

## The Precarious Future of Women's Equality in Canada: Access to Justice and the Court Challenges Program

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**Abstract:** Until its cancellation in 2006, the Court Challenges Program (CCP) enabled equality-seeking groups to challenge government infringements on the equality rights guarantee in Section 15 (1) of the Canadian Charter of Rights and Freedoms. Through an analysis of twenty-three cases focused on women's equality heard by the Supreme Court of Canada between 1985, when the CCP was expanded to fund equality litigation, and 2006, the year of the program's cancellation, this article examines how the CCP fostered access to justice. The analysis shows that the CCP funded forty-three per cent of women's equality litigation in this period. These findings will be of interest to those concerned with the current state of public policy, access to justice, and the advancement of women's equality in Canada.

The staggering cost of Charter litigation is recognized as a major barrier to access to justice in Canada, and this issue is especially acute for equality-seeking groups who want to advance the equality rights guarantee enshrined in Section 15 (1) of the Canadian Charter of Rights and Freedoms. Until its cancellation in 2006, the Court Challenges Program (CCP) provided partial access to justice for historically disadvantaged groups who sought to challenge government infringements on constitutional guarantees (Canada, Court Challenges Program 2007).

When the CCP was first established in the 1970s, funding was limited to minority-language rights litigation. The program expanded in 1985 to include test cases that addressed equality rights, in addition to minority-language rights (Epp 1996: 770). This was largely in response to the adoption of the Charter and the insistence of equality-seeking groups that without funding there would be no means to access these constitutional guarantees (770). Equality-seeking groups working to advance the equality rights of women have since played a major role in Charter equality litigation that addresses Section 15 (1) of the Charter (Canada, Court Challenges Program 1995). Many of these groups argue that government should provide the necessary funding to advance women's equality in Canada, but this is a contentious debate because of the ongoing pressure for government to exercise fiscal restraint in the expenditure of public funds. To explore this issue, this article will assess the leading arguments that justify the continuation of the program as well as its cancellation. By analysing the impact of the CCP in equality litigation from 1985 to 2006, it will also examine how the CCP fostered access to justice. The findings of this analysis will be of interest to those concerned with the current state of public policy, access to justice, and the advancement of women's equality in Canada.

### History of the Court Challenges Program

The Court Challenges Program was established in 1978 by the Trudeau Liberal government. Its mandate was to provide financial support for minority-language rights litigation to challenge federal legislation (Kloegman 2007: 107). Faisal Bhabha, a current member of the Ontario

Human Rights Tribunal, said the CCP went “beyond the legal aid model of funding cases and embraced a more advanced stage in the access to justice movement” (2007: 147). Christopher Manfredi has written extensively on how equality-seeking groups – the Women’s Legal Education and Action Fund (LEAF) in particular – viewed the adoption of the Charter as an opportunity to advance feminist legal reform in the courts and that “the Canadian feminist movement mobilized to exploit this opportunity to become a repeat player in the equality rights field” (2004: 34). These groups argue that the Charter lacks a real enforcement mechanism, because, without funding to pursue government infringements of Charter guarantees, many will be denied access to justice to assert their constitutional rights (Hackett and Devlin 2005: 159).

In 1985, the Parliamentary Committee on Equality Rights observed that “the imbalance in financial, technical and human resources between the opposing parties constitutes a serious impediment to those who might wish to claim the benefit of Section 15” (1985: 133). The Mulroney Conservative government heeded the recommendations of the committee and expanded the CCP to fund equality litigation. After the expansion, the CCP went through a series of changes in its mandate and structure. The Canadian Council on Social Development administered the CCP from 1985 until 1990, when the CCP entered into negotiations for funding renewal. Concerns were raised about the arm’s-length relationship between the program and government and the appropriateness of a government-funded program that supports challenges to government legislation (Canada, Court Challenges Program 1995).

The Mulroney government cancelled the CCP in 1992, citing fiscal restraint as the rationale. Although officials acknowledged that the CCP supported the development of a substantial body of Charter jurisprudence, it was argued that the program had outlived its usefulness and that more cost-effective means could be used to fund court challenges on an *ad hoc* basis (Ibid). However, the cancellation was speculated to be politically motivated, given the Mulroney government’s view that the program favoured funding for left-wing political causes. Upon the election of the Liberals in 1993, led by Jean Chrétien, the CCP was reinstated in 1994 (Ibid).

The Chrétien Liberal government incorporated the CCP as a not-for-profit independent body, with an annual operating budget of \$2.75 million (Morton and Knopff 2000: 98). In 2006, the program was cancelled once again, by the Harper Conservative government (Kloegman 2007: 108). Then-Treasury Board president John Baird commented that it was inappropriate for government to “subsidize lawyers to challenge the government’s own laws in court” (cited in Bhabha 2007: 141). Baird and other officials claimed that the decision to cancel the CCP was simply the result of routine evaluations of ineffective public programs (Canada, Standing Committee on the Status of Women 2008). Officials cited similar reasons in the 1992 cancellation, and this second cancellation was considered part of a broader political agenda because the announcement was made alongside sweeping changes that also limited the mandate and budget of Status of Women Canada (Morris 2006).

### **Current Status of Funding for Court Challenges**

In 2008, the Harper government announced the restoration of funding for court challenges for minority-language rights litigation. The Development of Official-Language Communities

Program is funded by the Department of Canadian Heritage and receives \$1.5 million annually (Canada, Department of Canadian Heritage 2008). This annual budget is more than half of the historical annual budget of the CCP. The amount of funding now devoted to minority-language rights litigation is considerably more than was allocated for these cases under the CCP. When the CCP was in operation, \$1,575,000 of its annual budget supported equality rights litigation, but only \$525,000 supported minority-language rights litigation. The differences in CCP funding was reflective of the number of applications received annually by the CCP, which typically processed an average of thirty-five applications for minority-language rights litigation and 123 applications that requested funding for equality litigation (Canada, Court Challenges Program 2006: 3—5). Although the 2008 partial restoration of funding was welcomed as a positive step towards improving access to justice for Canadians seeking redress for minority-language rights issues, there remains a severe limitation to access to justice for equality-seeking groups.

### **Equality-Seeking Groups**

Equality-seeking groups often access the courts in Charter litigation as intervening parties, when they can demonstrate that they have a specialized expertise or direct interest in the issue (Brewin 2006). Apart from Women's Legal Education and Action Fund (LEAF), other major equality-seeking groups include

- the National Association of Women and the Law (NAWL);
- the Native Women's Association of Canada (NWAC);
- the Charter Committee on Poverty Issues (CCPI);
- the DisAbled Women's Network of Ontario (DAWN); and,
- Equality for Gays and Lesbians Everywhere (EGALE).

These groups may apply for intervener status in cases that concern the Section 15 (1) Charter guarantee of the sexual equality of women, interventions Rosanna Langer describes as tactics to eliminate women's sexual inequality by "removal through the law" (2005: 29). F. L. Morton and Rainer Knopff describe the CCP as a "funding bonanza for LEAF and other equality-seeking groups on the left" and argue that the CCP expedited "interest-group" litigation and the policy-making function of the courts (2000: 54). Out of equality-seeking groups, LEAF was the most frequent recipient of CCP funding and holds the highest success rate for equality-seeking groups granted intervener status in cases heard before the Supreme Court of Canada (Morton and Knopff 2000: 98). Bhabha concurs with Morton and Knopff, observing that the CCP was "a vehicle for fringe groups to seek legal recognition of their political agendas where they were unsuccessful politically" (2007: 14). Louise Arbour and Fannie Lafontaine recognize the merit of this argument but counter that "interest groups are called 'human rights defenders' at the international level, and benefit from international protection" (2007: 257). Arbour and Lafontaine see value in providing access to justice for these groups, but the cost of that access remains a major argument in this debate.

### **Program Evaluation**

Since the incorporation of the CCP in 1994, it was evaluated twice through an independent evaluation process and both times was found to meet the requirements of an effective and accountable public program (Feminist Alliance for International Action 2006). In 2003, Prairie

Research & Associates conducted the most recent evaluation of the program and found that “the procedures to review applications and allocate funding do reflect good practices in that field” (cited in Ibid). However, the rationale for the cancellation of the CCP in 1992 and in 2006 heavily relied on the argument that the CCP did not use public funds responsibly (Canada, Standing Committee on the Status of Women 2008). The CCP was also criticized for lacking accountability and transparency – concerns related to the program’s exemption from the Access to Information Act, which was intended to protect the privacy of those it funded.

This legislative exemption also applies to provincial legal aid programs. In 2001, the duty for the CCP to protect such information was upheld in the Federal Court ruling of *L’Hirondelle v. The Queen*, 2001 FCT 999. In this decision, the court ruled that the CCP had a relationship with those it funded akin to lawyer-client privilege and thus private information could not legally be disclosed about the clients of the program (Brodie 2002: 15). This ruling hindered the transparency of the program, but the CCP continued to release general details including the number and types of cases that received funding (Feminist Alliance for International Action 2006). After the program was cancelled in 2006, Status of Women Canada heard primary accounts of the impact of the CCP on access to justice for women’s equality and defended the CCP as inexpensive in relation to what it was able to achieve for women’s equality (Canada, Standing Committee on the Status of Women 2008).

### **Access to Justice**

Access to justice refers to the financial ability of citizens to enter the courts and challenge government infringements of their Charter rights and freedoms. Financial constraint is frequently cited by equality-seeking groups as a barrier to justice. Governments in Canada are accused of exacerbating this barrier by engaging in tactics to delay proceedings, which increases the financial burden on the parties involved (Iyer 1996). Charles Epp suggests that programs like the CCP are what made the Charter enforceable and that these forms of institutional resources are vital because they enable citizens to engage in strategic litigation (1996: 766).

Similarly, Bhabha suggests that government bears an institutional responsibility to provide access to justice for Canadians, because it is essential to the functioning of a constitutional democracy (2007: 142). Status of Women Canada noted that “bringing court challenges was the principal means by which ordinary Canadians could challenge government action that infringes on their human rights” (Canada, Standing Committee on the Status of Women 2008). However, opponents argue that access to justice was never a real objective of the CCP (Fox 1989: 403). Larry Fox claims that had access to justice been a foundational objective of this program, the CCP would have provided funding for a wider spectrum of court challenges (1989: 403).

The CCP was also limited by its mandate to only provide funds for equality litigation that challenged federal legislation. This limitation had a major impact on the effectiveness of the program, from an access-to-justice perspective, because equality litigation often targets social programs that generally fall under the purview of provincial and territorial governments. In those instances, applicants would be denied funding from the CCP (Bhabha 2007: 148). This literature review concludes that the CCP provided access to justice that was necessary for equality

litigation and that, without such a program, it will hinder the legal, political and social advancement of women in Canada.

### The Impact of the CCP in Equality Litigation

The purpose of this analysis is to assess the role of the CCP in the major cases that have shaped women's equality jurisprudence in Canada, from the year the CCP was expanded to fund Charter equality litigation (1985) to the year the program was cancelled (2006). All cases brought before the Supreme Court during this time are included in this analysis if 1) the issue concerns the equality rights of women, and 2) if the outcome of the decision had a significant impact on women's equality jurisprudence in Canada. With these criteria, twenty-three cases were selected. This analysis also considered whether the case challenged provincial or federal legislation, if the case involved a major equality-seeking group as an intervener and if the case was funded by the CCP.

Table 1. *Women's Equality Litigation in the Supreme Court of Canada 1985—2006*

<i>Case</i>	<i>CCP-funded</i>	<i>Intervening equality-seeking group</i>	<i>Advancement in women's equality</i>	<i>Federal or provincial legislation</i>	<i>Issue and outcome</i>
<i>Canadian Newspapers Co. v. Canada (Attorney General)</i> , [1988] 2 S.C.R. 122	✓	Women's Legal Education and Action Fund (LEAF)	✓	Federal	<i>Issue:</i> Does the mandatory ban in the Criminal Code on the publication of the identity of a complainant in a sexual assault case violate freedom of the press as protected in the Charter? <i>Outcome:</i> The Supreme Court of Canada (SCC) upheld this provision in the Criminal Code.
<i>Brooks v. Canada Safeway Ltd.</i> , [1989] 1 S.C.R. 1219	X	LEAF	✓	Federal	<i>Issue:</i> Discrimination on the basis of pregnancy. <i>Outcome:</i> The SCC held that a disadvantage does not need to be shared by all members of a group for there to be discrimination, if it can be shown that only some members of that group suffered the disadvantage.
<i>Janzen v. Platy Enterprises Ltd.</i> , [1989] 1 S.C.R. 1252	X	LEAF	✓	Provincial	<i>Issue:</i> Is sexual harassment sex discrimination? <i>Outcome:</i> Yes. The SCC held that sex discrimination exists whenever sex is for no legitimate reason a substantial factor in the discrimination.

<i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	X	LEAF	✓	Provincial	<i>Issue:</i> Did the Barristers and Solicitors Act violate Section 15 (1) of the Charter by restricting admission to the Bar of British Columbia to Canadian citizens? <i>Outcome:</i> Yes. The SCC established the framework for applying and interpreting substantive equality and group-based disadvantage.
<i>Borowski v. Canada (Attorney General)</i> , [1989] 1 S.C.R. 342	X	LEAF	✓	Federal	<i>Issue:</i> Does Section 251 (4), (5) and (6) of the Criminal Code contravene the life, security, and equality rights of the foetus, as a person protected by Section 7 and Section 15 (1) of the Charter? <i>Outcome:</i> Appeal dismissed, the SCC declared that the appeal is moot and the Court should not exercise its discretion to hear it.
<i>Tremblay v. Daigle</i> , [1989] 2 S.C.R. 530	X	LEAF	✓	Provincial	<i>Issue:</i> Does a foetus have a right to life under Quebec legislation, and can a potential father have the right to veto the mother's decision to have an abortion? <i>Outcome:</i> The SCC held that a foetus is not included within the term "human being" in the Quebec Charter and, therefore, does not enjoy the right to life conferred by Section 1 in the Quebec Charter.
<i>R. v. Lavallee</i> , [1990] 1 R.C.S. 852	X	None	✓	Federal	<i>Issue:</i> Should the SCC consider the expert testimonial evidence from a psychiatrist on "battered women's syndrome" (BWS)? <i>Outcome:</i> BWS received legal recognition, relating to the ability of an accused to perceive danger from her partner in a plea of self-defence in criminal proceedings.
<i>R. v. Sullivan</i> , [1991] 1 S.C.R. 489	X	LEAF	✓	Federal	<i>Issue:</i> Should the foetus be legally recognized as part of the mother, such that a conviction for criminal negligence causing bodily harm could be obtained in the event of the death of the foetus? <i>Outcome:</i> No. The foetus was found not to be a person.

<i>R. v. Seaboyer;</i> <i>R. v. Gayme,</i> [1991] 2 S.C.R. 577	✓	LEAF	X	Federal	<i>Issue:</i> Do the “rape shield” provisions contained in the Criminal Code violate the right to a fair trial as protected in the Charter? <i>Outcome:</i> Yes. The SCC found that the “rape shield” provisions were inconsistent with the Charter and were unjustified infringements of constitutional guarantees.
<i>Moge v. Moge,</i> [1992] 3 S.C.R. 813	X	LEAF	✓	Federal	<i>Issue:</i> Can the support provisions of the Divorce Act justify the continued support of a wife who was not economically self-sufficient after sixteen years of separation? <i>Outcome:</i> The SCC in this case recognized that women tend to suffer economic disadvantages and hardships from marriage or its breakdown, because of the traditional division of labour within that institution.
<i>R. v. Butler,</i> [1992] 1 S.C.R. 452	✓	LEAF	✓	Federal	<i>Issue:</i> The SCC considered what degree of harm there was in allowing retailers to sell and distribute obscene material that could dehumanize women in a sexual context and if limiting obscene material could constitute a violation of the freedom of expression. <i>Outcome:</i> The SCC upheld the provision in the Criminal Code that regulated the public distribution of obscene materials. This was considered a major victory for women’s groups.
<i>Symes v. Canada,</i> [1993] 4 S.C.R. 695	✓	Charter Committee on Poverty Issues (CCPI)	X	Federal	<i>Issue:</i> This case challenged limitations in the Income Tax Act, which limited the deduction of child-care expenses as business expenses. <i>Outcome:</i> The SCC upheld the legislation, and found that there was no violation of Charter equality rights in this case.
<i>Native Women's Assn. of Canada v. Canada,</i> [1994] 3 S.C.R. 627	X	Native Women’s Association of Canada (NWAC)	X	Federal	<i>Issue:</i> NWAC was not provided funding to participate in constitutional consultations that led to the Charlottetown Accord. <i>Outcome:</i> The SCC held that the government was under no constitutional obligation to fund NWAC for these constitutional consultations.

<i>Miron v. Trudel</i> , [1995] 2 S.C.R. 418	X	None	✓	Provincial	<i>Issue:</i> The exclusion of benefits for unmarried partners. <i>Outcome:</i> The SCC held that “marital status” is an analogous ground to those enumerated under Section 15 (1) of the Charter.
<i>Thibaudeau v. Canada</i> , [1995] 2 S.C.R. 627	✓	CCPI, LEAF	X	Federal	<i>Issue:</i> Did the Income Tax Act unfairly place a tax burden on money used by a custodial parent exclusively for the benefit of raising children, by making the parent claim this money as income, constituting an infringement of Section 15 (1) of the Charter? <i>Outcome:</i> No. The court held that this was not a violation of the equality rights guarantee.
<i>British Columbia (Public Service Employee Relations Commission) v. BCGSEU</i> , [1999] 3 S.C.R. 3	X	DisAbled Women’s Network of Ontario (DAWN), LEAF	✓	Provincial	<i>Issue:</i> A female firefighter was dismissed in B.C. after failing a standardized fitness test. The question was whether this test was discriminatory, because of its disproportionately negative effect on women. <i>Outcome:</i> The aerobic standard imposed by the B.C government was held to be <i>prima facie</i> discriminatory.
<i>R. v. Ewanchuk</i> , [1999] 1 S.C.R. 330	✓	DAWN, LEAF	✓	Federal	<i>Issue:</i> This case considered the validity of “implied consent” in sexual assault cases. <i>Outcome:</i> The SCC held that there is no defence of implied consent to sexual assault.
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	✓	LEAF	✓	Federal	<i>Issue:</i> Are the Criminal Code provisions that regulate the production of private records of complainants in sexual assault proceedings in violation of the right to defence in cases of sexual assault? <i>Outcome:</i> The new “rape shield” provisions were upheld by the court.
<i>R. v. Darrach</i> , 2000 SCC 46, [2000] 2 S.C.R. 443	✓	DAWN, LEAF	✓	Federal	<i>Issue:</i> Does the Criminal Code provision that prevents the disclosure of a complainant’s sexual history limit the right of accused persons to defend themselves in a sexual assault case? <i>Outcome:</i> The SCC upheld the “rape shield” provisions in this case.



<i>Nova Scotia (Attorney General) v. Walsh</i> , [2002] 4 S.C.R. 325, 2002 SCC 83	X	None	X	Provincial	<i>Issue:</i> Did the Matrimonial Property Act in Nova Scotia violate the equality rights of unmarried partners by denying them access to spousal property? <i>Outcome:</i> The SCC held that this was not discriminatory, because it respected the autonomy of the parties to not enter into marriage and thus not enjoy the legal benefits of marriage.
<i>Gosselin v. Quebec (Attorney General)</i> , [2002] 4 S.C.R. 429, 2002 SCC 84	✓	CCPI, National Association of Women and the Law (NAWL)	X	Federal	<i>Issue:</i> Is there a constitutional right to social assistance that can be interpreted from the Section 15 (1) equality provision in the Charter? <i>Outcome:</i> No. The SCC denied that there was any positive or constitutional obligation on government to provide social assistance.
<i>Newfoundland (Treasury Board) v. N.A.P.E.</i> , [2004] 3 S.C.R. 381, 2004 SCC 66	X	LEAF	X	Provincial	<i>Issue:</i> Newfoundland Public Service Restraint Act led to the deferral of pay equity wage increases for public-sector female workers. <i>Outcome:</i> The SCC held that Section 15 (1) was violated, but this violation was justified as an exception in response to the exceptional financial crisis that faced the province at that time.
<i>Hodge v. Canada (Minister of Human Resources Development)</i> , [2004] 3 S.C.R. 357, 2004 SCC 65	✓	None	X	Federal	<i>Issue:</i> Is the definition of spouse in the Canada Pension Plan discriminatorily based on marital status, because of its preclusion of survivor's benefits to common-law partners? <i>Outcome:</i> The SCC held that the provisions in the Canada Pension Plan were not discriminatory.

The selected cases mainly involved the issues of violence against women, reproductive rights, pay equity, spousal and family benefits, and social assistance. Findings show that the CCP funded forty-three per cent of precedent-setting women's equality litigation between 1985 and 2006, out of cases selected for this analysis (n=10). This finding demonstrates that funding was sought for almost half of the equality litigation that significantly shaped women's equality jurisprudence in Canada. Notably, thirty per cent of cases were ineligible for funding because the court challenge involved provincial legislation (n=7). LEAF intervened in seventy per cent of these cases (n=16) and was the most frequent equality-seeking group represented. Thirty-five per cent of cases are considered significant setbacks for women's equality (n=8), but Langer suggests that cases with unfavourable outcomes may still be significant: "[W]here case

challenges may fail to change the rules, they may still operate as a catalyst for future changes” (2005: 116). Of these eight cases, the CCP provided funding for five.

A major limitation on the data presented arises from the *L'Hirondelle v. the Queen* decision, which removed the public disclosure requirement to release information on which equality-seeking groups received CCP funding from 2001 to 2006. However, some groups such as LEAF, often publicly disclosed this information. Cases that dealt with Charter challenges to common law (such as *R. v. O'Connor*, [1995] 4 S.C.R. 411) and not specific pieces of federal or provincial legislation were also excluded from this analysis. It is important to note that not all cases are granted leave to appeal to the SCC, and, although some cases may have received funding from the CCP, these cases were only included if they were granted leave to appeal to the SCC. This data was excluded to maintain the focus of this analysis on the impact of the CCP in setting an important precedent or legal principle that furthered or hindered the advancement of women's equality in case law. It should also be noted that the analysis of the significance of equality litigation presented is the exercise of subjective interpretation, from a feminist legal perspective widely shared by equality-seeking groups. Lastly, this data analysis is based on the assumption that without the CCP, these cases would not have accessed the courts.

There is limited data on how many Charter cases would have been brought forward since 2006, if the CCP was still in operation. However, the literature supports the argument that the CCP played a vital role in making Charter litigation possible, given the staggering cost of this litigation and the historical difficulties groups have faced in fundraising for court challenges. The CCP was the only formal program that subsidized the cost of Charter litigation in Canada, and the funding provided did not cover the full cost of court challenges (Feminist Alliance for International Action 2006). Taxation laws in Canada prevent donations for court challenges to qualify as charitable donations, which makes fundraising for Charter litigation even more difficult (Canada, Standing Committee on the Status of Women 2008). If an individual does not have financial resources, legal knowledge or a high-profile case, few alternatives are available. Given these realities, it is clear that CCP funding had a direct impact on the development of Charter equality jurisprudence in Canada.

## Conclusion

Arbour and Lafontaine observed that the CCP “led the way for the evolution of the Charter as a solid instrument of social progress in Canada” (2007: 244). The role of equality-seeking groups and concerns of program evaluation raise important issues about the operation of the CCP, but the value of supporting access to justice is the most compelling justification for continuing such a program. Findings from this analysis demonstrate that the CCP provided a key institution for access to justice in Canada and this led to advancements in women's equality. However, the findings also show that the CCP was not without its limitations. The inability to fund court challenges to provincial legislation hindered access to justice for a wider spectrum of Charter cases, and, since the program was a creation of government, it was susceptible to changes in the political stripes of government, which had a direct impact on its lifespan (Brewin 2006). Going forward, policy-makers must continue to explore ways to expand access to justice in Canada, be it through restoring the CCP to fund equality litigation and/or expanding the program to fund Charter challenges to provincial legislation. As this article's findings suggest, fostering access to

justice will have a direct impact on the future of women's equality in Canada and help secure the advances that have already been achieved for Canadian women.

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