mediation? We cannot simply choose to acknowledge half of our constitutional rights. Either we uphold them, or we do not. I believe that one should be able to request funding for mediation in appropriate cases, but I do not think that it is necessary in all cases. I gave you an example of this earlier on. Section 20 addresses the right to public services when there is a sufficient demand. However, Statistics Canada has decided that sufficient demand cannot be determined by the number of francophones in provinces where French is the minority language, but by the number of people who speak mostly French at home. This therefore excludes an enormous amount of people.

Do not forget that in the case of francophone communities outside of Quebec, over 60% of people are in mixed marriages. Suppose the children go to a French school or an immersion school, and are asked whether they speak more French or more English at home. Given that these children speak more often to their mother than to their father, if the mother is anglophone, 100% of these people will be counted as not speaking French and not requesting services in French. This system was established in the early 1980s, but doesn't meet any sort of scientific criteria. Indeed, no studies have been done on the subject.

● (0910)

Now with regard to the program's jurisdiction—and my friend Eric Maldoff has already mentioned it—it should not only affect rights that are directly tied to the charter, but all federal language rights. At least 30 Canadian statutes include language provisions, not only the Official Languages Act.

Here is an example. Today, the newspapers are running a good number of articles on the National Energy Board's public hearings. The NEB claims that it is a quasi-judiciary organization. Therefore, all documents submitted by parties do not have to be translated, as they are considered to be documents tabled during a trial. That would mean that in a hearing that would take place in Montreal, for example, the requesting party would be able to table all the documents only in English.

However, pursuant to the National Energy Board Act, the board must organize public hearings. The board tells us that public consultations are not a service to the public, but rather a judiciary service. One must remember that the board does not deliver licences, it merely makes recommendations to cabinet. All of this is rather questionable.

That is why requests for funding should, in my opinion, be tabled in view of a legal process that seeks to implement language rights pursuant to the charter or a federal statute.

What is important, in my opinion, is the program's independence and the fact that the focus is placed on the trials. We need to give up the notion of test cases as well as that of mandatory mediation before we reach the courts.

The Chair: Thank you, Mr. Justice Bastarache. We will have questions for you after the presentations.

[*English*]

Now we are going to move to Mr. Verrillo and Ms. Tansey.

Welcome. Thank you so much for being here.

Ms. Kathleen Tansey (Vice-President of the Board of Directors, Court Challenges Program of Canada): Thank you very much for having us. Good morning to everybody. Justice Bastarache is a hard act to follow.

We'd like to express our thanks to you, Mr. Chair, to the justice department, and to all of the members of this committee for inviting us here to participate today.

I'm Kathleen Tansey. I'm co-chair of the language rights panel, and I'm also co-chair on the board of directors.

This is Frank Verrillo. He is the English language representative on the board, and a member of the board of directors as well.

We've come to speak to you today about the Court Challenges Program of Canada, the CCP, to tell you what this program has done and still does represent in accessing justice and the protection of human rights in Canada.

You know the history, but I'm going to go through it briefly.

It was first established in 1978 by the Trudeau *père* government after important language cases had been brought forward in Quebec by individuals at tremendous personal financial cost and expense.

It had been recognized that because of the fundamental importance of these rights in question, and the staggering costs of litigation that were required to help enforce these rights, there was a pressing need for a financial contribution program to help members of official languages minorities bring their cases before the courts, and to clarify and enforce our constitutional language rights when government legislation, policies, or practices denied or obstructed these fundamental rights. Even 38 years ago, it was clear that without such a program or mechanism in place, official language minorities would have little or no voice to have their rights recognized or respected. Without the CCP, and its predecessor, such litigants would be deprived of any access to justice.

The mandate of the CCP was to provide limited financial support for minority language right litigants to challenge federal legislation. It was expected that it would not cover the entire costs, but there would be other elements, such as the constitutional lawyers giving a reduced rate, or whatever it happened to be, in order to take these cases forward.

In 1982 the Canadian Charter of Rights and Freedoms was enacted. The mandate of the CCP was expanded to include language rights entrenched now in the charter.

In 1985 the equality provisions of the charter came into effect. The Mulroney Conservative government expanded the program's mandate to include equality rights litigation for those who wish to exercise their equality rights guaranteed to them under section 15 of the charter. Without this in place the charter is certainly a noble inspirational and laudable document, but it lacked any real teeth or enforcement mechanism—pretty on paper, but nothing more.

The glaring inequity and imbalance between the opposing parties, with the rights-seeking litigants on one side and the government on the other side, exist on several levels. Primarily it's mostly on the financial level, so a program that provides contribution or funding for these test cases is essential. The financial inequality alone constitutes such a serious impediment as to effectively deny access to justice for those who wish to assert their constitutional and equality rights under the Constitution or the charter.

In 1992 Mulroney cancelled the CCP. The Official Languages Commissioner ordered an impact study done at the time. It identified and confirmed the deleterious effects of the cancellation of the program on official language minorities, their communities, their development, their enhancement, and their vitality. It underlined as well the importance of the program in promoting and in implementing constitutional official language minority rights.

In 1994 the Chrétien Liberal government, restored to power in 1993, reinstated the program. The program proceeded to exercise and fulfill its mandate to test cases of national significance in constitutional language and equality rights, and to provide access to Canada's official minority language groups, and its historically most disadvantaged, vulnerable, and marginalized citizens who had been denied and excluded from full participation in Canadian society.

On September 25, 2006, the Harper Conservative government, without any notice or any consultation with the Court Challenges Program or any of its stakeholders, and with no consultation whatsoever with Canada's official language minority communities, with equality-seeking groups, or with Official Languages, abruptly abolished and axed the Court Challenges Program.

● (0915)

It did so on the pretext—and believe me, a pretext it was—that the CCP did not provide value for money, was not accountable or effective, that there was no need for further test cases and, my personal favourite, that the Conservative government would not enact unconstitutional legislation.

There were two independent reviews. In 1997 and 2003, there were two extensive evaluations and reviews conducted on the Court Challenges Program. They were conducted by outside independent research firms.

I'm going to take some words from this to let you hear what they said. Both found the Court Challenges Program “effective and accountable”, and determined that it provided Canadians with value for the money spent. These are words from the 1997 review:

> The importance of the program's financial assistance on cases is undisputed. It has supported many cases and made an important contribution to constitutional law.

Maître Maldoff listed some of them. You know there are so many more.

It has been involved in almost all of the litigation across this country on educational rights for minority official language communities. On the equality side, the CCP has sponsored several cases that, while not necessarily successful before the court system, raised awareness of the issues, and ultimately resulted in changes to the law.

In the 2003 Prairie Research evaluation, they stated that Court Challenges addresses the need that led to its creation. “Its activities are consistent with strategic objectives established by Heritage, especially those relating to citizens' engagement and the promotion of official languages.”

They went on to say, too, that the charter and the Constitution are still alive, and consequently “there will continue to be dimensions of the constitutional provisions that require clarification indefinitely”.

> The evidence collected indicates that the Program has an effective management structure in place, and that the procedures followed to review applications and allocate funding do reflect good practices in that field. [...] The Program has been successful in reaching out to members of linguistic minorities and disadvantaged Canadians. [successful in supporting important cases that have a direct impact on the implementation of rights and freedoms] The evaluation indicates that many of these courts cases would never have been brought to the attention of the Courts without the CCP.

There was a public outcry in 2006 when the Harper government abolished the Court Challenges Program. Petitions from across Canada were signed; complaints were filed. There were 118 complaints filed with the Office of the Commissioner of Official Languages. The vast majority were protesting the abolition of the Court Challenges Program.

As Graham Fraser will be addressing this committee next, I'm going to defer to him on the steps he took and his findings.

Suffice it to say that the FCFA sued the Harper government over the abolition of the Court Challenges Program. The Commissioner of Official Languages intervened in the case on behalf of the appellant, the FCFA, and an out-of-court settlement was reached that resulted in the creation of PADL, the language rights support program, in 2009.

Am I still in my eight minutes?

● (0920)

The Chair: You're getting close.

Take another minute and a half and give us your recommendations.

Ms. Kathleen Tansey: I'll get to the conclusions, then.

There was absolutely no justification for the abolition of the Court Challenges Program, either in 1992 or in September 2006. In all the years of its existence, it had excelled in the performance of its mandate to clarify and advance constitutional rights and freedoms related to equality and official minority-language cases by providing financial assistance. It has been the major force and instrument in obtaining access to justice for official-language minorities and equality-seekers from its inception and, I would say, right up to the present day.

Yes, I did say “present day” because, despite rumours of its demise, the Court Challenges Program is still very much intact, active, operational, and viable. Its seven-person board of directors and the members of both rights panels—the language rights panel and the equality rights panel—have remained in place since September 25, 2006. The board submitted persuasive arguments. Harper would have cut every cent from the program immediately on September 25. We presented arguments that convinced the very reluctant government to allow the Court Challenges Program to continue supporting and funding test cases that had been approved by the two panels prior to the cuts. We won the right to have these cases funded up to final resolution or final appeal. The Caron case was just decided in January before the Supreme Court of Canada, and other cases continue, too, which is proof of the amount of money and time it takes to fund a court challenge.

As a result of this small victory for the CCP stakeholders, all members of both panels and the board of directors made commitments to stay in place and continue their work and functions for as long as it took to complete this mandate, or until the Court Challenges Program was restored and reinstated. It has been almost 10 years since we made that commitment. With the exception of one board member, who retired in January 2015 and was replaced with Mr. Frank Verrillo, we are all still here. For the record, all of us on the board and the two panels are unpaid volunteers. Nobody has bought us a cup of coffee in 10 years. May I ask you to consider what this indicates about the Court Challenges Program and its invaluable work on behalf of our official minority-language communities and equality rights communities to inspire that level of commitment?

Our sincere thanks to this government and to this committee, and especially to Justice and Heritage, for conducting consultations—that certainly was not done in 1992, and it was not done in 2006—with the communities and stakeholders in an attempt to determine how access to justice can best be achieved.

● (0925)

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

Through you, to all the members of the board of directors and both panels who have stayed in place for the last 10 years, thank you very much on behalf of myself and the members of this committee for all the work you have done as unpaid volunteers, and for making sure the cases that were approved before the termination of the program have been continued to fruition.

[*Translation*]

We shall now begin our question period.

We will begin with MPs from the Conservative Party, who have six minutes.

Mr. Cooper, you have the floor.

[*English*]

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you very much to the witnesses for their testimony this morning. It was very informative. I would like to direct my first question to Mr. Bastarache.

Certainly, the Court Challenges Program predated the charter. However, with the adoption of the charter, there was, I think, a widespread consensus that there was a need for a Court Challenges Program, that the Court Challenges Program needed to have its mandate expanded to test cases, to develop a body of case law. I happened to run across an article in the *National Post* that was published on April 6, 2000, in which you are quoted, particularly in the context of intervenors who appear before courts. You were quoted as saying, “we have lived with the Charter for 18 years.... There isn't the same need there was in 1982 to obtain help from intervenors”.

It has now been about 34 years since the Charter of Rights was adopted. Do you hold the same view, and how would that square in terms of a mandate of an expanded or renewed Court Challenges Program?

Hon. Michel Bastarache: I'm glad that you asked that question, because a lot of people would think that after 34 years the law must be settled. Why do we still need cases to be funded?

You may notice that in all provinces except Newfoundland there have been cases with regard to the educational rights of the language minority. This means that no province has readily accepted to implement section 23 of the charter. Some of the cases are still before the courts. There is one in the Northwest Territories, one in the Yukon, and one in British Columbia. There is one about to start in Saskatchewan. In New Brunswick, the only official bilingual province in this country, there were four language cases against the government last year, and there are still two going on. Why would you say it's not needed any more?

I'm saying that it's needed for the implementation of the rights. It's not so much because we haven't determined the scope of the rights. This is why test cases are not really what we need, although there are still a number of issues that have to be clarified. One of the most important issues is now being raised in the Northwest Territories case. In a few words, in the Northwest Territories there was a lawsuit by the francophone community to get funds to enlarge the school, because it was too small. The government decided that there was a way of restricting admissions so that they wouldn't have to enlarge the school. This they did by passing a regulation under which only persons who are qualified under section 23 are admissible. It means if you move here from France and have unilingual French children, they're not allowed in the French school, because they're not Canadian citizens. To add to that, they decided that preschool, which is in the same building, had to be in English, because it's not covered by section 23. This means that you're going to cut in half the number of children going into the first grade.

I haven't changed my mind. What has changed is the context. But there is still a tremendous need. I think the Court Challenges Program has been well run. It has been effective and is still needed.

● (0930)

Mr. Michael Cooper: Thank you for that.

I would invite your comments, Mr. Bastarache, on how the replacement language rights support program has worked over the last eight or so years.

Hon. Michel Bastarache: I think all important cases have been funded by the program. The reason it's so needed is that in almost all cases it's community groups or individuals trying to develop or start these cases. None of them has any funds. Right now what is happening is that when the funds that are available are spent, the community groups try to raise additional funds in the community. That's very difficult.

The other thing you have to realize is that there is a personal cost that is very important. I'll give you a small example. Before I became a judge, I started all the cases in Prince Edward Island. Three mothers of children in the first or second grade started the case. We won that case. But then, two of these women lost their jobs. They were working for the provincial government. A lot of them had tremendous problems in the community because they were seen as troublemakers and people who might cause strife between the anglophones and the francophones. It's not easy to find people who are willing to commit to these things.

The other thing you have to realize is that these cases last for three or four years. That's a long time. You can convince people to start something for a few months, but three years is much more difficult.

The Chair: Thank you very much.

We're going to go to Mr. Fraser.

[*Translation*]

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

I would like to thank witnesses for being here, and for their presentations.

My first question is for Mr. Justice Bastarache. I come from West Nova, in Nova Scotia, which is home to many Acadians. Our country's language rights are essential for these people. I personally started to learn French in first grade in an immersion school. I am an anglophone, but I have spoken French for a good number of years. Supporting language rights is therefore important to me.

I would like to know what constitutional provisions targeted by the Court Challenges Program and the Language Rights Support Program still need to be clarified. Could you give us examples of provisions that have not yet been clarified?

Mr. Michel Bastarache: The most important example is the one I have just mentioned, which is access to French-language schools. The extent of the management rights of francophone school boards that were created in certain provinces still needs to be defined. The reason is that establishing these boards follows from a legal decision. Section 23 of the charter does not include the right for the minority to manage its schools. However, the Supreme Court, in the Mahé decision, determined that if a school itself is of the minority, and not for the minority, obviously, there must be a management component. To come back to my example, the question is whether or not Yukon's Francophone School Board management powers include the right to offer preschool education because it is necessary to prepare for the first year of school. Is it legitimate for this school board to decide that a francophone person will be admitted to a French-language school, even if they are not a Canadian citizen?

More generally, there are other inconsistencies. For example, section 20 of the charter deals with the right to public services in one or the other official language in regions where there is a sufficient number of rights holders. It begs the question: how is that calculated? One also wonders if Treasury Board regulations were established arbitrarily, or if they rely instead on scientific analysis. For example, in a small municipality, the decision is that services will be offered if 20% of the population speaks the language of the minority. In another location, there must be 3,000 people who speak the language of the minority. What would happen if there were only 2,950? Would services be refused to them or not? In my opinion, the problem stems from the fact that mathematical criteria do not align with the object of the law, which is to support the communities' development. Consequently, the test should be based on community viability.

In a small community where there is a French-language school, church and cultural centre, I do not understand why services would not be offered if there are only 2,900 francophone residents rather than 3,000. It's for reasons like that one I maintain that it is still necessary to go through the courts. Indeed, the government refuses to meet with us and negociate and revise its policies based on the very purpose of the law.

The situation is truly sad in Canada. Think about it. One can sometimes ask why there are language rights in most countries. Is it to avoid conflict, or for historical reasons? Is there not also a moral basis for them? Is it not a matter of equality, dignity and the capacity to participate in public affairs without having to renounce one's language and culture?

In Canada, that is what the court decided, not the government. It is for that reason we are still in conflict with the government. We do not agree on the very purpose of the law.

● (0935)

Mr. Colin Fraser: Thank you very much, Mr. Bastarache.

I have many questions to ask. Do I have any time left?

[*English*]

The Chair: You have time for another question.

Mr. Colin Fraser: I have lots of questions for you, Mr. Bastarache, but in the interests of time I'll move on to Madam Tansey. You mentioned in your presentation that accountability is important for the Court Challenges Program itself in the way it's administered. The way I see it is that the program is there to expand rights, to allow charter-protected people to assert their rights, and also to clarify the position of the charter so that breathes life into the charter and moves charter rights forward.

How do you see that as far as the application process goes to ensure there is accountability in determining which cases are approved?

● (0940)

Ms. Kathleen Tansey: I can speak from the language panel, and obviously the equality panel has the same procedure.

The Court Challenges Program is accountable to its community. It is community based. It is not an institution. They come from the minority groups. They present their cases. They come to us for funding, and primarily it was a funding program to assist litigants. We had the contribution accord, which was signed with Canadian Heritage, and that contribution accord set a lot of the rules that were to be applicable. For example, the language rights panel, or the equality rights panel, would look to see if it was a constitutional case, if it raised issues that appeared to be of importance to the communities—the linguistic communities in our case—and if it was a question of national interest or potentially a question of national interest. We had to look to see whether the applicant was in fact a non-profit and did require funding, because we do not fund cases for those who can afford them.

Those are the issues we looked at. We weighed, and we balanced. We studied the cases. We studied what had already gone on. We were accountable in the respect that we had to make the best possible use of the money we had, and we had to sometimes select the best cases. Sometimes it was a simple process. Other times we had to send people back and ask them to obtain more documents, or to do a consultation with the community, as Justice Bastarache was just saying. How do you know whether the *ayants droit* are sufficient to make a case to go forward? It was often an elaboration of action or a consultation with the community before we could look at the case.

These were all issues we looked at. In the same way that we were accountable, and the program was accountable, the Government of Canada is accountable to its citizens by virtue of the charter and the Constitution. We want your accountability, too.

Thank you.

The Chair: Thank you very much.

I'd invite the panel...on Mr. Fraser's question about where there remain rights to be clarified. Bill 86 in Quebec is proposing to abolish the election of school board commissioners. Whether that constitutes a section 23 violation under *Mahé* to the right of the community to control and manage its schools, to me, would be another point that needs to be clarified.

Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): Thank you very much, Chair.

I want to echo the gratitude we all have to you, Ms. Tansey and Mr. Verrillo, for your service to Canada. We are fortunate to have such eminent jurists with us this morning.

In very little time, I want to talk about money and an autonomous administration, which I think Mr. Maldoff and Justice Bastarache touched on. I understand, if my figures are correct, the annual budget of the CCP was about $2.9 million before, and it's now going up to $5 million a year. I believe I'm understanding Justice Bastarache properly that the idea might be to create a foundation. I've heard from other witnesses that there ought to be three streams. There ought to be an indigenous stream, a minority language stream, and a section 15 stream. I've heard about different university models.

I'll be totally candid with you, I'm worried about the administration costs eating the budget. Something that was done under the former Conservative government I commend to you for your consideration, namely with respect to the special advocates program within the Department of Justice, which deals with national security immigration matters. I'm familiar with the program, and there was a very effective way of shielding those people and retaining the autonomy that everyone agrees, I'm sure, is required without having any administrative costs.

Especially when I hear from you, Justice Bastarache, about $150,000 versus the unlimited resources of government and all the cases that are still to be resolved under all three of those streams, I'm thinking we should figure out a way to retain autonomy, but avoid the administrative cost that I fear could gobble up the budget of $5 million pretty quickly.

I would like your respective comments.

Hon. Michel Bastarache: I'd like to comment on that because I have some figures here. Maybe one of the reasons.... The first program, the Court Challenges Program, not the PADL, had a budget in 2006 of $2,720,000, and they spent $750,000 on administration.

Mr. Murray Rankin: That sounds like a lot.

Hon. Michel Bastarache: It sounds like a lot to me. Maybe the reason for this is that they weren't just dealing with court cases. They were doing promotion, they were doing seminars, and they were doing all sorts of things. This is where I say it's not because they mismanaged; it's because the mandate wasn't what it should be. If you want to do promotion and things like that, well, fund it independently with somebody else, but don't take the amount available to implement our rights in order to do seminars and things like that.

Under the present program, the PADL, the figure I have—we're talking about language rights—is that they had $1.5 million, with $600,000 for promotion, $500,000 for mediation, and $400,000 for cases. This is what bothers me.

Mr. Murray Rankin: Understandably, so I'm suggesting that we need to come up with a model that has, as much as possible, zero administrative costs. I take your point.

Just to be provocative, let's recommend that we don't have an optional ADR type of program. I think I heard Mr. Maldoff say that for these rights cases we shouldn't have any mediation. Take away the *colloques* and all of that and give them to the universities and think tanks; that's not part of the program, which is simply litigation for court challenges. That's what the program is called.

Also, let's house it somewhere...and not at a university, with great respect, as we had the African Canadian Legal Clinic tell us that for their community that's just a no-no. Let's put it in a government agency, such as the Department of Justice, and build a fence around it, like they effectively did for the special advocates program.

I'm very concerned about administration eating up the money, and I think your figures make that point dramatically.

Hon. Michel Bastarache: Well, the only point.... I certainly wouldn't put it in the Department of Justice. They oppose us on almost everything.

● (0945)

Mr. Murray Rankin: Well, they do in the special advocates program, too, but I believe—and I'm familiar with that program—they've taken steps that give me comfort that it's independently administered. I'm simply saying that it can be done with people of goodwill.

Mr. Eric Maldoff: If I could just add one thing, though, when it comes to the language rights side of this—and I just speak to that issue—it's a structural, systemic, societal type of issue. It's not a one-off. It means building institutions and, in many instances, changing institutions, so as for the interests of government in engaging on this, if they can avoid it, they will. The pressure against this is enormous. It's a bit different from the individual cases of equality, for example, where people are coming forward who were not treated properly. This, every time you do it, has real money behind it. It's not the case but what happens as a result.

Therefore, I don't have an answer for you on the spot, but the autonomy issue has to be addressed in a very serious way, because the government's interests are too strong in that.

Mr. Murray Rankin: May I, Chair, ask one more small question?

This is for you, Mr. Maldoff. I was really taken by your examples, not the court cases, but the one of bad translation such that the English version becomes irrelevant, and I was also taken by the example of the health and social services where directives are provided that may or may not be illegal. That would be an administrative law problem, let's say, that has a dramatic effect on the minority communities of English speakers in the province of Quebec.

My question is this: shouldn't we extend the program to deal with section 15, the non-language rights provisions of the charter, in order to deal with administrative law problems that might have an impact on those? In other words, should we expand the mandate so that we don't have to worry anymore about whether it's grounded necessarily in a section of the charter but has an impact on those rights notwithstanding? Isn't that what your example would lead to?

Mr. Eric Maldoff: I would hope to try to ground it in the Montfort case and build from some broader principle than purely administrative law. I think that case opened some interesting doors with respect to the rule of institutions in communal life and a sense of well-being.

I worried that someone might ask me the question you just asked, and I'm going to be honest about why I worry about it. The federal government is pretty much locked into its official languages policy, constitutionally and otherwise. It extends to services beyond section 133. If there is federal support for attacks on the administrative procedures of the provinces, my bet is that the average province is going to double down on making its administrative procedures bullet-proof. Or they may try to remove the underlying right under provincial jurisdiction, such that you don't even have to worry about the administrative problem anymore.

We're all struggling to get the provinces themselves to establish rights. If the minute they do it, we turn around and beat them with a baseball bat under the Court Challenges Program, it may be counterproductive. Let's get the rights, and let's get them working. There's lots of stuff to work on right now. Once we have a culture that has come to some consensus on these items, then you can start to talk about fair administrative practices and perhaps court challenges. But I'm reluctant to encourage you to go there, because I think you may put at risk the whole program.

● (0950)

The Chair: Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): My thanks to the panellists for coming in and giving us this very informative discussion.

Ms. Tansey, I have a follow-up question to something one of my colleagues asked. How are the panel members chosen for the language rights program under the court challenges?

Ms. Kathleen Tansey: It's interesting because the FCFA in their resolution says they would like to have the panel members nominated by various universities, but the ultimate decision for naming members of the language rights panel should lie with the FCFA and the QCGN.

I've been appointed by both of them. All of us on the panel have been at our posts for the last 10 years. Prior to that, we had staff. I don't want to change your question, but I wanted to respond to Mr. Bastarache. Ken Norman, our financial treasurer from the Canadian Bar Association, says our overhead was 14%, but I'm not going to argue figures. I just had to get that in. It was in my report.

They were nominated. On the language rights panel, there are three attorneys and two people from the community. I don't mind telling you their names: André Braën, Professor of Constitutional Law, Université d'Ottawa, who came to us from the Université d'Ottawa, approved by the two major language groups, the FCFA and the QCGN; André Ouellette, a criminal lawyer in Alberta, one of the first to plead criminal cases in French in Alberta, approved by the same group; Léo Robert, from Winnipeg; and Gabriel Arsenault, from Prince Edward Island.

Their names came forward. There was a selection committee in times gone by that would vet and look for candidates or appropriate people who are active and had knowledge. You have to be a member of the minority community in the province that you're coming from. I'm the minority anglo from Quebec. The other four are representative of the francophone minorities in four other parts of Canada.

Ms. Iqra Khalid: Is this a process that you would like to see in the new Court Challenges Program? Can you recommend some tweaks to that?

Ms. Kathleen Tansey: I think it's absolutely essential that this be seen as coming from the community.

It's a little bit like a union. The power comes from the members up and can't be imposed from the top down. It is important that it addresses the needs of the minority linguistic community, for example, and, as well, the equality of minorities. I think it's essential that the process for selecting and appointing be absolutely transparent, and it can't be dictated by the universities.

We believe there should be one integrated program with two aspects: the linguistic and the equality. We felt that our board of directors and the program did an excellent job of controlling both. On our board of directors, there are three representatives from equality, three from the language side of the program, and one who is elected as chair.

Mr. Frank Verrillo (Board Member, Court Challenges Program of Canada): Perhaps I could add that our membership is made up not only of language minorities but, on the equality side, of very visible minorities, cultural minorities—our native and aboriginal communities—representatives from the intellectually and physically handicapped element of our society. Even new Canadians are represented in our membership. We have people who are advocates for the poor and the marginalized.

They are part of our membership, and from them we pick our panels.

● (0955)

Ms. Iqra Khalid: Thank you.

This is to all the esteemed panellists here today.

Ms. Tansey, you gave us the history of the Court Challenges Program and its comings and goings with the changes of government.

Can I hear your opinion as to how we can keep this program self-sustaining and not subject to the whims of the government of the day, perhaps something along the lines of an independent governing body, etc., with a private-public funding model?

The Chair: Given time limitations, if we're going to have all three answer, I'd prefer if everyone be very succinct .

Ms. Kathleen Tansey: Are you directing that to me, or to—

The Chair: She directed it to everyone, but is there anyone who wants to answer that?

Mr. Maldoff.

Mr. Eric Maldoff: There have been discussions within the broader community, let us say, of some sort of foundation with some sort of an endowment, and creating an independence from government in so doing, but lean—as my good friend Michel Bastarache has said—in terms of the mandate being very clear to avoid it.

Again, I strongly urge that the linguistic and the equality be separate items. They are really different birds.

Hon. Michel Bastarache: I would agree with that, with this one point. I don't think it should be the same administration because I think the distinctions are very important.

When you're talking about equality rights, you have to look at the context. The context is that we have human rights commissions and we have human rights tribunals. All of these institutions are important, and they deal with these issues. It doesn't mean we don't need a program like this one, but it means it's a very different kind of program. It has to be developed with regard to the context and other institutions.

Why not have one that is concentrated on that issue and adapted to that context, and have another one that is distinct and has to do with these language rights, which are rights of a very particular nature?

The Chair: Thank you very much.

Ms. Tansey, very briefly.

Ms. Kathleen Tansey: The equality and the language worked wonderfully together under the Court Challenges Program. The problem is that we've had two governments come in, and I think it's fair to say that the language proponent was the innocent victim of a drive-by shooting. The equality aspect was just as innocent, but it was the target, so when they torpedoed the program, there was....

I know the FCFA, Diane Côté and Sylvia Martin-Laforge, are not people who are anti-equality. In fact, their resolutions both say it, but we were able to....

Is there a way? Will the government want to open the constitution? I don't think so. With regard to an endowment to a foundation, how much of an endowment will make it sustainable? How many billions or millions of dollars do you want to put into it?

I think we need to look at it being arm's length from the government. We have to look at an organization that is accountable. I don't think it should come from the academic world, although certainly there will be aspects of that. Very strongly, I know the board of the Court Challenges feels very much that it should be....

Can it be enshrined in legislation? Well I'm a lawyer, but, as far as I know, unless you do it in the Constitution, the next government can come by and change your law. I'm not saying it should be status quo; we want to modernize. I'm saying they're both charter rights sacred.

Thank you.

The Chair: I don't want to keep the commissioner waiting too long, but I know that Mr. Nicholson is the former justice minister, and I want to give him the flexibility to ask a question, certainly given that his government was mentioned a couple of times.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much.

First of all, Mr. Maldoff, did you say that you applied for the Court Challenges Program or you didn't? If you did apply, did you get any funding for all those cases you mentioned earlier?

Mr. Eric Maldoff: Five out of the seven cases I mentioned, I was directly involved in organizing. I think four out of those five were funded. I can't remember whether—

● (1000)

Hon. Rob Nicholson: Was it through the Court Challenges Program or some other one?

Mr. Eric Maldoff: It was the Court Challenges Program. I can't remember whether Blaikie got funded, because I think that's actually when the government decided to create the program.

Ms. Kathleen Tansey: That's before my time. I can't answer that.

Hon. Rob Nicholson: Thank you very much.

Justice Bastarache, it was an honour for me to be there that day when your colleagues and everyone paid tribute to your service to the Supreme Court. Thank you for your service.

You had a number of comments that I was going to.... I may have missed a bit on the translation, but between governments and the courts, it's the courts that have to ensure our freedoms. I'm sure you would agree that governments have a responsibility to make sure that people's freedoms are protected. Isn't that one of the important, initial —

Hon. Michel Bastarache: Absolutely, and I think this is where we've had a problem. I've tried to understand why we've had such a problem in dealing with the government. You know, my own interpretation now is that the government doesn't see language rights as community rights. It sees them as individual rights.

I'll give you the example of the Beaulac case. Beaulac, of course, was a guy accused of murder. He was a francophone living in Vancouver and of course he worked in English. The problem, of course, was access to a trial in French.

The decision of the court was that what you should have is a system in which anyone who comes before the court can easily decide whether they want to be judged in French or in English, provided, of course, that he speaks those languages, but the government doesn't see it that way, or didn't see that way. It saw it as "we have a system here that's really totally anglophone and how do we accommodate this person who wants to be heard in French?" They see language rights as forcing them to change their institutions, or to change the way the institutions function or the way they plan things.

There are other cases that brought forward the same problem. I don't know if you remember the case in northern Ontario on the funding for development of small industry. The government had established a very good plan and had consulted with people in the industry, but they had consulted with anglophones in the industry and had developed a plan that was accommodating those needs. When the francophones said that it didn't answer their needs and the government couldn't just translate into English what they had developed, it came before the court. The court decided that if the needs are distinct, you must have two kinds of consultations and develop a program that is not the same but has the same object.

That forces a government to change its administrative organization locally, I suppose, and this is what they find very difficult. Of course, in many, many cases, they just say that the community is so small that it's not really worthwhile. This is where we come in conflict all the time.

I think you're right. The government should itself have an implementation plan that is not based just on the actual right coming from the Constitution but I think on the planning of bilingualism in the service.

Hon. Rob Nicholson: I have this one last thing on behalf of the Department of Justice. I remember that at any given time they were in courts on about 50,000 different cases in terms of defending the crown's interests, so I was interested in one of your comments.

You say that the justice department is always fighting you. Again, the government has to be in there, obviously, to make the case, as all solicitors do when they take on a client. The client of the justice department is—

Hon. Michel Bastarache: What I meant was that the justice department was against us even if it wasn't their business. For instance, in the Northwest Territories and the Yukon, the Government of Canada intervened to support the local governments against opening French schools and giving management to the minority population.

● (1005)

Ms. Kathleen Tansey: It increased the delay in that case.

Hon. Michel Bastarache: Basically, we are not just facing one government in those cases. There is a case now in B.C., as you know. You are fighting the federal government, Saskatchewan, Manitoba. Everybody else is on side, too.

Hon. Rob Nicholson: It's what we have to deal with here in terms of the different levels of government.

The Chair: Thank you very much.

Again, I thank all of you. Thank you so much to the panellists for a very informative, very interesting history of minority-language rights in Canada over the last 40 years. I am sure we will take your recommendations under strong advisement.

[*Translation*]

Thank you very much, Your Honour.

[*English*]

Thank you, Mrs. Tansey. Thank you, Mr. Verrillo. Thank you, Mr. Maldoff.

We are going to recess for a second, while we change panels.

● (1005)

(Pause)

● (1010)

The Chair: As people are coming back, I would like to say that it is a great pleasure to welcome the Commissioner of Official Languages, Graham Fraser.

[*Translation*]

We are very pleased to also welcome Ms. Johane Tremblay.

[*English*]

I believe your title is general counsel, legal affairs branch, of the Office of the Commissioner of Official Languages. It is wonderful to have you here.

Commissioner, it's over to you.

Mr. Graham Fraser (Commissioner of Official Languages, Office of the Commissioner of Official Languages): Thank you.

I am very glad to be accompanied by Madam Tremblay because, as a non-lawyer before all of you, I have fully authorized her to say, "What the Commissioner meant to say...."

Mr. Chair, members of the committee, good morning. I am pleased to appear before your committee today to present my position on establishing a new Court Challenges Program. In short, I applaud the government's decision to create a new Court Challenges Program. I also recommend that the program's mandate be extended to fund cases involving court proceedings that seek to clarify and ensure respect for the language rights guaranteed under the Official Languages Act and other federal statutes.

[*Translation*]

When I was appointed to my position, nearly 10 years ago now, the Court Challenges Program had just been abolished. When I took office, many complaints, which had already been filed, we waiting for me. Following an inquiry by my office, these complaints were deemed to be well-founded.

In June 2008, legal action undertaken by the Fédération des communautés francophones et acadienne du Canada, in 2007, was settled out of court. This settlement led to the establishment of the new Language Rights Support Program in September 2009.

[*English*]

The investigation, which included a study of the legal impact of eliminating the Court Challenges Program, led me to at least two conclusions I believe should be brought to your attention. First, not only has the Court Challenges Program had a direct and significant impact on clarifying and advancing language rights in Canada, but it has also helped to enhance the vitality and development of our official language minority communities.

[*Translation*]

Secondly, even when those rights are clear, or when language obligations are clarified by the courts, their implementation may still fall short for various reasons, either due to government inaction, or to deficient or minimal action. In such cases, the only effective way available to communities to force governments to act is court action or threatening to undertake such action.

[*English*]

I think this last finding justifies expanding the scope of the new program on two fronts. On the one hand, the new program should fund not only cases that would clarify language rights and obligations, but also cases that would ensure those rights and obligations were met. On the other hand, the program should also fund cases to ensure the language rights guaranteed under the Official Languages Act, and other federal statutes, are respected.

[*Translation*]

Over the last 10 years, I have been able to fully appreciate both the work and the costs associated with court action. Indeed, in 2010, I launched a court action to clarify CBC/Radio-Canada's obligations under the Official Languages Act. One of the complainants in that case was not eligible for funding under the Language Rights Support Program and had to be represented pro bono by a lawyer.

[*English*]

In two other cases, in which complainants initiated the proceedings, the complainant said had it not been for my decision to act as co-appellant before the Supreme Court of Canada, they would not have been able to appeal the Federal Court of Appeal judgment. Although the Official Languages Act allows me to intervene in legal proceedings initiated by complainants, they are the ones who are primarily responsible for pursuing the litigation and submitting the necessary evidence. In many cases, this is a significant burden for people who are seeking justice in terms of their language rights.

● (1015)

[*Translation*]

In other words, language rights guaranteed by the Canadian Charter of Rights and Freedoms and the Official Languages Act, including the right to launch court action, are only theoretical and illusory if groups and individuals cannot access the courts to enforce them because of the cost of taking a matter before courts of first instance. During the development of the new program, the government should ensure that funding granted for court action is set at an appropriate and sufficient level to support funding not only of language rights litigation, but also of cases which allow the courts to hear from other voices and perspectives.

[*English*]

I also think the permanence and independence of the new program are key factors that must guide the government in choosing the program's governance, management framework, and decision-making structure. This is also the opinion of other witnesses, including FCFA, the Quebec Community Groups Network, and the Canadian Bar Association. The proposal submitted by FCFA and the QCGN about creating the program through legislation and establishing a foundation that must report annually to Parliament is particularly relevant.

[*Translation*]

The same applies to their recommendation on the appointment, by Parliament, of members of the board of directors and the committee responsible for reviewing funding requests.

Since its creation, in 1978, the Court Challenges Program has played a vital role in the advancement of equality rights guaranteed by the Constitution Act, 1867, and by the Canadian Charter of Rights and Freedoms. As the 150th Anniversary of Confederation dawns, Canadians should be able to proudly highlight the establishment of a program that facilitates access to justice and contributes to the advancement of their constitutional and quasi-constitutional rights.

Mr. Chair, thank you. I would now be happy to answer your questions as well as those of your colleagues.

The Chair: Thank you, Mr. Commissioner. It is a great pleasure for the committee to welcome you again.

I will give the floor to Mr. Nicholson, who will start the first round of questions.

[*English*]

Hon. Rob Nicholson: Thank you very much, Mr. Fraser, and thank you for your service to the country.

I probably should remember this, it's about several years ago with that case with CBC, but you said one of the complainants was ineligible under the language rights support program. What exactly was the problem there? Do you remember?

Mr. Graham Fraser: I'm afraid I don't, but it was a community group in Windsor that launched the case. They reached the point of no return in terms of their ability to finance the case. We became co-appellants. The Federal Court ruled in our favour. The Federal Court of Appeal reversed that decision on technical grounds.

Actually, today our organization is having some discussions with CBC/Radio-Canada in the hope that we can arrive at some kind of mediated solution to the problem.

Hon. Rob Nicholson: Thank you for that.

That would be kind of interesting because the language rights support program sounds like it's a perfect fit in terms of what the issues were and what that program was all about. We could perhaps ask the clerks if they wouldn't mind checking into what the story was on that particular case. The case was before the courts about four years ago, if I remember, and just to get the background on that would be good.

Mr. Graham Fraser: Mr. Chair, we can refer you some information related to the case.

The Chair: If you could send us anything you have that would be very much appreciated. The analysts will also see what we have.

Hon. Rob Nicholson: One of the proposals that you made is that the new program should finance not only the litigation involving language rights but also interventions. That's kind of wide open. If we said that anybody or everybody who wants to get involved with this would be financed by the government, that could be pretty extensive.

Do you think there should be any limits on that, or what would be the decision?

Mr. Graham Fraser: In our experience the courts are usually fairly rigorous in deciding who can intervene and who can't. The courts have been very generous in accepting our requests to intervene before cases, but not every group that wants to intervene has their application to intervene accepted by the courts.

That's a filter that exists, and in my experience the court is pretty disciplined in deciding who they will hear from and who they won't.

● (1020)

Hon. Rob Nicholson: That's fair enough.

One of the questions that has come before this committee in many cases is with respect to the split of jurisdiction between the federal and provincial governments. I would imagine that many, maybe even most—I'm not sure—of the language issues would involve either provincial or municipal governments or organizations that do not directly come within federal jurisdiction. Is that a fair comment, or have you found that there is always a federal component to that?

Mr. Graham Fraser: Most of those cases are under section 23 of the charter, which covers access to minority language education rights.

That's the major area where the issue goes before the courts. The Montfort case, in terms of access to health services, was one in which my predecessor was actively involved. I'm not sure if that involved playing the role of an intervenor.

Ms. Johane Tremblay (General Counsel, Legal Affairs Branch, Office of the Commissioner of Official Languages): I would add, to complete your answer, that there was a case in Quebec some years ago involving the government's decision to amalgamate municipalities. There was a challenge based on section 16 of the Canadian Charter of Rights and Freedoms. This is often the section of the charter that is raised in matters involving provincial or municipal jurisdictions.

At the time, commissioner Dyane Adam intervened in that case because the case raised issues related to the interpretation of section 16 of the charter. That's an example of where, sometimes, even provincial jurisdiction issues can be brought forward and receive funding, because they're basing their request on section 16 of the charter.

The Chair: Thank you.

I appreciate you referring to that. I was one of the plaintiffs in that case. Our municipality was being forced to merge into the City of Montreal, and similarly to Montfort, we argued that the linguistics rights provision protected the English-speaking municipalities on the island of Montreal. We didn't win. I thought we were brilliant and the arguments from the commissioner were brilliant, but no.

Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Let the record reflect the Chair's brilliance—

Mr. Murray Rankin: In a losing cause.

Mr. Chris Bittle: We'll just pat ourselves on the back here.

Thank you for your testimony today.

You spoke about the permanence and independence of a renewed Court Challenges Program. I am wondering if you could expand on that a bit, and perhaps also discuss any other recommendations or thoughts that you see should be incorporated in a renewed Court Challenges Program.

Mr. Graham Fraser: Well, I was struck by the comments made by both QCGN and the FCFA in terms of the creation of a foundation which would establish a kind of arm's-length distance between the governments.

I wasn't familiar with the program that Mr. Rankin referred to inside of the Department of Justice. I must say I'm very relieved at the fact that our lawyers are not justice department employees. When we are appearing in court and the justice department lawyers are on the other side, on the question of accountability, the question of who the client is, there's no question as to.... Although I'm very aware that you should never judge a lawyer by their client, it is nevertheless a simplifying factor.

One idea that just occurred to us, listening to the exchange of the previous witnesses before the committee, was the possibility that an agent of Parliament might be an office that could provide that kind of independence you're looking for. A foundation is one that's being put forward, and we certainly don't have any problems with it. There would have to be some clear accountability rules. The finances would have to be accountable to Parliament on an annual basis, as our finances are.

● (1025)

Mr. Chris Bittle: In an address to the bar of Montreal on October 21, 2015, you said "...the mere possibility that parties could obtain funding to develop a test case to ensure respect for their constitutional language rights was sometimes enough to pressure governments into fulfilling their duties."

Can you share specific examples with the committee?

Mr. Graham Fraser: Often those are discussions that take place behind closed doors. I wouldn't want to disclose those discussions.

Part of my role as an agent of Parliament is to warn governments of the possibility that there might be a court challenge in the wings. I myself have been upset when people have come out of meetings and reported what I've said to them, so I don't feel really comfortable doing that. There have been a number of cases, both at the provincial level and at the ministerial level, where I have conveyed my concerns and subsequent action has been taken.

In some ways, the role of the Commissioner of Official Languages is similar to the role of a diplomat. I don't have power, but if I play my role effectively, I can exercise influence. However, influence diminishes dramatically if you talk too publicly about the role you've played, so I'm going to remain discreet on that issue.

Mr. Chris Bittle: Can I perhaps ask a question on maybe a broader level?

During the time when minority communities did not have access to public funding to assert their rights, did you notice a change in government's attitude toward respect for language rights in Canada?

Mr. Graham Fraser: Yes, and I think just to add to what the previous panel was saying about the introduction of the Court Challenges Program, the Court Challenges Program was introduced at the time of the Blaikie case. I suspect that it was involved in funding the Blaikie case. It was a consequence of then Prime Minister Trudeau deciding that he would reject the requests from the Protestant School Board of Greater Montreal to use the power of disallowance to strike that down.

Basically, what then Prime Minister Trudeau decided was that he would not use that tool, the power of disallowance, to strike down this legislation, but that he would create this program that would enable those institutions to challenge what they felt were unjust decisions by government. It was the introduction of a new tool in the context of major complaints. In fact, I think the initial request for the power of disallowance was even earlier, in 1974, with Bill 22, but through both Bill 22 and Bill 101, both in 1974 and three years later in 1977, there was a strong desire on the part of those school boards that were seeing access to those schools narrowed dramatically by those two pieces of legislation, to call upon the federal government for help and ask it to use the power of disallowance and strike down those pieces of legislation.

Then Prime Minister Trudeau, much as Prime Minister Laurier had done 80 years earlier, said he was not going to use that tool, but that he was going to create this new mechanism to equalize the forces of communities and government.

● (1030)

The Chair: Thank you very much.

Mr. Rankin.

Mr. Murray Rankin: Thank you, Mr. Fraser and Maître Tremblay, for your presence here today.

I have a couple of questions. You alluded to this special advocates program that I referenced. I'm confident that my friend Mr. Nicholson will be standing up for it, since it was his creation. I don't know why I'm the one who seems to be promoting it.

I want to make really clear a point that you alluded to, which was that you were relieved that Department of Justice lawyers weren't your lawyers.

Just to be crystal clear, that was of course never what happened in the department in the special advocates program. It was just housed administratively there. Other lawyers—I was one of them—were called from across the country, and still are, to represent people who are accused of terrorism-related issues with respect to immigration matters.

My only point in raising it is that I am personally very concerned about the administrative costs of this program, particularly when we hear not of not one, not two, but three streams, and different places. I think we really need to look hard at how we can save money and husband the resources.

I simply wanted to clarify that since you alluded to it.

Mr. Graham Fraser: Thank you. It's not a program that I'm familiar with or that we've dealt with at all as an organization. Thank you for that clarification.

Mr. Murray Rankin: I'm very impressed with the program.

Chair, it might be useful if our analysts could dig into it a bit and see whether they would find that model of help to us in our work.

The Chair: We'll ask the analysts to prepare a briefing on how that works.

Mr. Murray Rankin: I have two questions, then, related to administration.

What about housing the languages program within the office of the official languages commissioner as a separately administered program, etc.? I think you commented on that.

You sir, are an officer of Parliament. You are not within a line department. Consequently, I would have thought that all of the independence in the world would be guaranteed by putting it within your good offices. I wonder if you could elaborate on that and if you think that idea has any merit.

Mr. Graham Fraser: It's certainly something that we'd be willing to explore. Let me refer it to Maître Tremblay, since it's not something that we've examined or are bringing forward as a proposal, and I'm always a little uneasy about spontaneously making policy before a committee.

Maître Tremblay.

Ms. Johane Tremblay: I was just thinking of perhaps some conflict-of-interest issues, because the commissioner has the power to bring cases to court when the federal institutions do not comply with the Official Languages Act. Also, we do intervene in charter cases, so it may raise some issues about the possibility of administering this program in an independent manner.

Mr. Murray Rankin: I think those are very fair observations. I would point out that other officers of Parliament, I'm thinking of the information and privacy commissioners at the provincial level, have a section in their act where if there's a conflict, for example someone seeks records of that body, there's an adjudicator under the statute who is brought in to do the job, and that's usually a judge or a commissioner in another jurisdiction.

While I totally agree there are those issues that may arise, I think they have been handled effectively elsewhere.

In your remarks you said, "Although the Official Languages Act allows me to intervene in legal proceeding initiated by complainants, they are the ones who are primarily responsible for pursuing the litigation and submitting the necessary evidence."

I wonder if there might be a way for your act to be amended to allow you in circumstances where someone else is before the courts on a languages issue to take over the case.

That is an example under the Personal Information Protection and Electronic Documents Act. Section 15 allows the commissioner in certain circumstances to take over a complaint. That may be a way to save a lot of money. I'll keep making the important point that you are not government. You are separate from government. Consequently, that may be a way to advance language rights in some circumstances. I wondered if you thought that might be worthwhile.

● (1035)

Mr. Graham Fraser: I do have the power to launch cases on my own initiative. There have been other cases where we have, in effect, taken over the case, and in which we have become co-appellants. For all intents and purposes, we assumed the responsibility for providing documentation before the courts and providing the legal assistance. I think the powers we have within the act to become a co-appellant on a case meet the criteria you're looking for.

Mr. Murray Rankin: I was wanting to suggest that would be instead of the Court Challenges Program or something like that, but I'm suggesting that's a way we could advance minority rights more aggressively.

Mr. Graham Fraser: I think we've been able to do that. There are a number of cases where individuals have taken the case themselves. It was clear that without representation they would be at sea before the court process. We have intervened as, in effect, their partners and supporters through that process.

Mr. Murray Rankin: I want to push you a little harder in the last minute I have here.

You talk about permanence and independence being key. I think everyone here said that.

Then you say the recommendation of creating a foundation is particularly relevant.

Do you buy the idea of a separate foundation? What's your idea on how we can ensure its independence and permanence?

Mr. Graham Fraser: The other side of the coin of independence is responsibility. You have to ensure if there is a foundation, that foundation is appropriately managed, that its use of funding is appropriate, and there is some kind of auditing mechanism or financial reporting mechanism.

I am not an expert in public administration, so I abstain from the discussion on should there be a single administration, should there be separate administrations for all three streams, or should it be run by a foundation? I think those are essentially administration issues for which I would look to administrative experts as to the most effective way those could be run. My concerns, and some of them were expressed by Michel Bastarache, are that it be set up in such a way that the responsibilities that are given to the organization, however it is structured, do not create a situation in which their promotional activities eat into the funding for litigation, for example.

The Chair: Thank you very much.

We're going to pass to Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Commissioner.

I want to build on the thread that Mr. Rankin is following about independence. One of the suggestions that has come before us is that perhaps an independent officer or an independent body of Parliament should be created for this purpose.

We recognize that anything created by Parliament, any legislation that creates such a body, could be removed by some subsequent Parliament. I wonder whether such an approach might achieve the independence we're looking for, together with the requisite durability from government to government.

Mr. Graham Fraser: One of the things that has struck me, looking at the growth of agents of Parliament over the last 150 years, is that they have been created because of the perception of a crisis that needed to be dealt with by a body independent from the Parliament of the day. I see the institutions of agents of Parliament as guardians of value.

There was the creation of the Auditor General's Office shortly after Confederation, when there were a variety of financial scandals. There was the creation of Elections Canada after some of the electoral scandals during and after the First World War. The Official Languages Office was created in 1969 as a response to the recommendation of the Royal Commission on Bilingualism and Biculturalism, which was itself a response to the sometimes violent expression of Quebec nationalism. Later governments brought in offices of information, privacy, lobbying, ethics. There are some experts who think that we have gone too far, that the proliferation of offices of agents of Parliament has undermined the role of parliamentarians in holding government to account.

I certainly don't feel that's the case with my office. My advice would be to walk very carefully before immediately creating another officer or agent of Parliament. I would suggest looking at it in the context of the evolution of agents of Parliament and some of the academic literature that has raised questions about whether there are too many.

I think we all now play important roles, but I think parliamentarians should reflect seriously on whether an increase in these offices would contribute to the role of parliamentarians or undermine it. There are some academics like Donald Savoie who argue that the traditional role of parliamentarians has been somewhat undermined by the continual creation of these offices.

● (1040)

Mr. Ron McKinnon: Fair enough.

Carrying on with the concept of independence, the more independent we make such a body from government, the harder it is to make it accountable. Who do we make it accountable to?

Considering also that we are possibly expecting government to fund this on an ongoing basis, it puts independence into question on that basis as well.

There have been some witnesses who have raised concerns about reinstituting this program, because they perceive bias in the selection process. Would you like to comment on those concerns, the bias as well as the independence?

Mr. Graham Fraser: I have not been aware of bias. Certainly, some of the people who are challenging the idea of creating a new Court Challenges Program are people who challenge the rights discourse.

The charter itself was not without controversy when it was introduced. There were distinguished public figures at the time of the debate around the charter, in the fall of 1980, who argued that the very creation of the charter would undermine Parliament. The Premier of Manitoba, on the right, and the Premier of Saskatchewan, on the left, both very articulately made that case at the premiers' conference in the fall of 1980.

I would look at the background of those people who are arguing bias and ask what their views are on the outcome of those equality rights cases before the Supreme Court. Those were people, in my experience, who were challenging the jurisprudence. I don't dispute in any way their right to challenge the jurisprudence of the Supreme Court on article 15, or articles 16 to 23, but I don't think that debate should necessarily colour your discussions on the creation of a new Court Challenges Program

● (1045)

The Chair: Thank you very much.

We have now run out of time.

I want to thank you, Commissioner, for coming before us today. I want to thank you as well, Madam Tremblay, for coming before us today, and I wish everybody a wonderful day.

The meeting is adjourned.