# The Court Challenges Program

*by Ian Brodie*

Over the last 20 years, Canadians have become used to advocacy groups challenging all kinds of laws and regulations in the courts. Many of the groups involved in these challenges have financial backing from a $2.75 million-a-year federal government program called the Court Challenges Program (CCP). In effect, for more than two decades now, the federal government has encouraged advocacy groups to pursue their causes in court.

The Trudeau government launched the Court Challenges Program in 1978. It was designed to let language groups ratchet up pressure on the provinces to provide more bilingual services using the language guarantees in the British North America Act and, later, the Charter of Rights. In 1985, the Mulroney government extended the CCP to fund "equality seeking groups," namely, feminist, multicultural, gay, lesbian, and other groups. In the area of language rights, the CCP has steadily expanded bilingual services and minority language schooling. Equality-seeking groups have used CCP funds to establish, for example, that limiting free speech by outlawing hate literature or obscenity is acceptable under the Charter. They have also successfully pressed judges to expand government programs that they think are too narrowly focused. The CCP has encouraged some groups to by-pass the political process by using the courts instead. Pro-life and traditional family groups, however, have consistently been denied CCP funds.

It seems strange for the government to fund some causes and not others. It seems even stranger for the government to pay groups to challenge government legislation and government programs. But federal departments have long been helping to create and fund multicultural groups: Anglophone groups in Quebec, francophone groups outside Quebec, feminist groups, and others. This is part of a 30-year effort to "animate" society, to coalesce and lobby "for programs thought desirable both by the state and by suitably 'animated' interest groups" (LeRoy and Cooper, 2001, p. 17). The CCP simply extends these efforts into the judicial realm.

## Transparency and governance

Two years ago it became impossible to tell who actually gets money from the Court Challenges Program. The Program claimed it had a lawyer-client relationship with those it funded, a claim now backed up by a Federal Court ruling. As a result, the CCP no longer publishes the names of the groups it funds, and its files are no longer available under the Access to Information Act. Now, individuals and companies caught up in litigation with advocacy groups have no way to find out if federal money stands behind their legal opponents.

The problem of transparency is compounded by the close links the CCP has to those it funds. Many members of the Program's governing committees are drawn from groups that have received CCP funding in the past. When the Mulroney government expanded the CCP in 1985, the government contracted out the administration of the program to the Canadian Council on Social Development. This think tank in turn asked the groups planning to apply for CCP funds to help run the Program. Eventually, people closely connected to the groups that received CCP funds took on the role of deciding who would get support from the CCP. For example, the Women's Legal Education and Action Fund (LEAF) co-founder Shelagh Day helped to design the renewed CCP in 1994 and then ended up as co-chair of one of its decision-making panels. A network of advocacy professionals decides which of the groups they are involved with get federal funding for their litigation. And then they refuse to tell outsiders who they are funding and why!

## Program review

The federal government's funding agreement with the Court Challenges Program expires shortly, so the program is now being reviewed. This is a good time to ask some questions about federal funding for advocacy litigation:

1. Should the federal government be encouraging advocacy litigation? Encouraging groups to turn to the courts discourages them from using other means to advance their causes. Is that wise?

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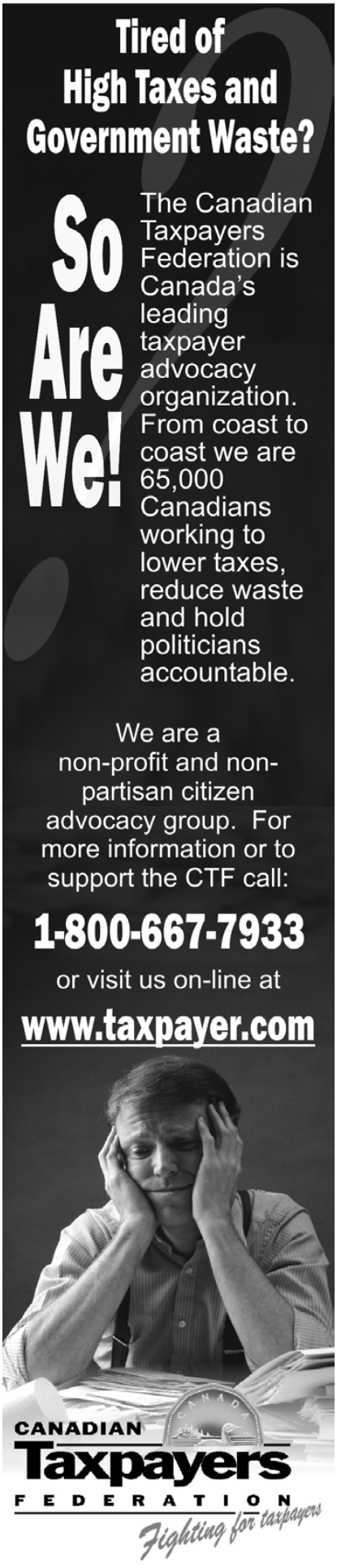




2. If the federal government continues to fund advocacy litigation, who should decide which causes get funded? Letting activists from the groups that have been funded in the past make decisions about who gets funded in the future seems unfair. The federal government should require the Court Challenges Program to follow strict conflict-of-interest rules, and appoint disinterested decision-making panels. Most importantly, when the CCP decides a case merits federal funding, then federal funding should be available to both sides of the case equally. If tax revenues end up being used to support the case for gay marriage, then tax revenues should also be available to those who oppose gay marriage. When the CCP supports pro-choice arguments in the courts, it should also support pro-life groups.

3. Is there a compelling reason to shroud the CCP's operations in secrecy? The Auditor General recently expressed concern about her and Parliament's ability to scrutinize federal spending when the government funnels its spending through foundations like the Canadian Foundation for Innovation (Auditor General, 2002). The Court Challenges Program creates similar problems. The Auditor General should review the program regularly. Its files should once again be open to the public under the Access to Information Act.

## Conclusion

Some say that government funding for advocacy litigation is nothing to fear. Some even suggest that advocacy litigation is a useful corrective to democracy's defects because it gives a voice to causes that otherwise might not be heard (Hein, 2000). Indeed, the success of American groups like the National Association for the Advancement of Colored People (NAACP) in challenging racial segregation has given these suggestions great appeal. The idea that "public interest litigation" lets marginalized individuals band together to fight oppressive government actions in court is attractive in the US and around the world.

In Canada, some advocacy groups follow in the NAACP's footsteps. They go to court, without government funding, to fend off government actions. The Canadian Civil Liberties Association (CCLA) and the National Citizens Coalition (NCC), for example, both refuse to accept government money. The CCLA's efforts to protect free speech rights and the NCC's challenges to restrictive election spending laws fit easily into the frame of "public interest litigation." Groups that receive government funding cannot claim that label so easily. Is federally-funded interest group litigation an example of marginalized individuals banding together to fight oppressive government policies? Or is it a complex dance of federal social animators and their favoured activists battling other government actions in court?

## References

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