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Summary report on the Court Challenges Program consultations

March – April 2016



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Table of contents

1. Background and overview of consultations	4
1.1 Background	4
1.2 Consultation process	4
1.3 Participants.....	4
1.4 Key findings.....	5
2. Results of consultations	6
2.1 Scope.....	6
2.2 Activities	7
2.3 Governance	8
2.4 Barriers.....	9
3. Conclusion.....	9
Annex – List of consultation participants for the roundtables and bilateral meetings ..	10

1. Background and overview of consultations

1.1 Background

- a. **Former Program and History:** The Court Challenges Program (CCP) was created in 1978 to clarify constitutional language rights; in 1982 it was expanded to include language rights under the *Canadian Charter of Rights and Freedoms*. The program was further expanded in 1985 to protect and clarify certain equality rights under the Charter. The original program was terminated in 1992 and reinstated in 1994. At that time, the Court Challenges Program of Canada (CCPC), a national non-profit organization was created to administer the program. The program was eliminated again in September 2006. Elimination of the program led to the conclusion of an out-of-court settlement between the Government of Canada and the Fédération des communautés francophones et acadienne in 2008. By way of this settlement, the Government committed to funding previously approved litigation cases under the CCP up to the final stage of appeal and to establishing a new Language Rights Support Program (LRSP). As a result, two separate programs are currently managed at arms-length by independent organizations; the LRSP is administered by the University of Ottawa and the CCPC continues to manage the wind-down of the former CCP.
- b. **Commitment to Reinstate:** The Government of Canada's commitment to reinstate and modernize the CCP was included in the mandate letters of the Honourable Mélanie Joly, Minister of Canadian Heritage, and the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General. The 2016 Budget Plan provides \$12 million in new funding over five years for the CCP. Combined with existing investments, this will bring the annual program budget up to \$5 million annually.

1.2 Consultation process

In March and April 2016, a range of stakeholders with an interest in language and/or equality rights, including community-based organizations, legal organizations, and representatives of the CCP and LRSP, were invited to participate in consultations with the Department of Canadian Heritage. The consultations consisted of a series of bilateral meetings and multi-party roundtables, as well as an online questionnaire, which was sent to a broad range of organizations and individuals with an interest in the program. Hearings were also held before the Standing Committee on Justice and Human Rights. The testimonies from these hearings have been reviewed and the Department looks forward to the release of the Standing Committee's Report.

1.3 Participants

- a. **Selection of Participants:** For the online questionnaire, invitations to participate were sent to current members of the CCPC, past CCPC stakeholders, a broad range of national equality and language rights organizations, and individuals with a potential

interest in the program. Participants were also invited to direct other interested parties to contact the Department in order to receive the questionnaire, which resulted in many additional requests to participate. All individuals and groups who asked to be consulted were included. For the bilateral meetings and roundtables, selection criteria focused on organizations with national scope and the representation of diverse interests. Administrators and expert panelists from the CCPC and LRSP, as well as representatives from the Office of the Commissioner of Official Languages, were also invited to participate.

b. Participation in bilateral meetings, roundtable discussions and online questionnaire:

Table 1. Invitations and stakeholder participation

Consultation Process	Number of Invitations	Participation & Response Rate
Online Questionnaire	187	90 (48.13%)
Roundtable 1*	18	9 (50%)
Roundtable 2*	16	9 (56.25%)
Bilateral Meetings*	10	10 (100%)

* For a full list of organizations that participated in the bilateral meetings and roundtables, please refer to the annex at the end of this document.

1.4 Key findings

Most stakeholders support expanding the legislative and jurisdictional scope of the program, although some noted limits to the program’s capacity to respond to an accompanying expansion in applications. Mandatory alternative dispute resolution as a program activity was generally considered an inefficient use of resources given the program’s objectives of clarifying constitutional rights and was therefore not supported. In contrast, increased funding for test cases was strongly supported, with many stakeholders citing the high costs of trials as a barrier to justice for disadvantaged groups. A prominent stakeholder concern regarded the independence and sustainability of the program, which has been cancelled twice before. Opinions varied on the best approach to fund and ensure the sustainability of a new program, but many suggested a foundation or endowment model. Increased use of technology was posited as a way to increase efficiencies and save on administrative costs.

2. Results of consultations

2.1 Scope

a. Legislation

- i. **Language Rights:** As was the case under the CCP, the LRSP funds challenges to sections 16 to 23 of the *Canadian Charter of Rights and Freedoms* (official languages), section 2 (freedom of expression) in support of official language minorities rights, sections 93 or 133 of the *Constitution Act, 1867*, and section 23 of the *Manitoba Act, 1870*. Most language rights stakeholders supported expanding the eligible legislation under a modernized CCP to include challenges to the *Official Languages Act*, especially Part VII (advancement of English and French), as well as all other federal legislation with language rights implications to ensure that the full range of federal language rights can be challenged.
- ii. **Equality Rights:** The previous CCP funded test cases based on sections 15 (equality) and 28 (gender equality) of the Charter. Applicants were also able to invoke section 2 (fundamental freedoms) or section 27 (multiculturalism) in support of a section 15 challenge. Some equality rights stakeholders supported expanding the legislative scope of the CCP to include challenges based on section 7 (life, liberty and security of the person), particularly as a means of testing economic equality issues related to poverty. Others proposed allowing claimants to invoke section 7 only in support of a section 15 challenge. Other proposed expansions included sections 8 (search or seizure), 12 (treatment or punishment), 25 and 35 (Aboriginal rights) and 36 (equal opportunities) of the Charter and the Constitution. However, few expressed support for these other proposals and many respondents were concerned that the program would be overwhelmed if these expansions were included.

b. Provincial and territorial jurisdictions

- i. **Language Rights:** Many respondents were concerned that expanding the program to include provincial and territorial measures, and the ensuing increase in applications, could place an undue strain on resources and limit funding for language rights cases. Some respondents noted that many language rights disputes involve healthcare and education services, which are under provincial domain, and therefore supported an expansion to provincial and territorial jurisdictions.

Equality Rights: Many equality rights stakeholders supported expanding the program to include provincial and territorial measures given that many areas of social policy fall under this jurisdiction. Some emphasis was put on the potential for provincial and territorial cases to have national implications; however, some

respondents questioned whether the program had sufficient resources to sustain an expansion to provincial and territorial jurisdictions.

2.2 Activities

a. Litigation

- i. Trial and Appeal: Test case litigation is the primary activity of the program and is strongly supported by stakeholders.
 - ii. Interventions: Intervenor funding was supported by most stakeholders. Respondents saw value in having third parties provide additional evidence or another perspective on a case. However, some groups were concerned that a lack of strategy and coordination could result in repetitive and ineffective arguments before the court. It was suggested money for intervenors could be used more effectively by the main party.
- b. Case development: Several respondents noted that mounting a court challenge is often time consuming, expensive and requires a high level of expertise not readily available to disadvantaged groups. For these reasons, respondents supported designating some funding toward case development.
- c. Alternative dispute resolution (ADR): ADR was generally not supported by stakeholders. Participants stated that ADR is rarely successful and is a drain on program resources. Doubts were also expressed over whether constitutional cases of potential national significance could be appropriately addressed through ADR; in their view, ADR does not establish precedents and therefore does not contribute to the program's objective of clarifying rights.
- d. Impact studies: Many respondents considered impact studies important for case development and for promoting the results of test cases. However, some respondents saw impact studies as a drain on resources and suggested responsibility for this type of research should lie with academic institutions and other social science research organizations, such as think tanks.
- e. Strategic consultations projects: Some groups stated that consultations with community members and organizations could be used to strategize test cases with the best possible chance of success. Critics of this approach would rather cases be assessed individually to ensure challenges brought forward by smaller groups/communities are not overlooked.

- f. Program promotion and outreach: Most stakeholders acknowledged the importance of promotion and outreach in ensuring awareness of the Program among its target population. Lack of program awareness was identified as a barrier to accessibility.
- g. General rights promotion: Many groups felt general promotion of language rights and equality rights should be left to the Office of the Commissioner of Official Languages, the Canadian Human Rights Commission, or more generally, the Government of Canada. They reasoned that this would allow a greater proportion of funds to be directed towards litigation and other program activities. Other groups indicated a preference for more organizations promoting rights. The view that given its existing communications network and resources a university is well placed to support the promotion of rights was also expressed.

2.3 Governance

- a. Structure: Many stakeholders expressed concern about the sustainability and independence of the program given its cancellation twice before. Language rights groups in particular were concerned that merging the LRSP with the CCP may jeopardize funding for language rights test cases in the future. Several language rights stakeholders have publicly stated a preference for two separate programs.

Stakeholders brought forward several alternative governance models aimed at enhancing the independence of the program. Many participants favoured a **foundation** or **endowment** model that would be protected by an **Act of Parliament**. Participants felt this model would make it more difficult for future governments to remove funding. Some suggested a foundation could accept private donations as a second revenue source, though others were concerned donations may negatively impact the objectivity of the program's administrators.

Other models discussed included a **non-governmental organization** similar to the CCPC or a **university-administered program** similar to the LRSP. The **not-for-profit** CCPC model was viewed positively by many stakeholders. Supporters noted the program performed well in evaluations and funding decisions were considered to be fair. Many argued the membership model ensures the program is accountable to disadvantaged groups; however, others were concerned this model gave too much influence to special interest groups and ideologies. Supporters of the university model noted it is not membership based, which reduces the potential for conflicts of interest. Other benefits included that university affiliation allows for resource sharing (e.g. access to legal scholars and communication networks) and provides opportunity for faculty and student engagement. Detractors were concerned about the independence of this model, suggesting the program could be used as a means of supporting the institution's own agenda despite being managed at arm's length.

- b. Administration: It was suggested that overhead costs would likely drop as a portion of total costs with the new budget of five million annually. Administrators and stakeholders also suggested that increased use of technology could save on clerical and communications costs.

2.4 Barriers

Three key barriers to mounting constitutional court challenges were identified. First, many saw funding dedicated to test case litigation as insufficient. Litigators noted Charter based cases can cost up to half a million dollars for a first trial in the lower courts, and more for every stage of appeal afterward. Second, respondents were concerned the complexity of the application process may be a barrier to applicants. Third, lack of awareness of the program was highlighted as a barrier. Some respondents were concerned that certain disadvantaged groups that could benefit from the program, such as the homeless, may be hard to reach.

3. Conclusion

Canadian Heritage wishes to thank all consultation participants for their contribution. The consultations yielded a wealth of information from stakeholders that will help inform the reinstatement and modernization of the CCP.

Annex – List of consultation participants for the roundtables and bilateral meetings

Roundtable 1

African Canadian Legal Clinic
Canada Without Poverty
Canadian Civil Liberties Association
Canadian Coalition for the Rights of Children
Canadian Council for Refugees
Centre for Research-Action on Race Relations
Ligue des droits et libertés
National Associations Active in Criminal Justice
Social Rights Advocacy Centre

Roundtable 2

Association des juristes d'expression française de la Saskatchewan
Association des juristes d'expression française de l'Ontario
Canadian Bar Association
Council of Canadian Law Deans
David Asper Centre for Constitutional Rights
Fédération des associations de juristes d'expression française de common law
Fédération des communautés francophones et acadienne du Canada
Quebec Community Groups Network
Regional Association of West Quebecers

Bilateral meetings

Court Challenges Program of Canada - Board of Directors
Court Challenges Program of Canada - Equality Rights Panel
Court Challenges Program of Canada - Language Rights Panel
Fédération des communautés francophones et acadienne du Canada
Language Rights Support Program - Expert Panel
Language Rights Support Program - Management
Office of the Commissioner of Official Languages
Quebec Community Groups Network

Online questionnaire

Ninety organizations and individuals with an interest in language and/or equality rights completed the online questionnaire.