



Annual Report 2021–2022



Foreword

The writing of the Court Challenges Program (CCP) Annual Report provides an opportunity to reflect on the past year. It was one that was undoubtedly impacted by the continuing pandemic, which surely made the management of the CCP's caseload more complex. I commend the way in which CCP staff was able to diligently serve both the public and the Expert Panels despite these difficulties. For it is precisely in such difficult times that the importance of the CCP's core mission becomes apparent.

2021-2022 marked the 40th anniversary of the *Canadian Charter of Rights and Freedoms*. Forty years is both a long and a short time in a country's constitutional history. The last forty years have unquestionably shaped the evolution of rights and freedoms in Canada. The courts applied the *Charter* in a wide variety of contexts, causing the law to evolve in light of these now constitutionally

protected rights and freedoms. At many points in the last 40 years, including the present day, the CCP and its predecessor programs have played an indispensable role by providing the courts with the opportunity to interpret the *Charter*, by facilitating the pursuit of constitutional challenges. Over the years, the Program has made a difference in hundreds of cases, and it continues to do so.

In the area of language rights, 2021-2022 was also marked by the introduction of bills to reform the *Official Languages Act*, bills which have also proposed enshrining the CCP in legislative instruments. It is logical that this proposal arises in the context of language rights, as the Program has proven to be of paramount importance to official language minority communities, by supporting cases that have shaped important jurisprudence. Legislative entrenchment of the CCP would be an important symbolic step, better guaranteeing

for future generations the protection of both language rights and human rights across Canada.

The University of Ottawa is privileged to have been associated with the management of the CCP and its predecessor programs at several points in their history. By playing a key role in the protection of the constitutional rights of a diversity of minority communities, the CCP reflects values held dear by our university community.

—Jacques Frémont



uOttawa



Director's Message

We are pleased to share with you the 2021–2022 Annual Report for the Court Challenges Program (CCP).

Since March 2019, when the Expert Panels first met to select cases for funding, the CCP has funded 200 test cases files in constitutional human rights and official language rights. This vital work of supporting the vindication of *Charter* rights and freedoms has continued, undaunted, despite the ongoing impacts of the COVID-19 pandemic on the operations of the courts, our beneficiaries and the CCP itself.

What does it mean to fund a “test case of national significance”? For the CCP, such a case is one that has the potential to advance or clarify the state of the law. The CCP’s Expert Panels review each funding application and select cases for their potential to have an impact beyond the immediate parties. By clarifying the constitutional rights covered by the CCP, the cases that we fund benefit all Canadians.

As we celebrate the 40th anniversary of the *Charter*, it is worth reflecting on what the *Charter* was designed to do: to “constitutionalize” human rights, which is to say, to make them the supreme law of the land. In doing so, the *Charter* binds governments to respect the human rights and equal

dignity of all those who live in Canada when enacting laws and policies. But governments make mistakes, and there can be disagreements about what is required by the *Charter*. What might have seemed fair in one case, or at one time, isn’t fair or reasonable in another. The Canadian Constitution provides a mechanism for resolving those disagreements through an appeal to the courts. If the promise of the *Charter* is to be made real, that mechanism cannot be out of reach for most Canadians.

This is where the CCP comes in: by providing litigants with the financial support that they need for effective access to justice, we empower them to hold governments in Canada to account with respect to their constitutional obligations. Our mandate is to help Canadians, whether alone or through collective action, afford to go to court in cases where they believe that their human rights or official language rights have been infringed. We cannot fund every case, but we do our best to fund the ones that can have the greatest impact. In doing so, we hope to enhance access to justice not only for the parties directly involved, but for those who might also be affected by the result but might never have a realistic opportunity to file a case in court. Indeed, by supporting a better understanding of the requirements of the *Charter*, the CCP believes that it contributes to the creation

of a political culture in which most people don’t need to go to court to enforce their rights.

In this 40th year of the *Charter*, the CCP recognizes that undertaking constitutional litigation is a daunting task. It involves an extraordinary commitment of time and effort. It requires brave people to come forward and tell their stories, which are often painful, and almost always intensely frustrating, and trust the courts to hear them out and decide fairly. Constitutional litigation requires a leap of faith, and the CCP is proud to support our beneficiaries at every step of the process. It is our great privilege to work with these brave Canadians: we are grateful for their determination, and we are inspired by their unwavering willingness to fight for a stronger constitutional democracy, for the benefit of us all.

–Marika Giles Samson



Message from the Interim Chair of the Human Rights Expert Panel

This has been another exciting year of work for the Human Rights Expert Panel. While day-long meetings and thousands of pages of preparatory reading might not sound like a typical formula for excitement, the work of the Panel offers a unique perspective on the evolution of human rights in Canada. Applicants to the Court Challenges Program (CCP) are an incredibly diverse range of individuals and civil society organizations seeking to develop an extraordinary range of creative legal arguments. Legal change, throughout Canada's history, has often begun with an idea that many people first considered to be implausible or even impossible. The Expert Panel's work allows us to look at this kind of innovative idea very early in its development. Our work is situated at the coalface of legal change: it really is an exciting vista.

The idea behind providing funding for innovative challenges in support of *Charter* rights is almost as old as the *Charter* itself. A lot has changed since the early rulings which built the basic interpretive contours of *Charter* rights in Canada. The terrain is not as unmapped as it was in 1982. However, Canadian society has changed enormously over that period and human rights law must keep pace with societal change to remain relevant. And sometimes, legal change itself paves the way for evolutionary change in society. The *Charter* rights that our Panel considers have been the locus of

landmark changes in rights for non-citizens, for same sex couples, for Indigenous peoples, for those grappling with the criminal justice system, as well as our understanding of free speech and equal participation in Canadian society. Inclusive justice has been a uniting theme.

Another thing that has changed enormously since the advent of the *Charter* is the nature of constitutional litigation in Canada. The process of pursuing innovative rights claims is considerably more complex and more costly than it was forty years ago. The challenge of ensuring that Canadians have robust access to justice is well past the point of being diagnosed as a crisis. The CCP makes a small but unique contribution to improving access to justice. The resources required to bring innovative constitutional arguments will rarely be within the strained scope of legal aid support, nor will they be part of the provision of basic legal services. The CCP recognizes that constitutional rights challenges require litigants to demonstrate extraordinary staying power. Funding is only one part of what's needed to see a challenge through to the end. But by providing funding, the CCP helps broaden the range of individuals and groups who can bring important rights claims to Canadian courts. This goal is something that is always top of mind for our Panel.

This year has been a time of growth and change for the Panel as we've welcomed one new member, Jo-Anne Pickel, and we eagerly anticipate the addition of two more new colleagues in 2022-23.

Continual renewal of our deliberative strength is vital to our work. The Program's secretariat has also seen considerable evolution this year. We recognize the crucial role that the CCP staff play not only in supporting the work of the Expert Panels but, even more importantly, in working with applicants before, during, and after their formal involvement with the Program. This conscientious staff work is demonstrative of the CCP's commitment to its access to justice mission. We publicly express our gratitude to those who have left us during this year, as well as to those who have joined us.

We look forward to another exciting year of deliberations.

–Catherine Dauvergne



Message from the Chair of the Official Languages Expert Panel

At the end of fiscal year 2021-2022, the Official Languages Rights Expert Panel (Panel) of the Court Challenges Program (CCP) can once again proclaim the success of the Program loudly and clearly, despite the pandemic. Official language rights in Canada have been advanced with the financial support of the CCP; cases have been funded in the areas of health, education, and fundamental rights, thereby enhancing respect for and promotion of Canada's linguistic duality.

During the pandemic, the work of the Panel and the staff's management of files were pursued without much hindrance or restriction thanks to the CCP's capacity for telework, thus allowing the continued promotion of the rights of Canada's two official language communities. The CCP's enhancement of access to justice, without which many language rights cases would never have seen the light of day, is essential to the vitality of official language minority communities (OLMCs). We salute the courage, determination and willingness of individuals and community organizations to fight for their language rights. These legal battles require resilience and perseverance, qualities not lacking in these official language communities.

The jurisprudential record has been enriched by new language rights rulings clarifying and articulating rights in various areas. Without the

financial support of the CCP, many of these cases would not have emerged, and this jurisprudential result would have been impossible for OLMCs. As a result, the evolution of language rights in Canada and the vitality of official language minority communities would have been greatly limited. The legal interventions funded by the CCP are crucial to the flourishing of these communities.

On behalf of the Panel, I would also like to congratulate the Government of Canada on the tabling of the bill for a new *Official Languages Act*. We recognize the commitment to enshrine the official languages rights branch of the CCP in the *Official Languages Act*, to allow for test cases of national significance to be brought before the courts to clarify and enforce certain constitutional and quasi-constitutional language rights. We view the inclusion of the CCP in Bill C-13 as encouraging evidence of the government's commitment to the Program as a whole and its intention to ameliorate language rights across Canada.

I am very proud of the work done by the Panel members and the CCP staff. The professionalism and commitment of these individuals demonstrates a strong sense of respect for and pursuit of the language rights of OLMCs in Canada and the objectives of the Court Challenges

Program. Despite delays in the appointment of new members to our Panel, we have nonetheless approached the work of analyzing the funding applications brought to us with great gusto, for the benefit of all Canadians.

The CCP is essential to a Canadian future in which Canada's two official languages are respected in all regions of the country. The Panel plays an essential role in this quintessentially Canadian project and, as members, we are proud to serve our fellow citizens in this way and thereby help to shape our collective future.

–Gilles LeVasseur



CCP Staff

CCP staff, working closely with the Director, are on the front lines of the Program. Tasked with the day-to-day administration of the Program, the staff ensure the efficient operation of the CCP and the independence of its decision-making process. Every day, staff field questions from potential funding applicants about the application process, coordinate the receipt of funding applications, support the Expert Panels in their selection process and communicate the Panels' decisions, and ensure the disbursement and proper management of CCP funds. Our staff are the primary point of contact for those who seek to access and engage with the Program at all stages of the funding process.



Sabrina Diotte
Legal Counsel



Hardie Rath-Wilson
Legal Counsel



Aminata Nyara Barry
Office Administrator

In 2021–2022, the CCP also had the benefit of two law student assistants. Liam Brunton joined the team for the summer of 2021 and Émilie Weidl worked with us for the 2021–2022 academic year. During the summer of 2021, our work was also supported by a communications intern, Yasmin Abdul Malik.

MISSION

- The CCP supports test cases of national significance seeking to affirm and clarify certain constitutional and quasi-constitutional official language rights and human rights in Canada.
- By providing financial support, the CCP aims to help Canadians access the justice system in order to assert their constitutional rights.
- The CCP provides a simple and fair application process through a modern, accessible website.

VISION

- The CCP provides vital financial support to test cases of national significance seeking to clarify and affirm official language rights and human rights in Canada. In doing so, the CCP not only helps Canadians to assert their rights, it supports the evolution of constitutional rights jurisprudence, reaffirms the rule of law, and contributes to making Canada a fairer and more equal country.



VALUES

- Independence in our decision making.
- Accessibility of our services.
- Quality services in both official languages.
- Fairness and respect in all our interactions.

Human Rights Branch

The CCP provides financial support to cases aimed at affirming and clarifying the following rights guaranteed by the *Canadian Charter of Rights and Freedoms*:

- section 2 (fundamental freedoms, including freedom of religion, expression, peaceful assembly and association)
- section 3 (democratic rights)
- section 7 (right to life, liberty and security of person)
- section 15 (equality rights)
- section 27 (multiculturalism) – in support of arguments based on equality rights
- section 28 (equality of the sexes)



Human Rights Branch

Examples of Funded Matters

1 A national alliance of community-led organizations that is acting as a public interest standing litigant was granted litigation funding by the Human Rights Expert Panel to challenge *Criminal Code* provisions that target sex workers and their work. The *Criminal Code* provisions being challenged include those that criminalize communication in public to sell sexual services, obtaining or communicating to try to obtain sexual services, and various offences relating to third parties that sex workers work or associate with. The Recipient argues that these provisions, many of which were enacted following the Supreme Court of Canada's decision in *R v. Bedford* (2013 SCC 72) striking down Canada's previous sex work criminalization scheme, create distinct and overlapping *Charter* violations. Specifically, the recipient argues that the *Criminal Code* provisions: heighten the risk of harm to sex workers' rights to security, liberty, personal and sexual autonomy, and life (violating section 7); discriminate by perpetuating existing disadvantage to historically marginalized communities (section 15); inhibit communication and negotiation of conditions to sex—essential to clear and ongoing consent—in a manner that infringes rights to security, liberty, and freedom of expression (sections 7 and 2(b)); and are further exacerbated by sex workers' inability to associate in pursuit of other *Charter* rights, as well as in pursuit of equitable labour practices and improved working conditions (section 2(d)).

2 The Expert Panel funded an intervention in the context of an appeal in a criminal case, in which the Recipient provided the court with critical analytical guidance on the proper interpretation and application of section 15 of the *Charter*. As part of their intervention, the Recipient highlighted the importance of a substantive approach to equality rights guaranteed by section 15 of the *Charter*. The intervenor also highlighted the history and value of incorporating principles of reconciliation into section 15, in light of the systemic and systematic discrimination suffered by Indigenous people, and specifically Indigenous women, in the Canadian criminal justice system. Thanks to CCP funding, the Recipient was able to bring to the fore important arguments related to the parity of Indigenous legal orders and the common law.

Human Rights Branch

Examples of Funded Cases

3 The Human Rights Expert Panel granted litigation funding to a Recipient challenging sections of the *Canada Transportation Act (CTA)* (S.C. 1996, c. 10) that set limits on general damages available under the CTA. The Recipient, a wheelchair user who was travelling abroad for their wedding anniversary and suffered physical and mental harm due to an airline's actions, was forced by prior judicial precedent and a decision of the Canadian Human Rights Tribunal to bring their claim of discrimination under the CTA. The statute, which formerly had provided no authority to the Canadian Transportation Agency to award general damages, was amended in 2019, in response to the Recipient's original complaint, to allow for general damages of up to \$20,000. In a subsequent application filed with the Agency, the Recipient further claimed that this new cap on general damages discriminated against people with disabilities and was therefore unconstitutional under section 15 of the *Charter*.

4 The Expert Panel funded litigation that sought to overturn certain provisions of an employment insurance regime that the Recipient argued were in violation of section 15 of the *Charter*. The Recipient, a group of individuals with similar claims, argued that the employment insurance regime discriminated on the grounds of sex and pregnancy, because the claimants, who took maternity leave or pregnancy leave and were not employed upon their return, were disadvantaged by the legislation's limited employment insurance eligibility period. The Recipient's argued that a substantive equality approach, particularly the one confirmed by the Supreme Court in the recent *Fraser* (2020 SCC 28) decision, meant that the provisions could not survive because they purported to be gender-neutral. The evidence demonstrated that the cap on the eligibility period for benefits had real impacts on claimants who had taken pregnancy or maternity leave and lost their job – a reality specifically faced by many new mothers upon their return to the workforce.

Human Rights Branch

FUNDING GRANTED IN 2021–2022

Number of applications	Test Case Development	Trial	Appeal	Intervention	Total
Received*	23	27	6	6	62
Funded	8	13	3	4	28

**This includes those applications received and decided by the Expert Panel.*

NUMBER OF APPLICATIONS FUNDED BY CATEGORY OF RIGHTS COVERED BY THE CCP

(Note that the table total is higher than the total applications funded because some cases involve more than one category of rights.)

	Fundamental freedoms	Democratic rights	Right to life, liberty and security of person	Equality rights	Multiculturalism	Equality of the sexes
Test Case Development	3	1	4	6	0	0
Trial	2	3	6	10	2	3
Appeal**	0	0	2	3	0	0
Intervention***	1	0	3	3	0	0

***Applications for an appeal may include applications for a motion for leave to appeal. ***Applications for intervention may include applications for leave to intervene.*

Official Languages Rights Branch

The CCP provides financial support to cases aimed at affirming and clarifying the following rights:

OFFICIAL LANGUAGE RIGHTS ENSHRINED IN:

- Sections 93 and 133 of the *Constitution Act, 1867*
- Section 23 of the *Manitoba Act, 1870*
- Sections 16 to 23 of the *Canadian Charter of Rights and Freedoms*
- Any parallel constitutional provision
- The language aspect of freedom of expression in section 2 of the *Charter* when invoked in a case involving official language minorities

THE JUSTICIABLE PARTS OF THE *OFFICIAL LANGUAGES ACT*:

- Part I, section 4 (Proceedings of Parliament)
- Part II, sections 5 to 7 and 10 to 13 (Legislative and Other Instruments)
- Part IV (Communications with and Services to the Public)
- Part V (Language of Work)
- Part VII (Advancement of English and French)
- Section 91 (Staffing)

Official Languages Rights Branch

Examples of Funded Cases

1 In the last year, the Official Language Rights Expert Panel funded litigation that targeted the constitutionality of a provincial government's English-only COVID-19 health briefings and press conferences, claiming a violation of ss. 16.1 and 20(2) of the *Charter*. Although the pandemic affected the entire Canadian public in a number of ways, for the Recipient and others belonging to an official language minority community (OLMC), COVID-19 engaged their official language rights as well. Specifically, the Recipient claims that since the beginning of this public health crisis, their provincial government's press conferences and public statements were only available in English, which disregards their constitutional language rights. Moreover, the Recipient objects to the fact that he has to rely on the media due to the lack of bilingual official communication coming from the provincial government. With financial support from the CCP, the Recipient can pursue a case relating to the positive obligations under s.16.1 of the *Charter* in the context of this health crisis, an issue that is of national importance in light of the today's social and political realities.

2 The Recipient received CCP funding to participate in the restructuring process initiated by a university to manage its insolvency and to seek protection from its creditors. The purpose of the Recipient's involvement in this process was to advocate for the maintenance of the institution's bilingual status and to have the needs and concerns of the official language minority community (OLMC) recognized given the profound impact the restructuring would have on it. In this case, the Recipient was concerned that the interests of the OLMC in question would not be represented and considered throughout the restructuring process. With the help of CCP funding, the Recipient requested and was granted access to the restructuring process. In doing so, it was able to shed light on the principles underlying section 23 of the *Charter* and the importance of language rights in the context of the proceedings under the *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36). This issue has made headlines due to its importance for OLMCs.

Official Languages Rights Branch

Examples of Funded Matters

3 CCP funding allowed the Recipient to intervene before the Federal Court of Appeal in *Canada (Commissioner of Official Languages) v. Canada (Employment and Social Development)* (2022 FCA 14). In the context of their intervention, the Recipient argued that Part VII of the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.)) applies to every decision made by a federal institution that could have an impact on the vitality and the development of official language minority communities (OLMCs). Further, the Recipient argued that Part VII imposes, among other things, a linguistic obligation on federal institutions to act in a manner that does not hinder but rather enhances the vitality and development of OLMCs. By way of their intervention, the Recipient contributed to the debate on the content of the obligations of federal institutions under Part VII of the *Official Languages Act* and highlighted the intricacies of this important issue for the Court. But for the CCP's funding of this intervention, this vital contribution would not have been made.

4 The Official Languages Rights Expert Panel funded the development of a test case on the underfunding of school infrastructure based on the principles established by the Supreme Court of Canada in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)* (2015 SCC 21) and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia* (2013 SCC 42). In this matter, the Recipient was concerned that the provincial government had funded only one major infrastructure project since the amalgamation of various school districts over the past decade, while many of the schools serving the official language minority community (OLMC) in question were dilapidated and required significant renovation. While there is an abundance of recent case law dealing with section 23 of the *Charter*, the implementation of the principle of substantive equality remains a vital issue. In this case, the issue of prioritization of infrastructure projects in relation to section 23 was particularly important. With the benefit of CCP funding, the Recipient had the means to develop their legal arguments, making it easier for them to assert their rights with respect to this important issue.

Official Languages Rights Branch

FUNDING GRANTED IN 2021–2022

Number of applications	Test Case Development	Trial	Appeal	Intervention	Total
Received*	5	11	4	1	21
Funded	1	8	3	1	13

**This includes those applications received and decided by the Expert Panel.*

NUMBER OF APPLICATIONS FUNDED BY CATEGORY OF RIGHTS COVERED BY THE CCP

(Note that the table total is higher than the total applications funded because some cases involve more than one category of rights.)

	Education rights	Legislative and legal rights	Equality and linguistic advancement	Right to services and communication	Right to freedom of expression
Test Case Development	0	1	1	0	1
Trial	1	2	5	4	0
Appeal**	2	0	1	1	0
Intervention***	1	0	0	0	0

***Applications for an appeal may include applications for leave to appeal. ***Applications for intervention may include applications for leave to intervene.*

Spending by Branch

APPLICATIONS FUNDED IN 2021–2022

CASES – OFFICIAL LANGUAGES RIGHTS	807 000 \$
Test Case Development	15 000 \$
Trial	627 000 \$
Appeal	115 000 \$
Intervention	50 000 \$
CASES – HUMAN RIGHTS	2 451 113 \$
Test Case Development	120 000 \$
Trial	2 026 113 \$
Appeal	155 000 \$
Intervention	150 000 \$

Statement of Revenue and Expenses (Cash Flow)

YEAR ENDED MARCH 31, 2022

REVENUE		6 875 292 \$
Contribution from the Department of Canadian Heritage		4 979 734 \$
Surplus carried over from 2020–2021		1 895 558 \$
EXPENSES		3 362 742 \$
Administration		812 639 \$
Cases – Official Languages Rights		338 267 \$*
Funded Applications	807 000 \$	
Less unused funds returned	(468 733 \$)	
Cases – Human Rights*		2 211 837 \$*
Funded Applications	2 451 113 \$	
Less unused funds returned	(239 276 \$)	
SURPLUS		3 512 550 \$

**Net figure, which includes new applications funded in 2021–2022 as well as unused funds returned at the conclusion of previously funded cases (including under the former CCP and the LRSP). Indeed, between the reinstatement of the CCP in 2018 and the end of 2021–2022 fiscal year, the CCP has recovered over \$1,000,000 in unused funds from files approved under predecessor programs.*

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*The Court Challenges Program recognizes that it has its offices and does most of its work on the unceded territory of the Algonquin people.
We thank the Algonquin people for the privilege of working in this place and honour them as the traditional guardians of these lands.*

COVER PHOTO: “[Supreme Court of Canada in summer](#)”, by Dig deeper, used under license [CC BY 4.0](#)

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