

Special interests: The Charter At 25 Third in a six part series

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Last fall, the Conservative government cancelled the Court Challenges Program (CCP). Despite a predictable outcry from interest groups, this decision should be applauded. An examination of the program reveals that over the years it survived not on its merits, but as part of a larger agenda advanced by left-liberal special interest politics. This agenda privileged select litigants over others and promoted an interventionist interpretation of the equality rights contained in the Charter of Rights and Freedoms.

How did this agenda come about, and how did the CCP fit into it? For the answer, one must go back to 1968, when prime minister Pierre Elliott Trudeau began shaping his "Just Society." Trudeau began by using millions of taxpayer dollars to fund external actors, chiefly special interest groups, to lobby in favour of the statist policies he sought to implement. These efforts mobilized the public and created the impression of widespread support for his initiatives.

Concurrently, in response to the rise of Quebec separatism, Trudeau sought to dilute the tension between Canada's two solitudes by instituting state-funded multiculturalism. Trudeau also adopted official bilingualism, partly to reassure French Canadians outside Quebec and anglophones inside that province that their language rights would be protected. Financial support was extended to official-language minority groups, as well as ethnic, native, women's and youth organizations.

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



CREDIT: Jean Levac, CanWest News Service

Supporters of same-sex marriage on Parliament Hill.

That year, the newly-elected Progressive Conservative government chose to increase the budget of the CCP to \$9- million over five years. In a 2005 interview, former federal justice minister John Crosbie stated that the Tories did so because of "political correctness. If we had discontinued the program we would have received very bad publicity ... reinforcing our image as not being 'with it' on social issues."

When the CCP came up for renewal again in 1989, it received \$12-million over five years. What did taxpayers get for their money? In its first decade, the CCP funded equality rights challenges by groups including: LEAF (the Women's Legal Education and Action Fund), the Charter Committee on Poverty Issues, Equality for Gays and Lesbians Everywhere (EGALE), the Canadian Prisoners' Rights Network, the Canadian Committee on Refugees and the Equality Rights Committee of the Canadian Ethnocultural Council. Of the 24 equality-rights judgments the Supreme Court handed down between 1984 and 1993, nine had a party or intervenor that was funded by the CCP, and most of these were successful.

While these groups battled for different causes, they had one thing in common: They sought to advance the doctrine of "substantive equality." This doctrine posits that to be equal, some individuals must in fact be treated differently, to compensate for discrimination they suffer as members of "disadvantaged groups," such as women, Aboriginals, immigrants, gays, lesbians, etc.

The CCP was instrumental in advancing substantive equality particularly through its funding of LEAF-led cases. These cases also advanced "political disadvantage theory," which holds that minority groups whose interests are excluded from the executive or legislative branches of government can resort to the courts to defend those interests. The fact that providing assistance to such groups may not have been intended by the framers of the Charter is thereby deemed immaterial. If the minority group in question is seen as "analogous" to other minorities who do explicitly enjoy protection under the Charter, the argument goes, they should be given the same rights.

This line of reasoning led to the adoption of the "reading-in" doctrine, which established that courts could "read in" (i.e. "rewrite") Charter provisions to reflect a growing list of disadvantaged minorities. Possibly the most controversial

use of this doctrine was to read in sexual orientation as a prohibited ground of discrimination under Section 15, as analogous to race, sex, religion or age.

By funding these cases, the CCP had a profound impact on the courts' interpretation of Section 15. Politically speaking, most of these cases advanced "progressive" or left-liberal causes. They furthered Trudeau's Just Society project, positioning the state as social engineer.

Not surprisingly, whether a litigant received funding from the CCP depended on where he or she stood on the political spectrum. In some cases, CCP grants appear to have had little to do with financial need, and much to do with connections and ideology, leading scholars Ted Morton and Rainer Knopff to conclude in 2000 that, "The CCP has been a funding bonanza for LEAF and other equality seeking groups on the left."

In 1992, as part of a package of restraint measures, the Progressive Conservative government terminated the CCP. Immediately, interest groups and powerful supporters lobbied for the program's reinstatement, and made it an election issue in the 1993 federal campaign. A year after sweeping to power in 1993, the Liberals inaugurated a new CCP with annual funding of \$2.75-million.

Overall, the effect of the CCP has been to privilege some litigants over others, and advance those litigants' particular view of equality rights in the courts. By entrenching substantive equality, CCP funded cases have perversely made it an advantage to be disadvantaged--and to remain so. As long as one is a member of a disadvantaged group, one is entitled to use the resources of the state to improve one's position.

The result is not a more equal society, just one with a different set of rules as to how you get ahead: who can best curry favour with bureaucrats doling out government grants, who has the better lawyer to assert "disadvantaged group" status, who has the better lobbyist to pressure the state to do its bidding.

The 2006 decision to scrap the CCP was thus justifiable and long overdue. The Conservatives should be commended for striking a blow for true equality -- in the courts and in society -- by finally putting an end to this program.

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TOMORROW

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