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CANADA

PROTECTION OF LANGUAGE RIGHTS UNDER THE COURT CHALLENGES PROGRAM

Report of the Standing Committee on Official Languages

Steven Blaney, MP
Chair

DECEMBER 2007

39th PARLIAMENT, 2nd SESSION

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has the honour to present its

SECOND REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the Protection of Language Rights under the Court Challenges Program and has agreed to report the following:

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PROTECTION OF LANGUAGE RIGHTS UNDER THE COURT CHALLENGES PROGRAM

INTRODUCTION

During the 1st session of the 39th Parliament, the House of Commons Standing Committee on Official Languages undertook a wide-ranging study of the vitality of the official-language minority communities that took it across the country. In a voluminous report, presented in May 2007, the Committee indicated that one of the communities' main concerns was that, with the cancellation of the Court Challenges Program in September 2006, they feel that they have been deprived of something they consider essential to the enhancement of their vitality.

Acknowledging how important this issue was to the communities, the Committee undertook a study at the end of the previous session solely on the Court Challenges Program. With Parliament prorogued in September 2007 and a second session begun in October, the Committee decided to continue its work on this theme using the evidence presented during the previous session.

This report begins with a description of, and background on, the most relevant aspects of the Court Challenges Program (CCP). All elements are included, but the analysis focuses primarily on the Program's linguistic component. Other parliamentary committees have studied the "equality rights" component.

The report analyzes various positions taken by witnesses on the main issues arising from the government's decision to cancel the CCP in 2006. These issues are the Program's contribution to the vitality of official-language minority communities, the access to justice that it made possible, the federal government's commitment to consult the communities on decisions likely to affect their development, the government's right to exercise its prerogatives freely, and the Program's neutrality. Other more secondary issues are also discussed, such as the relevant case law, the current government alleged promotion of the CCP to the international community, and the lack of transparency for which the CCP was criticized before the signing of the 2004-2009 contribution agreement.

Five options were considered in order to determine what the government should do about the CCP. A majority of the Committee's members decided that the only valid option at this point was to re-establish the Program. A majority of the members were however prepared to analyse the other options at a future date, but only after the government had rectified the error it committed in cancelling the CCP without consulting the official-language minority communities, and without explaining to Canadians the reasons for its decision. The report's main recommendation therefore consists in requesting the government to restore funding for the Court Challenges Program.

The Committee cannot disregard the fact that proceedings have been launched in Federal Court to contest the validity of the decision to eliminate the Program. The Court will have to rule on the interpretation of certain constitutional principles, such as the unwritten principle of protection of minorities and the federal government's fiduciary responsibility to the official-language minority communities, as well as the scope of Part VII of the *Official Languages Act* (OLA) and what is entailed in the duty to consult the communities as set down in section 43(2) of the Act. The Committee must leave the Court to rule on these fundamental issues. However, the value or otherwise of the Government of Canada's providing a funding program that facilitates access to justice for test cases likely to clarify the scope of constitutional language rights is entirely within the Committee's mandate.

THE PROGRAM

The Court Challenges Program (CCP) is a funding program providing for "the clarification of […] constitutional rights and freedoms […] thus achieving a better understanding, respect for, and enjoyment of human rights."[1] To achieve this objective, the CCP provides financial assistance for "test cases of national significance" involving the following constitutional rights.

1 Contribution Agreement between the Department of Canadian Heritage and the Court Challenges Program, November 2004, Clause 1.

Table 1 — Constitutional Rights and Freedoms Covered by the CCP

Provision	Description	
Language rights	***Constitution Act, 1867***	
	Section 93	Protects the rights and privileges of denominational schools.
	Manitoba Act, 1870	
	Section 23	Establishes English and French as the two languages to be used in the Manitoba Legislature, and for the publication of the laws adopted by the Legislature.
	Charter of Rights and Freedoms, 1982	
	Sections 16 to 23	Sections 16 to 22 establish English and French as the two official languages of Canada and New Brunswick. These sections address issues related to Parliamentary proceedings, publication of statutes and records, courts and tribunals, and communication with the public. Section 23 establishes minority language education rights, including the right of linguistic minorities to manage their schools.
	Section 2	Protects freedom of expression (eligible cases defined by CCP mandate).
Equality rights	Section 15	Protects equality rights (equal benefit of the law without discrimination).
	Section 28	Protects the equality of men and women.
	Section 2 or 27	Protects fundamental freedoms (Section 2) and multiculturalism (Section 27) (eligible cases defined by CCP mandate).

Source: Contribution Agreement between the Department of Canadian Heritage and the Court Challenges Program, 2004. Compiled by Marion Ménard, Library of Parliament.

The “test cases” must meet three criteria:

- “the intervention raises important and legally meritorious arguments for the resolution of the linguistic or equality rights issue(s) raised in the case;”

- “the arguments raised in the intervention are not covered in substance by the parties or other intervenors in the case; and”

- "the intervenors are, or are representative of, disadvantaged groups or individuals or official language linguistic minority groups or individuals that are directly affected by the outcome of the case."[2]

The language rights in question include those under both federal and provincial jurisdiction, insofar as they are protected by the sections of the *Charter* mentioned above. There is an important difference between the language rights and equality rights components of the CCP since for the latter the case must "challenge federal law, legislation, policies or practices" only.[3] The Contribution Agreement specifically excludes all applications relating to complaints filed under the *Canadian Human Rights Act, the Official Languages Act* or any provincial or territorial statute pertaining to language rights.

To be eligible, the cases must be brought by groups or individuals belonging to an official-language linguistic minority or disadvantaged groups or individuals or the non-profit organizations representing them.[4] A non-profit corporation administers the CCP pursuant to the Contribution Agreement signed with the Department of Canadian Heritage, which is responsible for its sound management.

The CCP funds various activities that are expected to contribute to attaining the Program's objectives. Clause 6 of the Contribution Agreement stipulates the following activities:

- **Program promotion, access and negotiation:** Recipients may obtain funding to carry out activities providing information on participation in the CCP and to defray the cost of consultation with community representatives and jurists on specific cases. Recipients may also obtain funding for negotiation or recourse to recognized dispute resolution methods in order to avoid court proceedings.

- **Case development:** The CCP provides funding for activities exploring potential cases. Such activities may include a review of the case law, consultation of the appropriate individuals, and organizations and other research activities.

- **Case funding:** The CCP may provide financial assistance for activities undertaken in connection with legal proceedings based on a provision in the Constitution listed in Table 1.

2 Ibid., Clause 6.1 d).

3 Ibid., November 2005, Clause 6.1 b).

4 Ibid., November 2004, Clause 7.

- **Impact studies:** The CCP may provide financial assistance to offset costs incurred by recipients for the preparation of impact studies regarding important court decisions on matters defended by the CCP. These studies are released to the general public.

The contribution agreement signed by the Department of Canadian Heritage and the CCP in November 2004 provides the corporation with annual funding of $2,850,000. This amount includes $750,000 in administration fees. The expenditures break down as follows:

Table 2 — Annual Expenses

Expenditure	Equality Rights	Language Rights	Total
Program promotion, access and negotiation	$165,000	$55,000	$220,000
Case development	$191,250	$63,750	$255,000
Challenges	$1,200,000	$400,000	$1,600,000
Impact studies	$18,750	$6,250	$25,000
Subtotal	$1,575,000	$525,000	$2,100,000
Administration			$750,000
TOTAL			**$2,850,000**

Source: Contribution Agreement between the Department of Canadian Heritage and the Court Challenges Program, 2004, Appendix A.

Two panels of independent experts make decisions regarding funding, one for linguistic rights and one for equality rights. These two panels are independent from the CCP Board of Directors and have exclusive jurisdiction over their sector of activity. The members of these two panels are appointed for three-year terms. There are thus two separate programs managed by the same non-profit corporation.

HISTORY OF THE PROGRAM

The Court Challenges Program was established in 1978 at a time of intense debate in Quebec following the adoption of Bill 101, which became the *Charter of the French Language*. In Blaikie,[5] the courts had to determine whether the bill violated sections 93 and 133 of the *British North America Act*. The court ruled that all Quebec legislation must be passed in both official languages. Similarly, in Forrest, in Manitoba, the court ruled that all of Manitoba's legislation, which had been passed in English only for decades, violated the *Manitoba Act, 1870*, and was therefore invalid.[6] Anticipating the potential

5 *Attorney General of Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016.

6 *Attorney General of Manitoba* v. *Fores*t, [1979] 2 S.C.R.1032.

impact of the decisions in these cases, the federal government decided to provide financial assistance to the applicants in these two cases, and to establish a funding program providing for the courts to clarify the scope of the language rights established in the Constitution. From 1978 to 1985, the program funded cases pertaining exclusively to language rights, and the government retained full control over the funding and the cases selected.[7]

Further to the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, the CCP was altered to reflect the language rights covered by the *Charter*. In 1985, the equality rights established in the *Charter* became eligible for funding under the CCP, once Section 15 came into force.

The inclusion of equality rights under the CCP led to administrative restructuring. Since the program was designed to fund cases that challenged federal legislation or decisions, the government would have been in a conflict of interest if it continued to administer the CCP itself. The Canadian Council on Social Development then took over administration of the program from 1985 to 1990.

The renewal of the program in 1990 was the subject of lively debate. From June to November 1989, the Standing Committee on Human Rights and the Status of Disabled Persons conducted a study of the CCP and presented its report on December 11, 1989. Among other things, it called for the renewal of the program for ten years, until March 31, 2000; for the removal of the restriction regarding equality rights which limited funding to cases that challenged federal legislation or programs; and for the expansion of the program to include the protection of Aboriginal rights.[8]

In its response to the report, the Government of Canada indicated that it was "prepared to renew the Court Challenges Program for a five-year-period" and, in response to the calls to expand the CCP, it indicated that, "given that there are still significant areas of language and equality rights which require clarification, the Government of Canada believes that it is currently preferable to retain the Program's objective."[9] A new five-year contribution agreement was accordingly signed on July 20, 1990, and the University of Ottawa's Center for Human Rights became responsible for administering the program, further to the Standing Committee's recommendation.

Facing budget issues, the federal government tightened its measures to cut spending in its budget of February 24, 1992, and two days later announced the cancellation of the Court Challenges Program. The Honourable Gerry Weiner, Minister of Multiculturalism and Citizenship, stated in the House: "There is now a solid base of

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7 See Court Challenges Program, *Annual Report 1994-1995, Beginnings of the Program*.

8 Standing Committee on Human Rights and the Status of Disabled Persons, The Court Challenges Program, December 1989.

9 Gerry Weiner, Minister of State, Multiculturalism and Citizenship, for the Government of Canada, Response to the First Report of the Standing Committee on Human Rights and the Status of Disabled Persons.

jurisprudence for future years and the remaining finer points are now those of provincial jurisdiction."[10] A few days later, the Solicitor General of Canada stated that the Program had attained its objective and that other groups would now have to take over this role.[11] It was also noted that "during a period of fiscal restraint there are cheaper ways to manage the funding of *Charter* challenges, in particular: a department of government (i.e. the Department of Justice) could undertake this role on an *ad hoc* basis."[12]

In June 1992, the Standing Committee on Human Rights and the Status of Disabled Persons presented another report on the same subject, expressing surprise that the jurisprudence argument had been made since the Government's Response to the 1989 report rightly noted that "there are still significant areas of language and equality rights which require clarification."[13]

After months of lively debate and protest by the opposition parties, Prime Minister Kim Campbell announced on August 30, 1993, that the program would be reworked and reinstated as the "Charter Rights Enrichment Program."[14]

ollowing the election of October 25, 1993, the Liberal government announced in the Throne Speech of January 18, 1994, that the CCP would be reinstated. The agreement reinstating the Program was signed on October 25, 1994, by the Honourable Michel Dupuy, Minister of Canadian Heritage. A non-profit organization was established to administer the Program, known as the Court Challenges Program of Canada.

PROGRAM PERFORMANCE, 1994 TO 2005

From 1994 to 2005, the corporation opened some 1,671 files in response to funding applications. Figure 1 provides the breakdown of files opened by province.

10 House of Commons Debates, Oral Questions, February 27, 1992, 3:00 p.m.

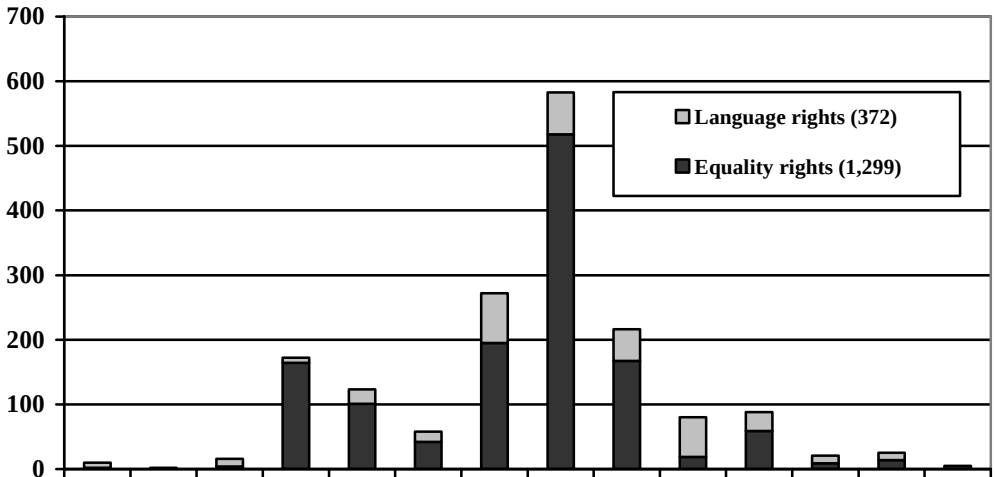
11 Debates of the House of Commons, Oral Question Period, March 10, 1992, 2:40 p.m.

12 Standing Committee on Human Rights and the Status of Disabled Persons, *Paying Too Dearly*, report presented in the House in June 1992, p. 4.

13 See note 9.

14 Quoted in the Court Challenges Program *1994-1995 Annual Report*.

Figure 1 — Financial assistance applications received by the CCP, by province and territory, October 1994 to March 2005



	Y.T.	Nun.	N.W.T.	B.C.	Alta.	Sask.	Man.	Ont.	Que.	N.B.	N.S.	P.E.I.	Nfld.	Other
Language rights (372)	8	2	12	8	22	16	77	65	49	61	29	12	11	
Equality rights (1,299)	2	0	4	164	101	42	195	518	167	19	59	9	14	5

Source: Court Challenges Program, *Annual Report, 2004-2005*, pp. 43 and 50.

The panels approved funding in 1,099 cases (66%). There were 821 files approved relating to equality rights and 278 relating to language rights. A significant number of funding applications approved relating to equality rights fall into six areas: discrimination against Aboriginal peoples (174), general physical disabilities (104), sex (94), race (88) and sexual orientation (75). With respect to language rights**,** half of the funding requests approved pertaining to language rights involve education rights (143) and, to a lesser extent, language of work, communication and service rights (55).

EVALUATION OF THE CCP — 2003

The CCP was evaluated for the period from 1998 to 2003. The evaluators noted that the CCP is consistent with the objectives of the Department of Canadian Heritage. Most of the individuals and groups consulted stressed that the CCP provides for the clarification of equality and language rights, and affords greater access to the justice system. Other respondents, however, pointed to the relatively controversial nature of the Program, insofar as it allows groups and individuals to bring lawsuits against their own government.[15] The evaluators said they had found "no other country with a similar program."[16] The results of the evaluation also show that the Program, as it is currently structured and operated, funds only cases that protect or advance the language, and equality, rights covered by the program. In other words, the CCP is not a neutral program,

15 Summative Evaluation of the Court Challenges Program, 26 February 2003, p. iii.

16 Ibid, p. 21.

insofar as a group or individual who would present legal arguments advocating a restrictive application of these rights will not receive CCP funds.

Conversely, a number of the key informers and organizations consulted would like to see the scope of the CCP expanded so that it could fund provincial court cases related to equality rights. However, few representatives of the federal government indicated that they share that desire.

The vast majority of the people consulted supported the decision to use a third party to deliver the Program. While the current corporation communicates the necessary information to the Department of Canadian Heritage, some of the people interviewed feel that it still lacks transparency.

> The individuals and groups benefiting from the CCP are located in all regions of the country and generally come from official language minorities or disadvantaged groups, such as Aboriginal people, women, racial minorities, gays and lesbians, etc. Those generally turned down include groups and individuals who do not represent a historically disadvantaged group, or whose arguments put forward would not advance the constitutional provisions covered by the Program. [17]

The evaluation determined that the Program's overall level of funding ($2.75 million a year) was sufficient to attain its objectives. Other key informants argued however that the funding should be increased because the number of funding applications had increased considerably over the years. A number of key informants also stated that the organization could — and should — try to find other sources of funding.

CANCELLATION OF THE COURT CHALLENGES PROGRAM IN SEPTEMBER 2006

On September 25, 2006, as part of an expenditure review, the Government of Canada announced a $1 billion reduction in spending, which led to the cancellation of a number of government programs, including the Court Challenges Program.[18] The Program is still operating however for cases for which funding was approved before September 25, 2006.

On October 25, 2006, the *Fédération des communautés francophones et acadiennes du Canada* (FCFA du Canada) officially filed a petition with the Federal Court to have the decision to cancel the Court Challenges Program's funding declared null and void. The FCFA maintains that when it ceased to fund the Court Challenges Program, the federal government did not take sufficient account of the decision's impact on the development and vitality of the official language minority communities or of its undertakings

17 Ibid, p. iii.

18 See Department of Finance Press Release, "Canada's New Government cuts wasteful programs, refocuses spending on priorities, achieves major debt reduction as promised," September 25, 2006, accessible at http://www.fin.gc.ca/news06/06-047e.html .

to the linguistic minorities under the terms of the *Canadian Charter of Rights and Freedoms* and the *Official Languages Act*.[19]

The reasons given by the applicant are:

- The decision to revoke the CCP contravenes the contribution agreement signed between PCH and the CCP;
- The decision contravenes the constitutional principles of respect for and protection of minorities;[20]
- The government's obligation to act positively toward official languages minorities (clause 16);
- The decision contravenes the federal government's fiduciary responsibility toward official language minorities;
- The decision contravenes Part VII of the *Official Languages Act*, in particular sections 41, 42 and 43.

Furthermore, the Commissioner of Official Languages examined 118 complaints received in 2006-2007 relating to the cancellation of the CCP. In his final report, delivered to the complainants and government stakeholders on October 9, the Commissioner recommended that the government review its decision to cut the CCP and other programs that serve linguistic minorities, or face further actions.

> The spending review of September 2006 was the result of a seriously flawed decision-making process that prevented full consideration being given to the needs and interests of official-language minority communities.[21]

The Commissioner has called on the government to thoroughly review its decision by February 2008. If the Commissioner is dissatisfied with the government's response, he can launch a lawsuit against the government or table a special report to Parliament. In November 2007, the Commissioner also decided to apply to the Federal Court of Canada for intervenor status in the FCFA lawsuit.

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19 FCFA du Canada, "Elimination of Funding to Court Challenges Program: FCFA Files a Petition in Judicial Review with the Federal Court", October 26, 2006, http://www.fcfa.ca/press/pressrel_detail.cfm? id=138&switchlang.

20 In the Supreme Court's decision on the *Reference on the Secession of Quebec*, it ruled that the Canadian Constitution is based on four principles: federalism, democracy, the protection of minority rights, constitutionalism and the rule of law. *Reference re: Secession of Quebec* (1998), 2 S.C.R.217, pp. 248-249.

21 See Karine Fortin, "*Programme de contestation judiciaire : Graham Fraser invite le gouvernement à refaire ses devoirs*," Canadian Press, October 9, 2007. 6:50 p.m.

The Committee must therefore exercise caution in the positions it states on the key components of the application filed with the Federal Court.

As part of its May 2007 report on the vitality of official language minority communities,[22] the Committee heard from representatives of these communities who opposed the decision to cancel the program. The organizations that spoke to this issue all called for the full reinstatement of the Court Challenges Program.[23]

In light of these objections, the Committee then recommended:

That the Government of Canada reinstate the Court Challenges Program or create another program in order to meet the objectives in the same way.

The report contained 38 other recommendations relating to community vitality. In its response to the Committee's Report, published in October 2007, the government did not address this recommendation. The response does not comment on it whatsoever.

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22 The Standing Committee on Official Languages, *Report 7 — Communities Speak Out: Hear our Voice The Vitality of Official Language Minority Communities*, May 2007, 39th Parliament, 1st Session, p. 144, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=206230.

23 The following list is a sampling of the most representative calls for the reinstatement of the Court Challenges Program: Marielle Beaulieu (Executive Director, *Fédération des communautés francophones et acadienne du Canada*), Evidence, December 12, 2006, 8:25 a.m. and passim; Mariette Carrier-Fraser (President, *Assemblée de la francophonie de l'Ontario*), Evidence, December 12, 2006, 10:15 a.m.; Louise Aucoin (President, *Fédération des associations de juristes d'expression française de common law*), Evidence, December 6, 2006, 7:25 p.m.; Nicole Robert (Director, *Réseau des services de santé en français de l'Est de l'Ontario*), Evidence, October 19, 2006, 9:55 a.m.; Denis Ferré (Education Director, *Division scolaire francophone numéro 310, Conseil scolaire fransaskois*), Evidence, December 6, 2006, 8:55 a.m.; Michel Dubé (President, *Assemblée communautaire fransaskoise*), Evidence, December 6, 2006, 9:45 a.m.; Wilfrid Denis (Sociology Professor, *Collège St-Thomas More, Université de la Saskatchewan*), Evidence, December 6, 2006, 9:45 a.m.; Jean Johnson (President, *Association canadienne-française de l'Alberta*), Evidence, December 5, 2006, 9:35 a.m.; Luketa M'Pindou (Coordinator, *Alliance Jeunesse-Famille de l'Alberta Society*), Evidence, December 5, 2006, 10:20 a.m.; Donald Michaud (Director General, *Réseau santé albertain*), Evidence, December 5, 2006, 9:35 a.m.; Daniel Thériault (Director General, *Société des Acadiens et Acadiennes du Nouveau-Brunswick*), Evidence, November 7, 2006, 1:45 p.m.; Marie Bourgeois (Director General, *Société Maison de la francophonie de Vancouver*), Evidence, December 4, 2006, 9:15 a.m.; Jean Watters (Director General, *Conseil scolaire francophone de Colombie-Britannique*), Evidence, December 4, 2006, 8:55 a.m.; David Laliberté (President, *Centre francophone de Toronto*), Evidence, November 9, 2006, 9:20 a.m.; Achille Maillet (First Vice-President, *Association francophone des municipalités du Nouveau-Brunswick*), Evidence, November 7, 2006, 1:50 p.m.; Jean-Luc Bélanger (as an individual), Evidence, November 7, 2006, 1:55 p.m.; Josée Nadeau (Director, *Association francophone des parents du Nouveau-Brunswick*), Evidence, November 7, 2006 ,1:45 p.m..; Josée Dalton (Coordinator, *Réseau de développement économique et d'employabilité de Terre-Neuve-et-Labrador*), Evidence, November 6, 2006, 11:15 a.m.; Lizanne Thorne (Director General, *Société Saint-Thomas-d'Aquin*), Evidence, November 7, 2006, 9:25 a.m.; Paul d'Entremont (Coordinator, *Réseau santé Nouvelle-Écosse*), Evidence, November 7, 2006, 10:55 a.m.; Louis-Philippe Gauthier (President, *Conseil économique du Nouveau-Brunswick*, as an individual), Evidence, November 7 2006, 1:25 p.m.; Josée Devaney (school trustee, *Autorité régionale francophone du Centre-Nord no. 2*), Evidence, December 5, 2006, 10:50 a.m.; Léopold Provencher (Director General, *Fédération Franco-Ténoise*), Evidence, January 30, 2007, 9:15 a.m.

The government's failure to comment on the CCP engendered mistrust of the government's reasons for this decision. Some remarks were made in the House of Commons, but they failed to provide a real explanation.

Various witnesses deplored this refusal to justify the decision.

> No satisfactory one has been forthcoming in the months that have passed since the cancellation of the program for this sudden and final decision. The absence of such an explanation has inevitably led to suggestions that the cancellation was motivated by ideological intransigence, partisan considerations, or simple disdain for due process. We wait to be enlightened by a more constructive or defensible answer.[24]

When she appeared before the Committee on December 6, 2007, the Minister of Canadian Heritage, Status of Women and Official Languages, the Honourable Josée Verner, in responding to a question about the reasons for the cancellation of the CCP, answered: "About the Court Challenges Program as such, […] the case is before the courts, and, at this point, I cannot comment."

Given the government's failure to respond to the Committee's recommendation, and the failure to explain the decision to cancel the CCP to community representatives, the Committee recommends:

Recommendation 1

That the government clearly explain to Canadians its reasons for cancelling the Court Challenges Program.

The following analyses present various points of view on the main issues involved in the cancellation of the Court Challenges Program.

Contribution of the CCP to the vitality of official language minority communities

All the witnesses heard and all the serious analyses of the impact of the CCP maintained that it had a significant effect on community development. Even witnesses who were in favour of cancelling the Program stated that it was "designed to protect minority language rights."[25] The summative evaluation conducted in 2003 reached the same conclusions.

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24 Marcus Tabachnick (President, Quebec English School Boards Association), Evidence, June 14, 2007, 9:05 a.m.

25 Tasha Kheiriddin (Professor, McGill University), Evidence, 14 June 2007, 9:15 a.m.

> Most key informants described the overall impact of the Program as significant. In relation to language rights, many noted that the CCP has always been a prominent player in practically all the critical court challenges related to these rights. Key informants think that many of these challenges would never have been possible without the CCP.[26]

In its brief submitted to the Federal Court, the Government of Canada also acknowledges that "[Translation:] the CCP undeniably fostered greater access to the courts in cases involving constitutional language rights."[27]

During its hearings, the Committee heard dozens of examples illustrating how the CCP has furthered language rights in Canada. The use of the CCP forced provincial governments to comply with section 23 of the *Canadian Charter of Rights and Freedoms*, which establishes school governance rights, undoubtedly the greatest contribution to enhancing community vitality. In other sectors, the CCP helped save the Montfort Hospital, the only francophone hospital in Ottawa. The challenges also led to changes to the *Canada Health Act* and the responsibilities of some municipalities, and influenced electoral boundaries. These decisions and others (see Appendix A) have become the most striking symbols of the progress made in official language community development. The communities firmly believe that they would not have a large number of their institutions without the Court Challenges Program.

In its report on the complaints it received regarding the cancellation of the CCP, the Commissioner of Official Languages notes similarly that:

> The evidence is overwhelming that the Court Challenges Program directly and significantly assisted in the advancement of language rights in Canada and, in so doing, contributed to the vitality and development of our official language minority communities.[28]

Access to justice

There is thus general agreement that the CCP has afforded communities better access to justice. In its brief to the Federal Court, however, the government argues that:

> [Translation:] it is entirely debatable that the decision to end [funding for the] CCP will henceforth deprive the applicant and the groups it represents of this access.[29]

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26 Department of Canadian Heritage, Summative Evaluation of the Court Challenges Program, February 26, 2003, p. iv.

27 John Sims, Deputy Attorney General of Canada, defence brief submitted to the Federal Court in *FCFA* v. *Her Majesty the Queen*, par. 16.

28 Office of the Commissioner of Official Languages, Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report, October 2007, p. 15.

29 John Sims, Deputy Attorney General of Canada, defence brief submitted to the Federal Court in *FCFA* v. *Her Majesty the Queen*, par. 16.

The government argues that while the CCP has afforded communities better access to justice, the cancellation of the program, even if it reduces that access, does not deny the communities access to justice. They will continue to have access to justice, but it will be more difficult, the government maintained.

The Committee cannot comment on what constitutes reasonable access to justice. Yet, based on much of the evidence heard, a majority of Committee members are of the opinion that greater access to justice does not constitute an unfair advantage but rather restores the balance toward real equality, since minorities are by definition at a disadvantage compared to the majority. They feel that, if minorities do not have comparable access to the courts as does the majority, which is usually represented by a government, such access is merely theoretical.

> Giving people rights without access to justice is meaningless. A charter of rights without the means to uphold those rights is a denial of justice. The Court Challenges Program of Canada has helped advance rights in this country. We believe that its cancellation will lead to a democratic deficit.[30]

This is what some witnesses referred to as a "substantive" equality:

> Substantive equality is essentially like handicapping a golf game. What it means is that certain groups who claim they have fallen behind because they are not on equal footing, they are not as strong, either economically or socially, claim the government owes them a head start in terms of achieving their goals.[31]

It is entirely legitimate for the government or any other group to advocate a different concept of equality, but the courts will have to determine which of these concepts applies in a given case. As regards language rights, the courts have tended to support substantive equality. The CCP can certainly not be blamed for the fact that the Supreme Court interpreted the application of the Constitution in this way.

Duty to consult the communities

The Accountability and Coordination Framework of the Action Plan for Official Languages imposes the requirement to:

> Consult affected publics as required, especially representatives of official language minority communities, in connection with the development or implementation of policies or programs.[32]

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30 Guy Matte (President, Court Challenges Program of Canada), Evidence, June 5, 2007, 9:05 a.m.

31 Tasha Kheiriddin (Professor, McGill University), Evidence, June 14, 2007, 9:15 a.m.

32 The Next Act: New Momentum for Canada's Linguistic Duality. Action Plan for Official Languages, Accountability Framework, art. 17, p. 70.

This part of the Action Plan stems from subsection 43 (2) of the *Official Languages Act*, which requires Canadian Heritage to:

> Take such measures as that Minister considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.

The community representatives heard by the Committee maintain that they were not consulted before the Court Challenges Program was cancelled. In its brief to the Federal Court, the government asserts that Part VII does not in any way require the government to consult the communities before making a decision in this matter. It argues that the provision of the OLA cited above

> [Translation:] leaves the Minister of Heritage to choose the method of public consultation. In other words, it is up to the Minister to determine how he will consult.[33]

In the same brief, the government argues that:

> [Translation:] the Minister of Heritage decided to fulfill this obligation through regular, institutional consultations.[34]

The Commissioner of Official Languages takes a position that is diametrically opposed:

> In the absence of positive measures, the termination of federal funding under the 2006 expenditure review is contrary to the Government of Canada's commitments and obligations under Part VII of the *Official Languages Act*.[35]

The Committee cannot comment on this matter, which is a key element of the case to be heard by the Federal Court. It is however entirely legitimate for the Committee to take a position on the Accountability and Coordination Framework that is part of the Action Plan for Official Languages, expiring on March 31, 2008. This framework is not an act, as reiterated in the government's brief to the Federal Court, but a majority of the Committee's members are concerned about the message being sent by such a position, which disregards the government's still valid commitments set out in the Action Plan, and the respectful treatment that community representatives and CCP officials would have expected instead of hearing through the media that the program had been cancelled.

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33 John Sims, Deputy Attorney General of Canada, defence brief submitted to the Federal Court in *FCFA* v. *Her Majesty the Queen*, par. 74.

34 Ibid., par. 77.

35 *Office of the Commissioner of Official Languages, Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report*, October 2007, p. 15.

The Government Response of October 2007 to the Committee's report on the vitality of official language minority communities notes:

> The Government of Canada reiterates its commitment to respecting fully the objectives undertaken in the Action Plan for Official Languages.[36]

The Accountability and Coordination Framework is an integral part of the Action Plan, and regardless of whether it has legal status, the government should have lived up to its undertakings.

The Committee is therefore of the opinion that, in view of its own undertakings, the government should have acted much more promptly to inform the communities of its intention to cancel the CCP. While the Committee cannot comment on the legality of the government's decision to fulfill its obligation through regular, institutional consultations, such consultations would clearly be pointless if the government does not inform the participants of its most important decisions.

Yet the investigation report of the Office of the Commissioner of Official Languages notes that, in its spending review of September 2006,

> Not only did TBS's instructions limit internal discussions to the most senior government officials, they also prevented departments from consulting outside parties, including official language minority communities, on proposed budget reductions.[37]

It is understandable that the government wishes to test the legal scope of its commitments under the *Official Languages Act*, but it cannot be justified that the government deliberately prevented such consultations.

The communities' intense reaction to the government's cancellation of the CCP derives not only from the program's effect on language rights, but also from the very strong symbolic value it acquired as a result. The CCP helped the communities achieve what they regard as landmark victories in gaining recognition of their rights. In the belief that the court decisions would not have been rendered if the program had not enabled them to take action, often after appeals by the provincial governments, the communities credit the CCP for many of the very tangible benefits stemming from these decisions. This is especially true for school governance and the Montfort Hospital. Many witnesses stated that these gains would simply have been unimaginable without the CCP.

The federal government's modest funding for the program, $525,000 per year for language rights, served in turn as a very concrete representation of Canada's commitment

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36 Government Response to the Seventh Report of the Standing Committee on Official Languages of the House of Commons, October 2007, p. 5.

37 Office of the Commissioner of Official Languages, *Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report*, October 2007, p. 34.

to fostering the vitality of official language minority communities. The decision to cancel the program, regardless of the reasons, was perceived by the community as a sudden and unexplained breach of an agreement that they had until then considered strong.

The government's right to govern

The Commissioner of Official Languages' argument focused on the government's obligation to comply with Part VII of the *Official Languages Act,* and not on its obligation to deliver any specific program as such. He did not therefore simply recommend that the CCP be re-established, and some community representatives expressed disappointment with this position.[38] The Office of the Commissioner offers the following explanation:

> OCOL fully recognizes the prerogative of the federal government to review and revise priorities, policies and programs. In interviews and in public statements, representatives of minority language organizations also readily acknowledged the government's right to govern. The fact that a given activity supports official language minority communities does not mean it is the only option or make it immune from change.[39]

This right to govern is also an integral part of the Contribution Agreement, which stipulates that the Government of Canada may simply terminate funding:

> In response to the government's annual budget, a parliamentary, governmental or departmental spending decision, or a restructuring or re-ordering of the federal mandate and responsibilities that impact on the Program under which this Agreement is made.[40]

A program that meets its objective need not of course become permanent, provided that its cancellation does not threaten the attainment of its objective. In this case, however, the links between the CCP, access to the courts for official language minority communities, the clarification of constitutional rights and community vitality are unanimously recognized, even by those opposed to the program. When the measures provided to achieve certain objectives are so clearly effective, the elimination of those measures represents an obvious risk to achieving the objectives, unless other measures are provided. Moreover, the elimination of measures that are entirely effective, together with a lack of proposed alternatives, creates legitimate suspicion of the government's real desire to meet these objectives.

What the government contests in its brief to the Federal Court is not that these links exist but rather their importance:

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38 See for example the FCFA press release, "Recommendations with teeth," October 10, 2007, http://www.fcfa.ca/press/pressrel_detail.cfm?id=168

39 Office of the Commissioner of Official Languages, *Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report*, October 2007, p. 38.

40 Contribution Agreement, Clause 20.1.

> [Translation:] The contested decision [cancellation of the CCP] has a very indirect impact on the applicant's language rights. No language rights are directly at issue in this matter (such as the right to government services in French). Rather in this case, the applicant is demanding the right to funding to cover the cost of litigation. The OLA does not guarantee this right, nor does our Constitution.[41]

If the government claims it can fulfill its constitutional and legal responsibilities through measures other than the CCP, its right to govern must be acknowledged and the electorate must be trusted in its choice of the executive. Yet we must also recognize the right of individuals and groups to challenge the validity of these decisions and the supremacy of the courts in their determination of the government's legitimate understanding of its commitments and the legality of its decisions.

In this regard, the government takes the following position in its brief:

> [Translation:] The role of the courts in general is not to tell the government how to spend public funds. It is up to elected officials to make those decisions and their actions are judged by the electorate.[42]

The Committee members fully recognize the inherent risks of an imbalance of power that would limit the government's decision-making flexibility in order to make way for too much litigation surrounding the political process. Community representatives repeatedly stated in this regard that they did everything possible to avoid going to court, and that respect for language rights should ideally be negotiated politically. The Committee members obviously share this wish, but history tells us that in the event of disagreement between a minority and the government, the power of the courts has often been a more powerful incentive to the government than a sincere desire to maintain social harmony. According to the majority of the Committee members, access to justice is therefore a key to maintaining social harmony. If an alternative to the CCP is being considered to restore the balance between minorities' rights and limited resources on the one hand, and the government's legitimate prerogatives and significant resources on the other, the Committee is willing to consider it. In the absence of such an alternative, the CCP has proven its effectiveness and remains the best way to preserve this balance.

Neutrality of the CCP

This is clearly a more difficult issue to tackle since it involves careful constitutional analyses and moral and philosophical principles that go far beyond the administration of a government program. We will limit ourselves here to a few general comments. First of all, the Committee members do not consider it possible or desirable for a country's constitution to be neutral. This fundamental law expresses specific values that by definition are

41 John Sims, Deputy Attorney General of Canada, defence brief submitted to the Federal Court in *FCFA* v. *Her Majesty the Queen*, par. 39.

42 Ibid., par. 37.

opposed to other values. All decisions by all orders of government must be made within the framework of these basic values, as broadly worded in the Constitution. The vast majority of government decisions and programs also reflect the sides it has taken in favour of certain points of view and against others. The only requirement is that these decisions and programs do not contradict the fundamental values of the country as expressed in the Constitution. In the event of ambiguity or conflicting points of view, it is up to the courts to interpret the meaning of these values in a specific case. Their interpretation will also change over time, as jurisprudence evolves and society's values change. One witness offered an especially apt description of this view of the law:

> I think the law, if I can use an analogy, is like a living tree; it constantly is evolving and developing. So yes, with the *Charter*, for example, I believe it celebrated its 25th anniversary. I'm generally familiar with the battle and struggle for English-language rights and French-language rights in Canada, and that develops over time. I don't think the law or the *Charter* or any section of the *Charter* is static, for example, so Section 15 may be interpreted in one way in 1982, or 1985, and down the road may be interpreted in another fashion, depending on who may be interpreting the law at that point. So I would say yes, we have a body of jurisprudence on the *Charter*, for example, in different sections; however, it's continually under review and development and will evolve, I'm sure, for years to come.[43]

Mr. Doucet expressed the same position:

> The Constitution is an ever-developing, living organism.[44]

It establishes principles that are not neutral. In the case of the CCP, the objective is to promote certain values and encourage the broad interpretation of the rights covered by the program.

> By their nature and wording, the provisos in the agreement are intended to broaden those fundamental rights. The objective is to ensure that all citizens are equal under the law and have access to services in the official language of their choice. The underlying principle of that provision is one of inclusion. Challenges based on that provision are naturally intended to increase people's ability to participate. This program does not exclude anyone; rather, it gives people access to the justice system. It would be contrary to that objective to support cases that jeopardize the rights of groups that are supposed to be protected by equality and linguistic rights. Unlike what our critics claim, this is not only an issue of diverging views on equality. The program does not fund cases that would likely undermine the equality and linguistic rights of protected groups.[45]

The CCP therefore advocates a broad interpretation of language and equality rights. As such, it is not neutral, since such an interpretation of rights is obviously not the only possibility. Many court decisions have demonstrated however that this broad interpretation

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43 Christopher Schafer (Director, Canadian Constitution Foundation), Evidence, June 12, 2007, 10:20 a.m.

44 Michel Doucet (Professor, Expert in Language Rights, Law Faculty, University of Moncton), Evidence, June 19, 2007, 9:30 a.m.

45 Noël Badiou (Executive Director, Court Challenges Program of Canada), Evidence, June 5, 2007, 9:05 a.m.

is largely consistent with the courts' interpretation of constitutional principles. It is quite possible that some aspects of language rights have been clarified more readily and more quickly than others because many decisions were made with the support of the CCP, but that does not mean that these decisions are not valid. The Program has allowed the courts to interpret the sections of the Constitution covered by the Program, but the CCP cannot be held responsible for whether or not these decisions have favoured the organizations or individuals that obtained funding under the program.

It is legitimate for the government to wish to promote a different interpretation of constitutional rights. Any initiative of this kind must however first be consistent with existing laws. It will be up to the courts to decide whether the cancellation of the CCP violated certain constitutional principles and provisions of the *Official Languages Act*. A majority of Committee members are in favour of a broad interpretation of constitutional rights. If the courts find that the narrower interpretation of rights put forward by the government enables it to meet its legal and constitutional responsibilities, members will have to acknowledge that decision. If the courts find otherwise, the government will have to implement measures to achieve similar results to those achieved under the CCP.

The Committee members also fully recognize that some provisions of the Constitution may not be consistent with certain values that are important to certain individuals or groups, especially as regards equality rights. It is however entirely possible that these differences may not always be expressed freely in the interest of healthy debate on these fundamental issues.

In addition to the points of law to be clarified by the courts in the case of the *FCFA* v. *Her Majesty the Queen*, the matters considered above are the central issues in the debate surrounding the government's decision to cancel the CCP. Some secondary issues also merit attention.

State of jurisprudence

When the CCP was cancelled for the first time in February 1992, the Honourable Gilles Loiselle, then President of the Treasury Board, offered the following explanations.

> [Translation:] The federal government has made substantial funding contributions to the Court Challenges Program over the years, providing for the development of extensive jurisprudence.[46]

Fifteen years later, it is legitimate to ask what constitutes sufficient jurisprudence. The document often mentioned in this regard is the Summative Evaluation of the CCP, conducted in 2003, which included meetings with judges and constitutional experts.

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46 Quoted in the 1991-1992 Report of the Court Challenges Program, p. 13.

> The evaluation findings suggest that there are dimensions of the constitutional provisions covered by the Program that still require clarification and that, most probably, there will continue to be dimensions of the constitutional provisions that require clarification indefinitely.[47]

Regardless of the number of decisions rendered, there will always be further important issues that cannot be anticipated. In other words, there are no clear criteria to determine whether there is sufficient jurisprudence. This will depend more on the government's decision whether or not to encourage the clarification of constitutional rights.

Another often quoted document is the Government of Canada's response to a question raised about the CCP by the United Nations Committee on Economic, Social and Cultural Rights, further to the tabling of its Fifth Report on the International Covenant on Economic, Social and Cultural Rights. Canada presented this response in May 2006 at a session of this Committee.

In its study of the impact of the elimination of the CCP, the Office of the Commissioner of Official Languages notes:

> In May 2006, while appearing before the United Nations Committee on Economic, Social and Cultural Rights, the federal government itself emphasized the importance of the Program and recognized the relevance of maintaining it to address the legal issues that still remained to be clarified.[48]

The report is quoted as follows to support this statement:

> The Court Challenges Program, funded by the Government of Canada, provides funding for test cases of national significance in order to clarify the rights of official language minority communities and the equality rights of historically disadvantaged groups. An evaluation of the CCP in 2003 found that it has been successful in supporting important court cases that have a direct impact on the implementation of rights and freedoms covered by the Program. [The individuals and groups benefiting from the CCP are located in all regions of the country and generally come from official language minorities or disadvantaged groups, such as Aboriginal people, women, racial minorities, gays and lesbians, etc.] The Program has also contributed to strengthening both language and equality-seeking groups' networks. The Program has been extended to March 31, 2009.[49] (The sentence in brackets was not included in the Commissioner's report)

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47 Canadian Heritage, Summative Evaluation of the Court Challenges Program, February 2003, p. 52. Part III of the Study pertained to the legal impact of the cancellation of the Court Challenges Program, conducted by the Office of the Commissioner of Official Languages, includes a very long list of questions not resolved by the current case law.

48 Idem, pp. 5-6.

49 Canada's Fifth Report on the International Covenant on Economic, Social and Cultural Rights, United Nations Committee on Economic, Social and Cultural Rights, document E/C.12/CAN/5, August 30, 2005, p. 29.

It would indeed have been unusual for the current government to have presented this report at a United Nations committee meeting. This report was produced in August 2005, however, before the current government was elected. The confusion derives from the fact that, after presenting this report at the United Nations, Canada received a list of questions, the answers to which were supposed to be presented in May 2006. The question was raised why Canada had not expanded the equality rights component of the CCP to include challenges of provincial and territorial legislation. Canada's response, which was presented to the UN in May 2006, that is, after the election of the Conservative government, was much more neutral than the report of August 2005.

> It is not possible for the government to support all court challenges, but this uniquely Canadian program has been successful in supporting a number of important court cases that have had direct impacts on the implementation of linguistic and equality rights in Canada. A recent evaluation found that there remain dimensions of the constitutional provisions currently covered by the CCP that still require clarification and the current program was extended to March 2009.[50]

This response is certainly not explicit enough to assert that the current government "emphasized the importance" of the program internationally a few months before it was cancelled.

Transparency of the CCP

The only serious reservation expressed about the CCP in the Summative Evaluation conducted in 2003 before the renewal of the Contribution Agreement concerned its rigid application of privacy provisions. That rigidity cast doubt on the Program's ability to give a satisfactory account of its process for selecting recipients of financial support:

> The standards established in the Access to Information Act and the recommendations of the Auditor General of Canada and her latest reports all point towards a need for more transparency on the part of the Corporation.[51]

However, the Final Investigation Report issued by the Office of the Commissioner of Official Languages in October 2007 had this to say about the CCP's transparency:

> During the investigation, government officials confirmed, to the extent possible subject to solicitor-client privilege, that all issues in the program evaluation identified for improvement were addressed in the subsequent contribution agreement.[52]

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50 Quoted in the Study of the Legal Impact of the Elimination of the Court Challenges Program, conducted by the Office of the Commissioner of Official Languages, p. 5.

51 Canadian Heritage, Summative Evaluation of the Court Challenges Program, February 2003, p. 49.

52 Office of the Commissioner of Official Languages, *Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report*, p. 14.

Possible replacements for the CCP

To date, the government has offered no possible replacements for the CCP. The government has, however, occasionally raised the possibility, in particular in a brief submitted in Federal Court,[53] that the Office of the Commissioner of Official Languages could serve as an alternative to the CCP, and that other existing provisions of federal and provincial legislation, and legal aid programs in particular, could play a role analogous to that of the CCP. In its October 2007 Final Report, the Office of the Commissioner of Official Languages clearly rejected these possibilities:

> The Commissioner reminds the government that, under the *Official Languages Act*, a complainant or the Commissioner can apply to the Federal Court of Canada only on matters relating to that Act. Furthermore, certain legislative linguistic rights are not covered by the *Official Languages Act*, for example, minority language education rights set out in the *Canadian Charter of Rights and Freedoms.* With regard to provincial legal aid programs, they provide legal services to low-income people, most notably in legal actions concerning criminal and civil law and family law. Legal aid would not be available, for example, to finance a court action aimed at obtaining a minority language school or school board, causes that the CCPC could and did support in meaningful ways over the years.[54]

The search for international comparisons that could suggest an alternative to the CCP proved fruitless:

> The consultations and research completed for the purpose of this evaluation have identified no other country with a similar program.[55]

The review of all the evidence presented to the Committee shows that five options were defended pursuant to the government's decision to cancel the CCP:

1. Uphold the cancellation;

2. Re-establish the entire program;

3. Re-establish the linguistic component of the Program;

4. Redefine the CCP's mandate to make it more neutral while continuing to apply it to the rights currently covered by the program, or expanding it to all constitutional rights;

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53 See in particular paragraphs 43 to 45.

54 Office of the Commissioner of Official Languages, *Investigation of Complaints Concerning the Federal Government's 2006 Expenditure Review, Final Investigation Report*, p. 15.

55 Canadian Heritage, Summative Evaluation of the Court Challenges Program, p. 21.

5. Provide federal government support to establish a foundation that would keep the program going and that would eventually become independent of government policies.

A majority of the Committee members reject the first option. Upholding the cancellation would mean a negation of the principle that there must be a balance between the presentation of a minority viewpoint by organizations with few resources and the presentation of the majority viewpoint by a government with enormous resources. Moreover, the easier access to the courts that the CCP permitted to defend language rights unquestionably helped clarify those rights and at the same time made a significant contribution to the communities' vitality. While the CCP may not be the only way to achieve that result, no solution has been found to date that could provide such effective support for the rights of the official-language minority communities.

For these same reasons, a majority of the Committee members is in favour of the second option, i.e., the re-establishment of the entire Court Challenges Program as it existed when it was cancelled on September 25, 2006.

A majority of the Committee members also rejected the third option, to re-establish the linguistic component of the CCP. Certain arguments in favour of this option, however, mentioned, for example, that the Committee has no mandate to examine questions related to equality rights. The Committee members could also have chosen this option for strategic reasons, recognizing that there is more likely to be a consensus on the CCP's "language rights" than on its "equality rights." Although a majority of the Committee members unreservedly support the CCP's "equality rights," they could have also thought that a recommendation to re-establish the entire Program would adversely affect the communities. In fact, if the government rejected this recommendation, it would in all likelihood have been for reasons unconnected to language rights. It would be a shame if the basic consensus that exists about language rights could not be expressed and were instead endangered by being linked to the more difficult and contentious debate taking place about other fundamental rights. The opposition to other issues could thus contaminate the relative peace that seems to prevail on the question of language rights, both among the Canadian public and on the Committee that serves as its reflection. If the language climate deteriorated following the breaking of the pact that the CCP represents for the communities, it would be in large part due to the government's refusal to clearly explain the reasons for its decision to the Canadian public.

The fourth option comes from witnesses who said that the CCP should be modified to make it more neutral.. The Committee is prepared to examine any proposal for a program that would uphold the principles of access to justice and clarification of constitutional rights but that would not defend a specific view of the law.

Similarly, the fifth option recommending the establishment of a foundation is an interesting avenue that could avoid the upheaval associated with the creation and

cancellation of programs. The Committee is also wholly prepared to attentively examine any proposals made to it in this regard.

However, the Committee cannot consider an analysis of the alternatives until the basic question about the cancellation of the Court Challenges Program is resolved. The Committee is not prepared to begin a constructive dialogue on the question of access to justice for official-language minority communities and clarification of constitutional language rights until the government has repaired the error it made by cancelling the CCP without consulting the communities and without explaining its decision to the Canadian public. That is why the Committee wishes to close it report by recommending:

Recommendation 2

That the Government of Canada re-establish the Court Challenges Program under the terms of the contribution agreement that was in effect before its cancellation was announced on September 25, 2006.

LIST OF RECOMMENDATIONS

Recommendation 1

That the government clearly explain to Canadians its reasons for cancelling the Court Challenges Program.

Recommendation 2

That the Government of Canada re-establish the Court Challenges Program under the terms of the contribution agreement that was in effect before its cancellation was announced on September 25, 2006.

APPENDIX A
LIST OF WITNESSES

FROM THE 1ST SESSION OF THE 39TH PARLIAMENT

Organizations and Individuals	Date	Meeting
As an individual	2007/06/05	56
Gisèle Lalonde, Former President of SOS Montfort		
Association des parents fransaskois	2007/06/14	59
Roger Gauthier, Executive Director		
Canadian Bar Association	2007/06/19	60
Melina Buckley, Representative		
Tamra Thomson, Director, Legislation and Law Reform		
Canadian Constitution Foundation	2007/06/12	58
Christopher Schafer, Director		
Centre for Cultural Renewal	2007/06/14	59
Iain Benson, Executive Director		
Commission nationale des parents francophones	2007/06/14	59
Ghislaine Pilon, President		
Court Challenges Program of Canada	2007/06/05	56
Noël Badiou, Executive Director		
Guy Matte, President		
Kathleen Tansey, Vice-President of the Board of Directors		
Fédération des associations de juristes d'expression française de common law inc.	2007/06/19	60
Louise Aucoin, President		
Fédération des communautés francophones et acadienne du Canada	2007/06/12	58
Serge Quinty, Director of Communications		
Lise Routhier-Boudreau, Vice-President		
McGill University	2007/06/14	59
Tasha Kheiriddin, Professor		
Montfort Hospital	2007/06/05	56
Michel Gratton, Communications Consultant		
Quebec Community Groups Network	2007/06/12	58
Sylvia Martin-Laforge, Director General		

Organizations and Individuals	Date	Meeting
Quebec English School Boards Association	2007/06/14	59
David Birnbaum, Executive Director		
Marcus Tabachnick, President		
Société des Acadiens et Acadiennes du Nouveau-Brunswick	2007/06/12	58
Ghislaine Foulem, Interim Director General		
University of Moncton	2007/06/19	60
Michel Doucet, Professor , Expert in language rights, Law Faculty		

LIST OF WITNESSES

FROM 2ND SESSION OF THE 39TH PARLIAMENT

Organizations and Individuals	Date	Meeting
Department of Canadian Heritage	2007/12/06	8
Josée Verner, Minister of Canadian Heritage, Status of Women and Official Languages		
Judith LaRocque, Deputy Minister		
Hubert Lussier, Director General, Official Languages Support Programs		
Greater Quebec Movement	2007/11/29	6
Richard Smith, Vice-President		

APPENDIX B
LIST OF BRIEFS

FROM THE 1ST SESSION OF THE 39TH PARLIAMENT

Organizations and Individuals

Court Challenges Program of Canada

Fédération des communautés francophones et acadienne du Canada

LIST OF BRIEFS

FROM 2ND SESSION OF THE 39TH PARLIAMENT

Organizations and Individuals

Greater Quebec Mouvement

APPENDIX C: SELECTION OF KEY CASES INVOLVING LINGUISTIC RIGHTS, AND FUNDED BY THE COURT CHALLENGES PROGRAM

This table sets out a small sampling of cases considered important in the area of language rights that benefited from funding under the Court Challenges Program. Most of the judgments in these cases obliged provincial or territorial governments to modify the legislative regime applicable to the rights of official-language minority communities.

Table 19: Cases pertaining to language rights

Case	Description
Mahé v. Alberta (School governance)	In Mahé v. Alberta the Supreme Court of Canada recognized the rights of parents belonging to an official language minority group to govern minority language education facilities.
Susan Abbey v.Essex County Board of Education (Access to education)	An English-speaking couple, Susan Abbey and her husband, registered their three children in a French-language school. When the family moved to another community, Ms. Abbey registered her children in an immersion school, but she quickly realized that the immersion program did not meet her children's educational needs. The English- language school board turned down her request to register her children in a French- language school and pay the tuition fees. The Ontario Divisional Court rejected the applicant's arguments. The Court of Appeal of Ontario decided in Susan Abbey's favour. It ruled that all Ms. Abbey's children were accorded rights under section 23, even if their parents were not French-speaking, given that the eldest had been educated in a minority French-language school..
Commission of Official Languages v. Her Majesty the Queen (Delegation of powers and language rights)	The CCP granted funding to the Association des juristes d'expression française de l'Ontario (AJEFO) so it could intervene in a court challenge calling into question the Federal Contraventions Act and the issue of delegation of powers. AJEFO was concerned that, in the Act, the federal government had failed to confirm the protection of acquired language rights provided for in federal law, and more particularly Bill 108 (Streamlining of Administration of

	Provincial Offences Act, 1998).La Cour fédérale a tranché en faveur de l'AJEFO.
The Federal Court ruled in favour of AJEFO. Fédération franco-ténoise v. Canada (Territorial governments' linguistic obligations)	The CCP granted funding to the Fédération franco-ténoise for a court challenge to clarify whether the government of the Northwest Territories and, by extension, all territorial governments, were institutions of the Government of Canada in the application of section 20 of the Charter and of language rights in the area of services. According to Justice Rouleau, the Northwest Territories were part of the federal Crown and were therefore subject to the linguistic obligations set out in the Charter. The Northwest Territories launched an appeal of this ruling before the Federal Court of Appeal, which upheld the appeal.
Chiasson et al. v. The Attorney General of Québec (Language rights and freedom of expression)	The CCP granted funding for a court challenge involving Québec's Charter of the French Language, section 2 of the Canadian Charter of Rights and Freedoms, and the language of software in the workplace. Justice Pierre J. Dalphond of the Québec Superior Court, District of Montréal, declared that the Charter of the French Language did not allow the Office de la langue françaiseto prevent an employer from providing English-language programs in a workplace where French-language programs were already available to employees.
Charlebois v. City of Moncton (Legislative bilingualism)	A City of Moncton building inspector issued Mr. Charlebois, a French-speaking resident of Moncton, an order that was written in English only. Mr. Charlebois challenged the constitutional validity of the order, as well as that of the by-law under which the order was issued, since the by-law was not adopted in both of New Brunswick's official languages. The Société des acadiens et acadiennes du Nouveau-Brunswick and the Association des juristes d'expression française du Nouveau- Brunswick intervened in Mr. Charlebois' favour. The trial court judge dismissed Mr. Charlebois' motion and stated that the City of Moncton had no constitutional obligation to adopt its by-laws in both official languages and that the fact that its by-laws were adopted in one or the other, but not both, official languages could not serve as a basis for having them declared null and void. The New Brunswick

	Court of Appeal reversed this decision in favour of Mr. Charlebois.
Lalonde v. Health Services Restructuring Commission of Ontario Unwritten principle of protection for minorities	In this case, the applicants were contesting the Ontario government's decision to close the only fully francophone hospital in the Ottawa region, the Montfort Hospital. The CCP granted the Fédération des communautés francophones et acadiennes du Canada, the Association canadienne-française de l'Ontario, and the Association canadienne-française de l'Ontario (Toronto) funding to intervene in favour of the applicants before the Ontario Court of Appeal. The Court rejected the appeal from the Ontario government and maintained the Divisional Court's decision stating that the closure of the hospital violated the unwritten principle of protection for minorites.
Arsenault-Cameron v. Prince Edward Island	French-speaking parents in Summerside, Prince Edward Island, and the organization representing them - the Fédération des parents francophones de l'Île-du-Prince-Édouard - had for several years been demanding that a French-language school be set up in their community. In January of 1997, the Prince Edward Island Supreme Court sided with the parents, saying they had a right to a French-language school. The government appealed the decision and won. In 1998, the Fédération des parents de l'Île-du-Prince-Édouard were granted Program funding to take the case before the Supreme Court of Canada. Funding was also granted to Prince Edward Island's French Language Board, the Société Saint-Thomas d'Aquin and the Commission nationale des parents francophones to intervene on behalf of the parents. The Supreme Court's decision of January 2000 quashed the decision of the Prince Edward Island Supreme Court, Appeal Division.
Sources: CCP Annual Reports, http://www.ccppcj.ca/e/resources/resources.shtml	

MINUTES OF PROCEEDINGS

A copy of the relevant Minutes of Proceedings from the 1st Session of the 39th Parliament (Meetings *Nos. 56, 58, 59, 60)* is tabled.

A copy of the relevant Minutes of Proceedings from the 2nd Session of the 39th Parliament (Meetings *Nos. 4, 6, 7, 8, 9)* is tabled.

Respectfully submitted,

Steven Blaney, MP
Chair

Dissenting Opinion from the Conservative Party of Canada

The following report is the Conservative Members of the Official Languages Committee's dissenting opinion on the committee's study of the Court Challenges Program.

First of all, it is important to note that the report commences with a negative message that precipitately concludes that the abolition of the Court Challenges Program is an error. When reading the report, it is apparent that the solution to the analysis can be found in the first paragraph where it is clearly stated that the analysis of the presented options should have been "preceded by the Government's decision to rectify the error it committed in cancelling the CCP without consulting the official language minority communities and without explaining to Canadians the reasons for its decision"[1]. Stating this in a peremptory matter at the beginning of the report influences the rest of the study and does not allow the reader to have a general view of the government's realizations in promoting linguistic duality.

There is a fundamental contradiction in this report: it recognizes, on one hand, the necessity of leaving the Court to rule on these issues, and, on the other hand, holds arguments, opinions and conclusions that exceed this necessity. The government's obligations concerning the official language minority communities are presently before the Court.

Unlike stated in the report, the government publicly explained many times the expenditures review process that led to the elimination of the Court Challenges Program. It is possible that certain groups that had found an eliminated program to be useful will be against the government's decision as well as its explanation. It is up to Canadians to judge if the explanation was clear and satisfactory.

As mentioned in the report, the opposition members refused to consider other options concerning the protection of linguistic rights. The refusal for constructive discussion resulted in the tabling of a biased report that does not present many new elements on this question.

On the other hand, our Government firmly believes that there are many ways to promote the two official languages and to help official language minority communities. An impartial evaluation should have considered many positive initiatives taken by the government in order to ensure its commitment to linguistic duality.

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[1] Report on the Protection of Language Rights under the Court Challenges Program (Version 1, Dec 3 2007) (p.1, No. 2)

The present government has more then once stated that it would directly help communities in order to obtain concrete results. This was the main message in the announcement of $30 million in additional funding over two years for official language minority communities.

The government also committed, during the last Speech from the Throne, to renew its support to linguistic duality by proposing the next phase of the Action Plan on Official Languages.

On December 3, the Prime Minister and the Minister for Official Languages announced the appointment of a special advisor on linguistic duality and official languages, Bernard Lord. M. Lord will report the results of the consultations as well as the discussions with Canadians from coast to coast via the Web.

Following this announcement, the Fédération des communautés francophones et acadiennes welcomed the appointment of Bernard Lord, and federal official languages commissioner, Graham Fraser, said that he was pleased with Lord's appointment and described the former Premier as being an excellent choice. Following his first consultation on December 4, 2007, the Fédération des francophones de la Colombie-Britannique sent Mr. Lord a letter stating that "the Fédération des francophones de la Colombie-Britannique would like to thank you for listening and for your consideration during the consultations on linguistic duality and official languages on December 4, 2007 in Vancouver (translation)"[2].

Thus, through additional funding invested in order to directly support communities and the consultation process presently being held, the government has demonstrated that it has not forgotten the Official Languages Act and still truly believes in respecting it.

In conclusion, not only is the issue of the government's obligations towards the official language minority communities presently before the Court - which should encourage us to refrain from announcing conclusions on this report - it clearly forgets to state the many positive initiatives taken by the government by firmly announcing that the elimination of the Court Challenges Program is an error. Despite the report, the government will continue acting in the best interests of the minority language communities and will keep on taking concrete action to ensure the vitality of French and English in Canada.

[2] Letter from the Fédération des francophones de la Colombie-Britannique, addressed to Bernard Lord, (December 5, 2007)