



ACCESS TO THE JUSTICE SYSTEM
COURT CHALLENGES PROGRAM

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STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

Submitted by:

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REAL Women of Canada is a national non-denominational organization of women, federally incorporated in 1983. We support both the equality of women and the family consisting of father, mother and children, which is the foundation of society. Our objective is to support the human rights of women and all members of their families. REAL Women of Canada is supported solely by membership fees, donations and bequests. It does not receive government funding.

REAL Women has had long experience with the previous Court Challenges Program (CCP) and its panels on equality rights, since its inception in 1985. We have also closely followed the operation of this program over the years.

As a result of our experience and knowledge of the CCP, we strongly urge that the appalling defects in the previous CCP be eliminated before the program is reinstated.

Fundamental Rights

The Charter of Rights was established to protect minority language rights and the fundamental equality rights of all Canadians. Ironically, equality rights principles were gravely undermined by the CCP, which ultimately became one of the most corrupt, discriminatory and biased programs developed in Canada.

Entirely funded by the taxpayer, the program was not accountable to the public, did not report to Parliament, and was not subject to the Access to Information Act. The program was an embarrassment in that it betrayed human rights by its discriminatory practices and biases.

This became particularly egregious in 1994 when the CCP ceased entirely to be an agency of the government, and, instead, was incorporated as an independent, non-profit corporation. This permanently locked in the bias and prejudices of the program since it was no longer subject to political and budgetary restraints and oversight by the government.

Mandate of CCP

The CCP's mandate was to assist "disadvantaged" groups in cases that had "legal merit" and promoted "equality" rights for Canadians. This criteria, unfortunately, was not defined in the mandate. This omission became the basis of many of the problems with the CCP. The absence of definition led to the program developing its own criteria wherein it interpreted these expressions in a narrow, restrictive, ideological basis, which denied access to justice to groups that did not share the ideology of those managing the program.

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PROBLEMS WITH THE CCP

1. Discrimination in the Application of the Definition of Equality

All women believe in equality, there are different understandings and interpretations of its meaning. The CCP, however, applied the definition of “equality” based solely on the ideology of feminism, and funded only legal challenges undertaken by feminist organizations and other groups sharing this ideology.

Women do not all think alike. Their views differ according to their social, economic, religious and cultural backgrounds, the same as men. As no men’s group can claim that it represents the views of all males in Canada, similarly, feminist groups cannot claim that their ideological views represent the views of all Canadian women. To suggest this is to insult both the intelligence and integrity of Canadian women.

The feminist agenda is based on the premise that women are “victims” oppressed by a patriarchal society and that they require special protection. On the contrary, most women today with a few exceptions, such as aboriginal women, are perfectly capable of standing up for themselves, and do so. We are not shrinking violets. We do not regard ourselves as helpless victims.

Yet the CCP, for example, funded the legal arm of the feminist movement, LEAF (Women’s Legal Education and Action Fund) in 140 cases¹ on a multitude of issues that most women regard as extreme and unreasonable. Consequently, by funding feminist organizations only, the funding did not benefit “women” but, rather, benefitted and promoted the feminist lobby, whose views are just a single thread among the many threads that make up the fabric of women’s views.

It is particularly noteworthy that the issue of abortion is one on which women are most widely divided. Feminists insist that easy access to abortion is necessary in order for women to be equal to men in living out their lives. Many women, however, believe that there can never be equality or genuine justice in Canada when the lives of some members of the human family, namely, the pre-born child, can be arbitrarily destroyed at the discretion of another. To many women, abortion is the ultimate in the oppression of vulnerable human life, and a total denial of equality and justice.

Yet the CCP has funded only those cases dealing with the abortion issue that support the feminist view.

When REAL Women of Canada applied for funding in the case of *Daigle v. Tremblay* [1989] 59 D.L.R. (4th) 609, which dealt with an injunction granted by the Quebec Court of Appeal to prohibit an abortion, REAL Women was informed in a letter dated October 11, 1989 by the CCP:

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The Panel was of the view that there was no federal government policy, practice or legislation being challenged in this case and therefore, the case lay outside the mandate of the Program.

Imagine our shocked disbelief when the CCP funded LEAF in that same case.² The fact that “there was no federal government policy, practice or legislation being challenged in this case” was apparently not relevant to the equality panel when it came to funding the feminist organization.

REAL Women also applied for funding in two other cases relating to abortion,

- *Borowski v. A.G. Canada* [1989] 1 S.C.R. 142; and
- *R. V. LeMay v. Sullivan* [1991] 1 S.C.R. 489.

REAL Women were refused funding in both cases, but re the same cases, the CCP funded LEAF.

It is significant, that in response to REAL Women’s request for funding in the *Borowski* case, the CCP demanded that REAL Women submit its legal arguments to the equality panel for review. REAL Women very reluctantly did so. These arguments were then presumably handed over to LEAF because the latter’s lawyer responded to every one of our arguments in its own *Borowski* intervention. In a letter to REAL Women, dated January 11, 1989, the CCP refused REAL Women funding. As a final insult, even before the equality panel had notified REAL Women of its refusal to fund it, an executive member of LEAF, who was a lawyer, sent a letter to REAL Women disputing in detail each one of our legal arguments.

Such actions by the CCP led to the conclusion that it was a bigoted and corrupt program which undermined the democratic process.

Under the circumstances, it was startling that in the Minutes of the proceedings of the Committee on March 8th, 2016, Ms. Rachel Wernick, Assistant Deputy Minister at Canadian Heritage reported (page 4) that:

. . . but there was no indication in the evaluations that there was a problem in impartiality. [with the program]

A possible explanation for this discrepancy: according to the testimony of Mr. Yvan Déry, Senior Director, Policy and Research, Department of Canadian Heritage, at page 9 of the Proceedings of March 8, 2016:

. . . this is a program run by a third party . . . we don’t go into that level of detail.

Further, (at page 10) of the proceedings, Mr. Déry states:

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It's [the CCP] run totally independently. We have the reports. Most of the information that we shared with you today is drawn up from the old reports of the CCP or the reports that have been made available to us by the language rights support program, but it is independently run.

REAL Women has also retained copies of the annual reports of the CCP, and we can attest that none of these annual reports included information as how the CCP was actually was being operated.

As a result of the refusal to fund REAL Women, our organization was placed at a severe disadvantage before the courts in that, unlike the feminist organizations, we had to fund these cases with our own resources. In the March 8th, 2016 Minutes of this Committee, Ms. Rachel Wernick, stated that the . . . “biggest barrier, bar none, is financial. There was a demonstrated need to provide some financial support in order to bring these test cases forward”. Indeed.

2. Questionable Interpretation of Financially Disadvantaged Groups and Individuals

There are many groups and individuals that fall within the description of “disadvantaged” about which there would be little or no dispute. Examples of this would be organizations or individuals representing physically or mentally disabled persons and some visible minorities, aboriginals and immigrants. However, many groups funded by the CCP cannot reasonably be defined as financially “disadvantaged”.

For example, a large number of feminist organizations had received, since 1973, millions and millions of dollars from the Women’s Program Secretary of State to assist them in their operations as well as for special projects. As a consequence of this generous funding, these organizations could not reasonably be described as being financially disadvantaged. For example, LEAF, together with being funded for its litigation activities by the CCP, also received from the Women’s program the following:

- In the 21-year period since its inception, between 1985 and 2006, LEAF received over \$2,000,000 in funding from the Status of Women to cover its operational expenses;³
- In December, 1985 the Ontario Attorney General Ian Scott awarded LEAF \$1,000,000 to carry out its court interventions;⁴

All women are important, but this fact was consistently ignored by the CCP in its enthusiasm to fund those cases not based on “legal merit” as required by its mandate, but, rather, cases based on ideology.

Other examples of CCP’s ideologically based funding of groups or individuals, which were not financially disadvantaged include:

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(a) *Elizabeth Symes v. Canada* [1993] 4 S.C.R. 695

Ms. Symes was one of the founders and a litigator for LEAF. At the time of her personal legal challenge in 1993, she was a Toronto Bay Street lawyer who had, according to the evidence, an annual family income of over \$200,000. CCP funded her legal challenge before the Supreme Court of Canada in which she argued discrimination because she was unable to deduct the costs of her children's nanny as a business expense from her income tax. The Supreme Court of Canada denied Ms. Symes' appeal on the reasonable grounds that a tax deduction for a nanny's expense would create inequality for other women who did not have a nanny, or paid for their own day care costs, or cared for their children at home.

(b) *Funding of The Privately Owned, For-Profit, Vancouver Abortion Clinic*, (Unreported Decision, November 1991)

The privately owned for-profit, abortion clinic in Vancouver, Everywoman's Health Centre Society, received funding from the CCP to successfully argue before the court that the federal government's denial of "charitable status" under the *Income Tax Act* for its privately owned business, was a violation of "women's equality rights" under the Charter.

(c) *The Canadian Union of Public Employees (CUPE)*

The affluent union (due to compulsory union dues), CUPE, received funding from CCP to intervene in two cases: one before the Ontario Court of Appeal in the 1992 in *Rosenberg, et al v. Canada* [1998] 38 O.R. (3D) 577, and the other in the Alberta Court of Appeal and the Supreme Court of Canada, in *Vriend v. Alberta* [1998] 1 S.C.R. 493. Both these cases did not relate in any way to union matters, but dealt solely with the homosexual issue.

3. Lack of Transparency

Prior to the year 2000, the CCP annual reports provided at least some information as to the names of the recipients of the funding, the amounts they received, and the issues involved in the litigation. However, in the year 2000, the Native Women's Association of Canada (NWAC) intervened in a challenge of Bill C-31, which amended the *Indian Act*. One of the Bands sought to receive information regarding NWAC's funding application and the contract made with the CCP. Its application was rejected by a prothonotary, (a court official with the power to make certain decisions in the Federal Court Trial

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Division). In an order, dated April 27, 2000, Associate Senior Prothonotary Giles ordered that information concerning CCP applications and funding contracts be protected by solicitor-client privilege. (See CCP annual Report 2000-2001.) CCP, therefore, was no longer required to disclose any significant information to the public about its funding practices. Solicitor-client privilege is the legal term used for the strict obligation of confidentiality that lawyers owe to their clients.

The CCP obviously was not a “solicitor” and its funding arrangements with groups which were obviously not “clients” cannot reasonably be described as a “solicitor-client” relationship. To do so is to contradict common sense. The result of this ruling, however, was that the CCP ceased to provide any substantive information in its annual reports, and the managers of the program were made completely unaccountable for all its decisions and operations.

4. Incestuous Relationship Between CCP’s Board of Directors, Advisory Committee and the Equality Panel

The members of the CCP’s Board of Directors, Advisory Committee and equality panel included representatives from the organizations who were also funded by the program. Examples include LEAF and other feminist organizations, such as the National Association of Women and the Law (NAWL), Disabled Women’s Network of Canada (DAWN), the Ottawa based homosexual organization EGALE, and the Vancouver based homosexual organization, December 9th Committee. Representation from these organizations were on the CCP’s seven member equality panel. (The CCP funded 41 cases dealing with homosexual issues between 1994 and 2005, as referenced in the CCP’s annual report 2004-2005, the last detailed report available by CCP on its website).

According to CCP’s website in 2006, four of the seven members of the equality panel were members of LEAF or other feminist organizations, and the remaining three members were representatives of homosexual organizations.

According to Ms. Wernick, at page 5 of the Committee’s March 8, 2016 Proceedings:

The highest number of cases, representing about 20% of the total caseload, was for the Women’s Legal Education and Action Fund, Egale Canada . . . but it spanned a lot of groups.

This incestuous relationship among its administrators allowed the CCP to easily direct funding to those organizations which controlled the program.

It is troubling that in the March 8th, 2016 Minutes of this Committee (page 8), the equality panel was described as consisting of a “panel of experts and leaders in that field which approved the litigation”. They may have been “experts” in promoting their

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own organization's agenda, but they could scarcely be described as impartial or objective "experts" regarding funding decisions.

In effect, members of the equality panel served as watchdogs for their own organizations in order to channel funding to them or to those sharing their ideology. The panel also ensured that any organization with a differing ideology was refused funding.

5. CCP an Instrument for Social Change

The CCP was used as an instrument for social change by judicial fiat. In fact, it did not provide "equality" or economic benefits for disadvantaged groups.

With very few exceptions, the CCP subverted the democratic process in order to change the social values of this country. The CCP accomplished this by doing an end run around Parliament, where legal changes would not have been so readily achieved. As a substitute for the democratic process, the CCP enabled select special interest groups to access the courts by providing funding that financed only those who shared its agenda. This was accomplished, as described above, by the handful of interlocking representatives of special interest organizations on the CCP's equality panel, Board of Directors and Advisory Council. Frequently, the same individual served the program simultaneously in several capacities.

There cannot be true equality when the court hears only one side of an argument. Consequently, the CCP provided undue advantage and influence to favoured activists before Canadian courts. As a result of its tight control, the program became a national powerhouse directing traffic to and from the courts to change the direction of Canadian society in order to adapt to the views of the ideology of special interest groups, which managed the program in the name of "equality". By doing so, the CCP defeated the very objective of the Charter, which was to provide equality for all Canadians. Effectively, by denying funding for legal challenges to organizations which supported accepted social norms and traditional values, determined by trial and error over long human experience in less politically correct times, it permitted so-called "progressive" organizations to dominate the courts. It should be noted that not all "progressive" ideology serves the public good and that not all traditional or conservative values and beliefs create disadvantages.

As stated by Ian Brodie in his book, Friends of the Court: The Privileging of Interest Group Litigants in Canada:⁵

Many of the frequent interveners share what might be called a post-material agenda. Rather than seeking economic benefit per se, many of these groups are seeking social change in the name of equality ... [including] the expansion of government and the entrenchment of redistributive programs so that government can remake society ...

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SUMMARY

The Court Challenges Program, funded by the Canadian taxpayer, purportedly established to support equality and non-discrimination, became, ironically, one of the most biased and discriminatory programs in Canada. It distributed funds to only those who shared the ideology and version of justice of those responsible for the administration of the program. It was not “justice” that was sought, but the political and social aspirations espoused by select, often radical, advocacy groups, which controlled the program.

CCP Distorted the Purpose of the Charter

The Court Challenges Program distorted the purpose of the Charter as it was not used for the protection of individuals against the state, which was the intention, but, rather, to achieve a new social order. This problem was exacerbated during the early years of the Charter of Rights, when the interpretation and application of the Charter were being decided by the courts. These crucial, early cases, determined the framework on which Charter decisions would subsequently be made. The CCP subverted the democratic process, served to undermine the judicial system and betrayed the Canadian public.

Recommendations

1. Because of the enormous differences in the interpretation of what constitutes “equality” the previous administration of the CCP was burdened by this confusion, and complexity of determining what is exactly meant by “equality”. It interpreted the word “equality” in accordance with progressive or liberal perspectives and repeatedly denied funding to organizations which supported traditional culture and religious values, while favouring those opposing such beliefs. **It is recommended, therefore, in view of the difficulty in interpreting “equality”, that the reinstated CCP be limited to issues involving economic inequality and language rights only.**
2. There must be a financial means assessment of those seeking funding. Funding was previously provided to organizations, which were also funded by other government sources, and, therefore, could not reasonably be described as “financially disadvantaged”.
3. The administrators of the program must be impartial and objective in their assessment of those requiring funding. They should not be affiliated with any special interest group, as this provides a platform to advance their own organization and ideology.
4. The program must be transparent, publicly accountable and answerable to Parliament. It must be subject to *The Access to Information Act*.
5. Should the reinstated CCP continue to provide funding for “equality” issues, this would create a bias and discrimination against those who do not accept the CCP’s

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interpretation or equality. It is recommended, therefore, that not just one side of an issue be funded, but that organizations having a different understanding of the equality issue in question should also, simultaneously, be funded. This is critical as there cannot be true equality if the court hears only one side of an issue.

¹ Hansard, September 28, 2006, page 3368

² Court Challenges Program Annual Report – 1989-1990 Equality Rights page 30

³ Information obtained under *The Access to Information Act*

⁴ Correspondence from Ontario Attorney General, Ian Scott, September 7, 1988 to Real Women of Canada; Globe and Mail, Oct. 1985

⁵ Ian Brodie, "Friends of the Court: The Privileging of Interest Group Litigants in Canada" State University of New York Press, 2002 (p. xvi)