



November 2, 2006

Mr. Art Hanger, M.P.
Chair
Standing Committee on Justice and Human Rights
180 Wellington Street, Room 622
House of Commons
Ottawa, ON K1A 0A6

Dear Sir:

**Re: Study of the Effects of Abolishing the Court Challenges Program
and the Law Commission of Canada**

The Canadian Bar Association (CBA) appreciates the opportunity to voice its concerns to the Standing Committee on Justice and Human Rights Committee about the demise of the Court Challenges Program and the Law Commission of Canada. In our view, the elimination of these programs will have a serious impact upon the Rule of Law and the administration of justice in this country.

Court Challenges Program

It is inconceivable to think that democratically-elected representatives enacted the *Canadian Charter of Rights and Freedoms* without the expectation that Canadians would exercise these rights and challenge laws that violated them. However, without the assistance of the Court Challenges Program, there is a real risk that these rights will simply become “rights on paper.” People who find their rights disregarded by government are often the same people who lack the financial means to bring the government to court to make it accountable. The Program ensured that not only did rights exist, but they were *meaningful*. It played a critical role to assist in giving a voice to those in society who are often ignored. It did so very efficiently and at relatively little cost to the taxpayer.

To name but a few legal milestones to which the Program contributed:

- the right of deaf persons to sign language interpretation so that they can understand doctors and other hospital staff;
- the right of women to say no to sexual contact and have this right respected; and
- the right of children who are part of a French-speaking minority to quality education.



Our October 16, 2006 letter to the Prime Minister and the Ministers of Justice, Canadian Heritage, Finance, and the Treasury Board explains in greater detail the reasons for the CBA's long-standing support of the Court Challenges Program.

Law Commission of Canada

The CBA also has a long record of recognizing the vital role played by the Law Commission of Canada, as an independent body to advise the government on modernization of the law. As early as 1966, the CBA recommended that the federal government establish a law reform commission. The CBA was instrumental in the creation of the Law Reform Commission of Canada in 1970, and, by unanimous resolution of its Council, strongly protested the 1992 decision to abolish that Commission. The CBA supported reinstatement of the Commission in 1995.

The Law Commission engages Canadians in “renewal of the law to ensure that it is relevant, responsive, effective, equally accessible to all, and just”. Its central function is to provide strategic, independent advice to government and Parliament on legal policy issues. To perform this role, it must have sufficient resources. An independent Law Commission can engage in innovative research and adopt a multi-disciplinary approach to law reform, engaging experts in law, social sciences and humanities to study these issues on a macro level.

We were frankly surprised to hear some Ministers suggest that the CBA could fill this role. Had we been consulted before the announcement, we would have advised that the CBA is a member-based legal organization with a mandate that includes law reform in the name of its members and in defence of the Rule of Law. The CBA is not primarily a legal research body. There is an important need for an independent legal research body that can undertake broad-based research and advise on emerging legal policy issues. It is simply unrealistic to expect this work to be done by an organization with a different mandate and no funds for the task, through the volunteer efforts of CBA members who are primarily lawyers with full-time legal practices.

The CBA is committed to ensuring the existence of a law reform commission grounded in the qualities of independence, accessibility, permanence, and comprehensiveness. The Law Commission of Canada has made a valuable contribution to Canada's current dialogue on such issues as legal recognition of adults' personal relationships, how to redress the abuse of children in Canadian institutions, and the future of policing in Canada.

We strongly urge your Committee to recommend to Parliament that funding for the Law Commission of Canada be reinstated, and the Court Challenges Program be reinstated with long-term financial stability through increased funding.

Yours truly,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.



OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

October 16, 2006

The Rt. Hon. Stephen Harper, P.C., M.P.
Prime Minister of Canada
80 Wellington Street
Ottawa, ON K1A 0A2

The Hon. Victor Toews, Q.C., P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H9

The Hon. Beverley J. Oda, P.C., M.P.
Minister of Canadian Heritage and Status of Women
15 Eddy Street
Gatineau, QC K1A 0M5

The Hon. John Baird, P.C., M.P.
President of the Treasury Board
L'Esplanade Laurier, 9th Floor, East Tower
140 O'Connor Street
Ottawa, ON K1A 0R5

The Hon. James Flaherty, P.C., M.P.
Minister of Finance
140 O'Connor Street
Ottawa, Ontario K1A 0G5

Dear Prime Minister and Ministers,

We are writing to you to add the voice of the Canadian Bar Association to those who have already expressed profound concern and dismay over the elimination of the Court Challenges Program.

A program such as the Court Challenges Program is critical in a society that prides itself on adhering to the Rule of Law and promoting unimpeded access to the justice system. It plays an important role in ensuring that marginalized groups in society are not precluded from enforcing their constitutional rights by virtue only of their limited financial means.

In light of the Program's vital importance to Canada, the Canadian Bar Association recently restated its long-standing support for the Court Challenges Program, calling on the government to ensure its long-term financial stability through increased levels of funding. Your government rationalized the elimination of the Court



Challenges Program on the basis that it did not provide good “value for money”. With respect, this rationale fundamentally misconstrues the purpose and operation of the Program.

Claimants who have benefited from the Court Challenges Program include disabled children and their families, French speaking minority groups, women who have experienced sexual assault, Aboriginal groups, and gay men and lesbians. Characterizing these groups as “third parties” suggests an “us versus them” mentality that has no place in Canadian society. The *Canadian Charter of Rights and Freedoms* protects the rights of *all of us*. All of us have a gender, a first language, a race, a nationality, a sexual orientation, and certain physical and mental abilities, among other things. Striking down discriminatory laws alleviates the historical disadvantage experienced by vulnerable groups. A more egalitarian society benefits us all.

The Government of Canada enacted the *Charter* because it recognized that in a democracy, minorities require protection against the greater resources and political power of the majority. This imbalance of power often manifests itself when an individual claimant takes the government to court to uphold their rights. A *Charter* case against a government with seemingly deep pockets can be all-consuming for an individual claimant and his or her advocate. The funding provided on a per-case basis by the Court Challenges Program was relatively modest. In addition to legal fees, the funds were used for expert testimony, court fees, and out-of-pocket expenses to get the documents filed and the lawyers to court. No lawyer gets rich from Court Challenges funds. Maximums are set for legal fees (\$150. per hour), as well as total costs for taking a case to trial (\$60,000) or an appeal or intervention (\$35,000).

Despite Court Challenges funding, much of the legal work on cases for disadvantaged persons is at substantially reduced rates, or *pro bono*. Every Court Challenges application includes a budget line for a lawyer’s *pro bono* contribution. Most lawyers take on a *Charter* claim because of the commitment of the legal profession to the principle that every person, no matter what their means, deserves their day in court and that individual rights and freedoms are worth upholding.

Without the Court Challenges Program, equality rights and language rights guaranteed in the *Charter* remain simply rights on paper. Based upon the CBA’s frequent dialogue with international bar leaders and our engagement in international development work, we know that, by its example, Canada spreads its vision of democracy around the world, including respect for minority rights. Sacrificing these rights at home in the name of budgetary restraint is too high a price to pay.

We urge you to consider reinstatement of and providing stable funding for the Court Challenges Program. We would be happy to meet with you or the appropriate members of your Cabinet to discuss this matter of concern to the Canadian democracy.

Sincerely,

(original signed by J. Parker MacCarthy)

J. Parker MacCarthy, Q.C.
President