WHY THE GOVERNMENT WAS RIGHT TO CANCEL THE COURT CHALLENGES PROGRAM

Tasha Kheiriddin

In September 2006, the federal government announced it was cancelling the Court Challenges Program, which funded Charter-based challenges to legislation. While the decision prompted criticism from the opposition and interest groups, Tasha Kheiriddin writes that Canadians should applaud the move. She chronicles the history of the program and its effect on the Supreme Court's interpretation of section 15, and concludes, "Overall, the effect of the CCP has been to privilege some litigants over others, and advance those litigants' particular view of equality in the courts. It has helped further a statist political agenda by institutionalizing it in the form of government-sponsored interest group litigation."

En septembre 2006, Ottawa annonçait l'abolition du Programme de contestation judiciaire (PCJ) servant à financer des causes types fondées sur la Charte des droits et libertés. La décision fut vivement critiquée par l'opposition et les groupes d'intérêts, mais Tasha Kheiriddin estime que les Canadiens devraient plutôt s'en réjouir. À l'examen de l'historique de ce programme et de ses effets sur l'interprétation par la Cour suprême de la section 15, l'auteure conclut que « dans l'ensemble, le PCJ a eu pour effet de privilégier certaines parties en litige plutôt que d'autres, et de faire valoir devant les tribunaux leur propre vision de l'égalité. Il a de surcroît favorisé l'étatisme en institutionnalisant les litiges de groupes d'intérêt subventionnés par le gouvernement. »

In the words of the late, great American economist Milton Friedman, "Nothing is so permanent as a temporary government program." By targeting groups with specific characteristics — such as sex, race, disability or income bracket — government programs create political constituencies, and in a democracy, constituencies vote. Whenever the state terminates a program, it inevitably generates howls of protest from the affected group, which claims that its "rights" — usually code for "financial benefits" — have been taken away. The pressure exerted by interest groups is frequently so strong that governments back down and maintain the programs, especially when faced with the prospect of an imminent election.

That is why the Conservative government exhibited remarkable courage last fall when it cancelled a spate of ineffective and outdated initiatives. It put an end to the One-Tonne Challenge (an environmental program which gave comedian Rick Mercer considerable airtime but did little to improve the environment), closed 12 Status of Women offices (instead of paying bureaucrats to keep the lights on, the government decided the money would be better spent by women working in their communities) and terminated the Court Challenges Program (an initiative which funded legal challenges to government legislation, led mostly by interest groups).

It is on this last program that we focus our attention, because the decision to end it represents more than just sensible policy, but a potential turning of the page in Canadian politics. Even if the concept of the CCP was defensible when the Charter of Rights and Freedoms was new, few can say that 25 years later, the Charter needs testing at the taxpayer's expense. In an interview in 2005, excerpted in *Rescuing Canada's Right*, former federal justice minister John Crosbie, who renewed funding for the CCP 20 years earlier, agreed that the time for the program "is long past…If the civil rights advocates want to, let them pay for their own challenges."

In that same interview Crosbie also made a more disturbing comment. He affirmed that the Progressive Conservative government renewed the CCP in 1985 because of "political correctness. If we had discontinued the program we would have received very bad publicity...reinforcing our image as not being 'with it' on

social issues." And therein lies the most compelling reason to cancel the CCP. The program survived all these years not on its merits as a program, but as part of a larger agenda of left-liberal special interest politics.

How did this agenda come about, and how did the CCP fit into it? For the answer, we must cast our eyes back to 1968 when newly elected prime minister Pierre Elliott Trudeau began shaping what he called the Just Society. His project was profoundly interventionist, seeking to use the power of government to "correct" social inequalities, whether of means, status or rights. It would ultimately culminate in the entrenchment of equality rights in the Charter some 13 years later.

In Trudeau's first term in office, however, his strategy was more subversive. It involved using the state's resources to fund external actors, chiefly special interest groups, to lobby in favour of the type of interventionist policies he wanted to implement. These lobbying efforts mobilized the public and created the impression of widespread support for his government's initiatives. The funds were disbursed mainly through the Citizenship Branch of the Secretary of State, which journalist Sandra Gwyn, writing for *Saturday Night* magazine in 1972, colourfully described as "a freespending *animateur sociale* …Massive grants went out to militant native groups, tenants' associations and other putative aliens of the 1970s."

At the same time, in response to the rise of separatism in Quebec, Trudeau sought to dilute the tension between Canada's two solitudes by implementing state-funded multiculturalism. Former civil servant Bernard Ostry, who headed the Citizenship Branch at the time, confirmed that "millions of dollars were made available to the branch to ensure justice and fairness to every ethnic group that wished to preserve and celebrate its cultural heritage."

Trudeau also brought in official bilingualism, in part to reassure French Canadians outside Quebec and anglophones inside that province that their language rights would be protected. Between 1970 and 1982 official language minority groups received $76 million in funding from the federal government; not surprisingly, during that time the number of these groups doubled, to 370. Sociologist Leslie Pal, in his seminal work *Interests of State*, chronicled how the federal cabinet authorized a new "Social Action Program" to "animate" French-Canadian minorities in "desired directions." This support was then extended to women's groups, ethnic groups, native and youth groups as well.

The CCP formed part of this state-supported interest group strategy. Trudeau initially set up the CCP in 1978 to sponsor minority language law challenges, in particular to Quebec's Bill 101. Between 1978 and 1982 it funded six cases, three in Quebec and three in Manitoba and Saskatchewan, with a total annual budget of $200,000. But with the equality provision of the Charter, section 15, coming into force in 1985, interest groups began demanding direct government funding of minority rights litigation of all kinds, not just linguistic.

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Trudeau had departed the political scene, but as Crosbie pointed out, the new Progressive Conservative government wanted to be seen as "with it" on social issues. Crosbie also claimed, in a 2001 interview with Ian Brodie (now chief of staff to Prime Minister Stephen Harper), that the Tories wanted to promote a progressive agenda without creating new entitlement programs. An expanded CCP was seen to fill that need, and in 1985 the program's budget was increased to $9 million over five years.

In his book *Friends of the Court*, Brodie reported that by 1989 15 percent of that budget was being used for "community outreach" to encourage litigation and in some cases even create new interest groups. Furthermore the program was spending $1,421 per application on "public information," more than 10 times what it spent deciding which application to fund. Yet when the CCP came up for renewal again in 1989, the Progressive Conservatives increased its budget to $12 million over five years, and outsourced its management to the Human Rights Centre of the University of Ottawa.

What did taxpayers get for their money? In its first decade, the CCP funded equality rights challenges by a variety of groups, including LEAF (the Women's Legal Education and Action Fund), the Charter Committee on Poverty Issues, Equality for Gays and Lesbians Everywhere (EGALE), the Canadian Prisoners' Rights Network, the Canadian Committee on Refugees and the Equality Rights Committee of the Canadian Ethnocultural Council. Of the 24 equality rights judgments the Supreme Court handed down between 1984 and 1993, 9 had a party or intervenor that was funded by the CCP, and most of these were successful.

Policy Options Photo

The majestic Supreme Court became a battleground for Charter litigation, much of it funded by the $3.2 million Court Challenges Program, which was cancelled last fall by the Conservative government. In effect, government fed the hand that bit it, and, writes Tasha Kheiriddin, privileged some litigants over others.

While these groups battled for different causes, they all had one thing in common: they sought to advance the doctrine of substantive equality. Unlike formal equality, which requires that the law treat all persons equally, substantive equality posits that to treat people equally, the law must actually treat some people differently. This "different but equal treatment" is said to compensate for discrimination suffered as a result of belonging to a "disadvantaged group," such as women, Aboriginal people, immigrants, gays and lesbians, etc.

The CCP was instrumental in advancing the concept of substantive equality through its funding of two LEAF-led cases, *Andrews v. Law Society of British Columbia* and *Schacter v. Canada*. Ironically, in both cases the plaintiffs were white males. In *Andrews*, a British lawyer argued that the B.C. Law Society's refusal to admit him because he wasn't a Canadian citizen was discriminatory; being a "non-citizen" made him part of a disadvantaged group. In *Schacter*, an adoptive father sought the same paternity leave benefits as a natural father, claiming that adoptive parents should be treated the same as parents with biological children.

In both cases, the plaintiffs were successful, entrenching the doctrine of substantive equality in Canadian jurisprudence. The cases also advanced what is known as "political disadvantage theory," which advocates that minority groups whose interests are excluded from the executive or legislative branches of government can resort to the courts to defend those interests. It implies an ever-growing range of "discrete and insular minorities," to quote former Canadian Supreme Court justice Bertha Wilson in *Andrews*. These minorities may not have been envisaged by the framers of the Charter, but if they are analogous to other minorities which do enjoy protection, the argument goes, they should be given the same rights. This line of reasoning led to the establishment of the "reading-in" doctrine in *Schacter*, which established that courts could read in (i.e., rewrite) Charter provisions to protect this growing list of disadvantaged minorities. Possibly the most controversial use of this doctrine was to later read in sexual orientation as a prohibited ground of discrimination under section 15, as analogous to race, sex, religion or age.

By funding these types of cases, the CCP had a profound impact on the courts' interpretation of section 15. The *Andrews* decision laid the foundation for more successful challenges down the road involving freedom of speech, abortion, gay rights, prisoners' voting rights and pornography. Politically speaking, in most of these cases, the causes advanced were "progressive" or of a left-liberal persuasion. They furthered Trudeau's Just Society project, with the state as social engineer, constantly deploying its power and resources to accommodate differences and "correct" inequalities.

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Not surprisingly, whether a litigant received funding from the CCP depended on where he or she stood on the political spectrum. In *The Charter Revolution and the Court Party*, authors Ted Morton and Rainer Knopff concluded, "The CCP has been a funding bonanza for LEAF and other equality seeking groups on the left." In some cases, CCP grants appear to have had little to do with financial need and much to do with connections and ideology. For example, in the late 1980s, Toronto lawyer Beth Symes received a CCP grant to challenge the fact that she couldn't deduct the expenses for her nanny. At the time, Symes was a practising lawyer and was one of the founders of LEAF.

Litigants who were not bent on advancing the doctrine of substantive equality or other left-liberal views were not as warmly received by the CCP. Morton and Knopff reported, "Non-feminist groups such as REAL Women and Kids First saw their applications for litigation funding either ignored or rejected." A group of Native elders in British Columbia who wished to challenge the constitutionality of the Nisga'a agreement were refused funding as well; their lawyer, John Weston, ended up setting up an autonomous foundation to fund their case.

In 1992, as part of a general package of restraint measures, the Progressive Conservative government terminated the CCP. The outcry was immediate. Interest groups, together with powerful supporters including Supreme Court justice Wilson and Max Yalden, Chief Commissioner of the Canadian Human Rights Commission, lobbied for the CCP's reinstatement and made it an election issue in the 1993 federal campaign. Liberal leader Jean Chrétien vowed to re-establish the program and Prime Minister Kim Campbell softened her position and promised to create a new Charter Law Development Fund. A year after sweeping to power in 1993, the Liberals inaugurated a new CCP with annual funding of $2.75 million. After 1997, according to Brodie, the beneficiaries of the CCP were also given a direct role in the management of the program.

Overall, the effect of the CCP has been to privilege some litigants over others, and advance those litigants' particular view of equality in the courts. It has helped further a statist political agenda by institutionalizing it in the form of government-sponsored interest group litigation. The 2006 decision to scrap the CCP is thus justifiable and long overdue. It is completely inappropriate for government to favour one side of the debate on the Charter by funding it to the exclusion of other voices. While groups should be able to use all the levers at their disposal, including the courts, to make their case for social change, no group has the right to do so at taxpayers' expense.

Worse yet, by entrenching substantive equality as a doctrine in our courts, CCP-funded cases have perversely made it an advantage to be disadvantaged. As long as one remains a member of a disadvantaged group, one is entitled to use the resources of the state to improve one's position. Instead of encouraging individuals to advance themselves on their merits, this type of politics fractures society into rent-seeking groups, which look to the state to correct perceived inequalities. This increases people's dependence on government, and expands the power of the state in the life of the citizen. The result is not a more equal society, just one with a different set of rules as to how you get ahead: who can best curry favour with bureaucrats doling out government grants, who has the better lawyer to assert their "disadvantaged group" status, who has the better lobbyist to pressure the state to do its bidding.

In sum, if the government rigs the game to give some a greater say in the legal debate, it is not furthering equality — it is just creating a new inequality. For all these reasons, Canadians are better off without the CCP, and the government should hold firm in its decision to cancel the program.

Tasha Kheiriddin is the co-author of the best-selling Rescuing Canada's Right: Blueprint for a Conservative Revolution *(Wiley and Sons, 2005). She is currently teaching a course on the conservative movement in Canada at McGill University.*
tasha.kheiriddin@rogers.com