Rights Without Remedies: The Court Party Theory and the Demise of the Court Challenges Program

by

Shannon Salter

A thesis submitted in conformity with the requirements for the degree of Masters of Law
Graduate Department of the Faculty of Law
University of Toronto

© Copyright by Shannon Salter 2011
Rights Without Remedies: The Court Party Theory and the Demise of the Court Challenges Program

Shannon Salter
Masters of Law
Graduate Department of the Faculty of Law
University of Toronto
2011

Abstract

The author argues that the Court Challenges Program’s 2006 cancellation was based on claims that judicial review is undemocratic, including those made by three academics, Rainer Knopff, F.L. Morton and Ian Brodie; the Court Party Theorists (the “CPT”). Through a study of Charter equality cases, this paper examines the CPT’s arguments regarding judicial activism, interest groups and interveners and finds they are largely unsupported by statistical evidence. Further, the debate about judicial review and democracy obscures judicial review’s important auditing function over the legislature’s constitutional adherence. This audit depends on individuals’ capacity to pursue Charter litigation, an ability compromised by the access to justice crisis. The author examines this crisis and the efforts to fill the funding gap left by the CCP’s cancellation and concludes that an accessible publicly-funded program like the CCP is best-placed to ensure that the Charter remains a relevant tool for enforcing fundamental human rights in Canada.
Acknowledgments

I am very grateful to Professor Lorne Sossin for his guidance, thought-provoking questions and comments, and encouragement throughout this thesis paper. Midway through the project, Professor Sossin was appointed as Dean of Osgoode Hall Law School, yet he generously agreed to continue as my thesis supervisor, despite the increased demands of his new position. Richard Haigh provided some excellent practical advice about organizing and structuring a project of this magnitude, and I was fortunate to have his counsel. I am also very much indebted to Professor Lorraine Weinrib for her fresh perspective and comments on a draft of this paper.

I would not have been able to undertake a Masters of Law program without a generous fellowship from the Law Foundation of British Columbia as well as scholarship funding from the Faculty of Law of the University of Toronto.

I am most indebted to Professor David Dyzenhaus and Julia Hall for their support and assistance with some of the practical aspects of completing this project. Also, Coreen Lapointe at Legal Aid Ontario was very helpful and patient with my myriad questions, and I thank her.

The adage that it takes a village to raise a baby applies equally to writing a thesis, and is doubly true when attempting to do both at the same time. I am so very grateful to my family, all of whom contributed to the completion of this project. I am especially thankful to both my mother and mother-in-law, who watched the baby so that I could write, and my father, who provided thoughtful notes and technical assistance with graphs and charts.

Most of all, I have been blessed with an exceedingly supportive and loving husband, Robert, and a sunny and spirited daughter, Clara, who together make everything possible.
# Table of Contents

Acknowledgments .................................................................................................................. iii

Table of Contents .................................................................................................................. iv

List of Tables .......................................................................................................................... vii

List of Figures ......................................................................................................................... viii

**Introduction and Overview** .............................................................................................. 1

**Chapter 1: The Court Party Theorists and the Fall of the CCP** ........................................ 8

1 The history of the CCP ........................................................................................................... 8

  1.1 The CCP’s cancellation ................................................................................................... 9

  1.2 The CCP’s partial restoration ....................................................................................... 12

2 The CCP: Victim of inefficiency or ideology? ....................................................................... 13

3 The Court Party and the Charter Revolution ...................................................................... 17

  3.1 Who are the CPT? ......................................................................................................... 18

  3.2 What is the Court Party Theory? .................................................................................. 18

4 Evaluating the CPT’s claims ............................................................................................... 22

  4.1 The CPT’s descriptive claims ..................................................................................... 23

    4.1.1 Interest groups, rather than individuals, drive Charter equality cases ................ 23

    4.1.2 Judges are inclined to radically expand Charter rights .......................................... 25

    4.1.3 Interveners frequently influence judges to adopt their agendas ......................... 31

  4.2 The CPT’s normative claim: judicial review is undemocratic ....................................... 33

5 The CCP as societal ill ......................................................................................................... 34

  5.1 Should the CCP be restored? The need for quantitative research ................................. 37

**Chapter 2: Methodology and Data Summary** .................................................................. 39

1 Methodology ....................................................................................................................... 39

  1.1 Selecting the Cases ...................................................................................................... 39
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 The financing of Charter litigation</td>
<td>93</td>
</tr>
<tr>
<td>4.1 Judicial assistance for Charter challenges</td>
<td>94</td>
</tr>
<tr>
<td>4.1.1 Advance costs awards</td>
<td>94</td>
</tr>
<tr>
<td>4.1.2 Costs in public interest litigation</td>
<td>98</td>
</tr>
<tr>
<td>4.1.3 The delegation of Charter litigation to administrative tribunals</td>
<td>99</td>
</tr>
<tr>
<td>4.2 Legislative assistance for Charter challenges</td>
<td>101</td>
</tr>
<tr>
<td>4.2.1 The LAO Test Case Program</td>
<td>102</td>
</tr>
<tr>
<td>4.3 Private assistance for Charter challenges</td>
<td>103</td>
</tr>
<tr>
<td>4.3.1 The Asper Centre</td>
<td>104</td>
</tr>
<tr>
<td>4.3.2 Law Foundation of British Columbia</td>
<td>105</td>
</tr>
<tr>
<td>4.3.3 Pro bono legal services</td>
<td>106</td>
</tr>
<tr>
<td>5 Comparison of Charter litigation funding models</td>
<td>108</td>
</tr>
<tr>
<td>Conclusion</td>
<td>114</td>
</tr>
<tr>
<td>Bibliography</td>
<td>118</td>
</tr>
</tbody>
</table>
List of Tables

Table 1: Comparison of primary Charter litigation funding models ........................................... 111
List of Figures

Figure 1: Trends in CCP-funding of federal equality cases, 1994-2010 ............................................. 43

Figure 2: Number of federal equality cases, 1994-2010................................................................. 45

Figure 3: Initiator of federal equality cases, 1994-2010 ................................................................. 50

Figure 4: Outcome of federal equality cases by initiator, 1994-2006................................................ 54

Figure 5: Trends in outcome of federal equality cases by CCP funding, 1994-2010 ....................... 56
Introduction and Overview

_Ubi jus ibi remedium_ – There is no right without a remedy

The Court Challenges Program (the “CCP”) was instituted in 1978 by the Canadian federal government under Prime Minister Trudeau, and expanded after the passage of the Canadian Charter of Rights and Freedoms in 1982 (the “Charter”), to fund not only language rights cases, but also litigation dealing with the Charter’s provisions on equality (section 15), multiculturalism (section 27) and gender discrimination (section 28). In the past thirty years, the fortunes of the CCP have risen and fallen with federal electoral change. In general, when the Progressive Conservative or Conservative parties have been in power the program has been downsized or cancelled and when the Liberal party has been in power, the program has been reinstated and expanded.

The political tug-of-war over the CCP reflects a deeper ideological divide between social conservatives and liberals about the role of the courts and interest groups in our polity. This divide has found expression in the academic and popular debate about the influence of the Charter on the Canadian political system and more particularly, the merits of the judicial review power, which permits the courts to overturn legislation which violates the constitution. At the forefront of the academic debate are University of Calgary political scientists Ian Brodie, F.L. Morton and Rainer Knopff, who I refer to collectively as the Court Party Theorists (the “CPT”). The CPT consider the judicial review power to be an undemocratic threat to the political order in Canada because it allows unelected judges to strike down legislation enacted by elected representatives.

---

4 Knopff and Morton discuss their Court Party Theory in _The Charter Revolution and the Court Party_ (Peterborough, Ont.: Broadview Press, 2000) [Knopff & Morton, “CRCP”].
According to the CPT, the judicial review power is also problematic because it has spawned two other developments which they view as social ills. The first development is the participation in Charter litigation of interest groups representing disadvantaged people in Canada including feminists, homosexuals, visible minorities and the disabled. Collectively, the CPT label these groups the “Court Party”, implying that they operate as an unelected political party in Canada. The second development is the broadening of court standing rules which has allowed the Court Party to participate more extensively in constitutional cases as interveners. The CPT allege that the Court Party conspires to influence the judiciary, even going so far as to campaign for the appointment of judges friendly to their cause, according to Brodie. The Court Party is enabled in its rights-expanding agenda by a variety of social actors, including judges, the media, lawyers, judicial law clerks and legal academics. Of these groups, the CPT consider the judiciary, and especially the judges of the Supreme Court of Canada (the “SCC”), to be the most blameworthy, claiming that activist judges use their expanded powers of judicial review under the Charter to unduly extend the rights of the Court Party. The CPT argue that the use of the Charter to achieve the Court Party’s goals is deeply undemocratic and corrosive to representative government because it usurps power from the legislative branch and thereby violates the will of the majority.

The CPT’s notion of the Court Party as a unitary entity with a singular purpose has been contested by several legal academics who point out that in many cases the interests of the groups which comprise the Court Party diverge and conflict. In addition, the CPT’s omission of conservative groups, such as REAL Women and the National Citizens’ Coalition (the “NCC”) from the Court Party is anomalous. Both of these conservative groups have intervened in several SCC Charter cases using the same standing rules which the CPT characterize as undemocratic,

---

7 Knopff & Morton, “CRCP”, supra note 4 at 149.
8 Smith, supra note 5 at 201. See also Elliot, supra note 3 at 313-314.
yet the CPT do not include these organizations in their critique of interest group participation in Charter cases.

Given their opposition to the Court Party’s use of judicial review under the Charter, it is easy to understand why the CPT are harshly critical of the CCP. The CPT argue that the program exacerbates the unholy alliance between activist judges and the Court Party by funding interest groups to participate as interveners in Charter cases. In their view, it is particularly aggravating that through the CCP, the Court Party uses federal funds to attempt to overturn federal legislation. The CPT have published their arguments against the public funding of constitutional litigation almost since the Charter’s inception. However, their work has renewed relevance today, as the Conservative government under Prime Minister Harper has increasingly enacted policies which reflect the CPT’s ideas. In this respect, the decision to terminate the CCP may have been an opportunity for the CPT to put their theory into practice; Brodie left his position as a professor of political science at the University of Calgary to become Prime Minister Harper’s Chief of Staff from 2006 until July 2008. Shortly after Brodie assumed this position, the Harper government cancelled the CCP.

Even apart from the philosophical issue of whether the government should fund individuals and groups to sue it, the CCP has generated a considerable amount of controversy. Critics argue that the CCP’s administration was biased towards particular interest groups and that funding decisions lacked transparency. An analysis of the CCP’s structure and operation are beyond the scope of this paper, which is not a polemic in support of or against the CCP. However, the program does offer a useful context for examining the broader legal and constitutional issues which are inextricably associated with the CCP, including the separation of powers between the legislative and judicial branches of government, the role of judicial review in a democracy, and the societal value of access to justice. Moreover, in considering the merits of publicly funding constitutional litigation, it is helpful to consider both the actual effects of the CCP on Charter equality cases as well as the validity of the CPT’s ideological arguments against the program.

10 See e.g. Marshall, supra note 2 at 185-190.
Despite numerous journal articles, dissertations, and academic and popular books by the CPT on the anti-democratic consequences of judicial review, judicial activism, interest groups, and by extension, the CCP,11 there has been little empirical evaluation of the CPT’s claims.12 In this paper, I intend to evaluate three key descriptive claims in the Court Party Theory, relied on by the CPT in support of their primary normative argument; that judicial review is fundamentally undemocratic. The three descriptive claims are as follows: first, that interest groups instead of individuals are the central players in Charter equality claims; second, that judges adopt a radically expansive and interventionist approach to the application of the Charter’s equality provisions; and third, that interveners frequently influence judges in deciding federal equality cases.

I endeavour to critically assess these descriptive claims using a quantitative analysis of the federal Charter equality decisions heard at the SCC or the Federal Court of Appeal (“FCA”) both during and after the CPP. Focusing on federal equality litigation under the Charter provides a discrete case study for examining some of the CPT’s descriptive claims. Although the CCP funded both language and equality rights Charter litigation, I limit my analysis to federal equality rights decisions under sections 15, 27 and 28 of the Charter heard at the SCC and FCA.13 The rationale for excluding language cases from the data set is that language rights funding was restored by the federal government in 2008 as part of a court settlement with the Federation des communautés francophone et acadienne du Canada (the “FCFA du Canada”).14

12 Several commentators have challenged various aspects of the CPT’s claims from a doctrinal perspective; however there has been little qualitative analysis of the CPT’s assertions.
13 The CCP’s mandate excludes funding for Charter challenges involving provincial governments or agencies.
After assessing the degree to which the CPT’s descriptive claims are supported by the quantitative analysis, I turn to the CPT’s normative assertion that the judicial review of legislation by unelected judges is undemocratic. In doing so, I draw on legal and political science theories of judicial review as well as the nature of democracy in progressive, pluralistic societies such as Canada. I then offer a new outlook on the role of judicial review in the state, one which departs from the polarizing debate about judicial review and democracy. In my view, courts exercising the power of judicial review should be regarded as auditors of the government’s adherence to the constitution, in much the same way as the Auditor General of Canada ensures the government’s adherence to its own spending policies. This auditing function is a means by which elected officials can resolve the conflict of interest inherent in proposing policies which are popular with those who elect them as well as fulfilling their obligation to respect a constitution which requires the protection of minority groups.

However, since judges cannot review statutes on their own motion, the court’s ability to perform this constitutional auditing function depends on a steady stream of Charter challenges brought by private entities. Unfortunately, the number of Charter equality cases before the FCA and SCC has declined considerably in recent years as a result of the access to justice crisis in Canada. This decline has significantly limited the court’s ability to act as a check on the enactment of unconstitutional legislation. In the last part of this paper, I discuss the access to justice crisis in Canada and as well as its implications for the future of Charter equality litigation.

While it is unclear to what degree the cancellation of the CCP in 2006 has contributed to the downward trend in the number of Charter equality cases, I argue that it is reasonable to attribute at least some of the decrease to the evaporation of CCP funds, given the high percentage of such cases which were funded by the CCP during the life of the program. Evidence from the quantitative analysis of the federal equality case data set suggests that CCP funding did not, as alleged by the CPT, lead to a dramatically higher success rate for parties or interveners. Rather, the CCP’s primary contribution to federal equality jurisprudence seems to be that it enabled

---

15 The origin of the word “audit” comes from the Latin word for "a hearing", and dates back to the 16th century when the auditing of financial accounts was done orally. In this sense, conducting a constitutional audit via court hearings is consistent with the original meaning of the word.
cases to be heard by the FCA and SCC which otherwise would never have reached the higher courts.

There have been several attempts by the legal community to fill the funding gap left by the CCP’s cancellation. I compare the effectiveness of these alternative sources of funding with publicly funded programs such as the CCP, focusing on recent developments in advance costs awards, litigation funding by private entities and the use of pro bono counsel. I conclude that while ad hoc methods of constitutional litigation funding have an essential role in resolving the access to justice crisis in Canada, creating a stable, well-administered source of funding for a wide array of constitutional equality cases is necessary to give meaning to the fundamental human rights enshrined in the Charter.

This paper is organized into four chapters. In Chapter One, I review the history of the CCP, including its termination and partial restoration. I also introduce the CPT as well as the key descriptive and normative claims which underlie the Court Party Theory. I then discuss the CPT’s criticisms of the CCP and explain why a quantitative analysis of the CPT’s claims is essential to assessing the merits of publicly funding Charter litigation through programs like the CCP.

In Chapter Two, I explain the “intramural” methodological approach I have taken with respect to selecting, collecting and categorizing the cases which comprise the data set of federal equality decisions used in the quantitative analysis, along with some of the limitations of this method. I also present a data summary of some of the statistical outcomes of my analysis, and then review some preliminary conclusions which arise from the study.

In Chapter Three, I evaluate the strength of the CPT’s three descriptive claims with reference to the quantitative analysis and conclude that, for the most part, these claims have little evidentiary foundation. I also discuss the CPT’s normative argument that judicial review is undemocratic, and offer my own perspective on judicial review which departs from the traditional debate about its compatibility with democracy.

In the final chapter, I discuss the access to justice crisis in Canada and its consequences for the development of Charter equality rights. I also evaluate the necessity of publicly funding Charter
litigation through programs such as the CCP in light of alternative funding sources used in recent years to assist claimants in bringing Charter cases to court.

In the conclusion, I argue that the Court Party Theory is fundamentally flawed, because to the degree that the Court Party exists, and evidence of this is scarce, it achieves almost nothing of which it is accused by the CPT. Far from being the central drivers of Charter litigation, interest groups act as claimants in a very small percentage of federal equality decisions. When they do participate in Charter cases, interest groups are not particularly successful at convincing the court to accept their equality arguments, either as interveners or in the rare cases in which they appear as parties. The third finding follows from the first two; judges are highly deferential to the legislature and cautious about expanding Charter rights. The CPT’s normative argument that judicial review is undemocratic is both unsupported by the quantitative analysis and much weakened by the fact that the ultimate veto over judicial constitutional decisions rests with the legislature. If the CPT lament the degree to which court decisions are treated as the final word on government policy, the target of their criticism should not be interest groups or judges, but rather the elected officials who are loathe to expend the political capital required to override the court on constitutional matters.

In my view, the power of judicial review should be re-conceived as an important constitutional audit on the government’s adherence to the constitution. Of course, the court can only perform this audit when individuals and groups challenge the constitutionality of government action. Unfortunately, the ability of individuals to bring Charter claims is threatened by the current access to justice crisis in Canada. Without a reliable and stable means by which Charter claims can reach the court, preferably through a system of public funding, the fundamental human rights protected by the Charter will be rendered unenforceable and consequently, meaningless.
Chapter 1:  
The Court Party Theorists and the Fall of the CCP

1  The history of the CCP

The CCP was instituted in 1978 by Prime Minister Pierre Trudeau’s Liberal government to finance litigation by official language minority groups. The program accepted applications from Francophones living outside Quebec or Anglophones living inside Quebec challenging provincial or federal legislation on the basis that it violated the Constitution Act, 1867 or the Manitoba Act, 1870. In 1985, the equality provisions of the Charter (sections 15, 27 and 28) came into effect and the Conservative government led by Prime Minister Brian Mulroney expanded the scope of the CCP to fund Charter equality rights litigation against the federal government, allocating $9 million over five years to an arms-length agency to administer the program. The CCP was renewed in 1990 for another five years, with a total budget of $12 million for that period. Partway through this renewal period, the Mulroney government cancelled the program and eliminated its remaining funding. The CCP became a campaign issue in the next general election in 1992, with both the Conservatives and Liberals promising to reinstate the program in response to public outcry following its cancellation. In 1994, the Liberal government under Prime Minister Jean Chretien revived the CCP, in the form of a non-profit, arms-length agency with a three-year contract and $2.75 million in annual funding. The program was renewed twice more, with the most recent renewal in 2004 slated to last until 2009, with only a modest increase in annual funding.

The CCP’s mandate was, “to clarify and advance constitutional rights and freedoms related to equality and minority official language rights by providing financial assistance for test cases of national significance.” The program was administered by a national board of directors whose

committees evaluated applications for funding. Successful test case applicants were eligible to receive up to $60,000 for the first stage of the litigation and $35,000 for each subsequent appeal. Interveners were limited to a total of $35,000 in funding. One of the criteria used to select cases for funding was whether the case raised an important issue for members of disadvantaged groups or minorities.

1.1 The CCP’s cancellation

Despite its 2004 renewal, the Conservative government led by Prime Minister Harper cancelled the CCP’s funding on September 25, 2006, stating in a press release that the CCP was one of several “wasteful and ineffective programs” being eliminated in order to reduce Canada’s debt. The Harper government proffered no evidence of the CCP’s alleged wastefulness or ineffectiveness in support of its decision to terminate funding, nor is there any indication that the Harper government undertook an analysis of the program’s use of resources or effectiveness before deciding to terminate the CCP.

In fact, the most recent study of the CCP’s effectiveness, entitled Summative Evaluation of the Court Challenges Program (the “Summative Evaluation”), was undertaken by the Department of Canadian Heritage under the Chretien government in 2003 and its conclusions about the program’s effectiveness and efficiency were overwhelmingly positive. The evaluation included five components: a literature review addressing (among other issues) the effect of the program; the role of the courts in Canada; interest group litigation; an administrative review of CCP files; key informant interviews with representatives from the Department of Canadian Heritage, CCP personnel, experts on language and equality issues, and various federal departments; and a survey of funding applicants and CCP members. In addition, five case

---

19 Court Challenges Program Funding: Equality Cases, online: Court Challenges Program <http://www.ccpp cj.ca/e/funding/funding-equality.shtml#funding>.
20 Ibid.
22 The previous report into the effectiveness of the CCP was published in 1989: Canada, Court Challenges Program: First Report of the Standing Committee on Human Rights and the Status of Disabled Persons (Ottawa: Queen’s Printer, 1989). The report concluded that the CCP was a necessary program which was meeting the goals of its mandate.
studies were prepared to illustrate how the CPP functioned. Finally, the draft report was reviewed by two outside experts including former SCC justice, the Honourable Gerard La Forest.24

On the basis of the data reviewed, the authors of the Summative Evaluation reached four important conclusions with respect to the CCP. First, they found that the CCP was addressing the need that led to its creation and stated with respect to the program’s mandate to advance minority rights that, “the Charter itself is an unbalanced document, designed to ensure that the rights of the minority are not unduly limited by the actions of the majority. A program that seeks to clarify and advance the rights of minority and disadvantaged groups appears entirely consistent with the Charter.”25 Second, and contrary to the Harper government’s allegation that the CCP was inefficient, the Summative Evaluation found that, “[t]he evidence collected indicates that the Program has an effective management structure in place and that the procedures followed to review applications and allocate funding do reflect good practices in that field.”26 Third, the report indicated that the CCP was effective; “[t]he CCP has…been successful in supporting important court cases that have had a direct impact on the implementation of rights and freedoms covered by the Program. The evaluation indicates that many of these court cases would never have been brought to the attention of the courts without the CCP.”27 Finally, rather than being “wasteful” as the Harper government claimed, the data indicated that the CCP was cost-effective and was more efficient than alternative methods of enforcing equality and language rights, such as constitutional research, conferences or litigation brought by groups like LEAF.28 Because of its efficiency, the Summative Evaluation found there was no need to increase the program’s funding of approximately $2.75 million per year.29 The Summative Evaluation also made some minor recommendations concerning the administration of the CCP, including that its board of directors increase the program’s transparency by reporting on funding activities more frequently.30

24 Ibid. at 1.  
25 Ibid. at 55.  
26 Ibid. at 56.  
27 Ibid. at 59.  
28 Ibid. at 53-54.  
29 Ibid. at 59.  
30 Ibid. at 55-59.
Since the CCP’s cancellation, there have been two further studies of its outcomes and the consequences of its termination. Both studies were conducted by committees of the House of Commons comprised of government and opposition representatives. In 2007, almost a year after the CCP ended, the House of Commons Standing Committee on Official Languages studied the impact of the CCP’s cancellation on language rights, in part through the testimony of witnesses at a public hearing. The committee made headlines in May 2007 when its chairman, Conservative Member of Parliament Guy Lauzon, cancelled the public hearing at the last minute. Opposition Members of Parliament accused Mr. Lauzon of stifling debate about the CCP and its cancellation. Mr. Lauzon eventually resigned as committee chairman.

The committee went on to finish its study and publish its report (the “Official Languages Report”), which found that the CCP was very effective and was preferable to a number of alternatives considered by the committee, including provincial legal aid programs which are very limited both in terms of funding and civil law coverage. The report also questioned the Conservative government’s motivations for terminating funding for the program:

A program that meets its objective need not of course become permanent, provided that its cancellation does not threaten the attainment of its objective. In this case, however, the links between the CCP, access to the courts for official language minority communities, the clarification of constitutional rights and community vitality are unanimously recognized, even by those opposed to the program. When the measures provided to achieve certain objectives are so clearly effective, the elimination of those measures represents an obvious risk to achieving the objectives, unless other measures are provided. Moreover, the elimination of measures that are entirely effective, together with a lack of proposed alternatives, creates legitimate suspicion of the government’s real desire to meet these objectives.

The report concluded with two simple recommendations. First, “[t]hat the government clearly explain to Canadians its reasons for cancelling the Court Challenges Program.” Second, “[t]hat the Government of Canada re-establish the Court Challenges Program under the terms of the

---

34 Ibid. at 17.
contribution agreement that was in effect before its cancellation was announced on September 25, 2006.”

The Conservative Party of Canada included a “Dissenting Opinion” in the Official Languages Report, asserting that, “[u]nlike stated [sic] in the report, the government publicly explained many times the expenditures review process that led to the elimination of the Court Challenges Program…It is up to Canadians to judge if the explanation was clear and satisfactory.” This response is, to a large degree, an exercise in misdirection; while the government may have explained the expenditures review process, that is that ineffective and wasteful programs would be eliminated, the basis upon which it concluded that the CCP should be eliminated remains unexplained.

The second study, entitled Women and the Court Challenges Program, was conducted in 2008 by the Standing Committee on the Status of Women and also received testimony from witnesses (the “Status of Women Report”). The Committee heard that, “the Court Challenges Program was a relatively inexpensive program but a highly effective one at just under $3 million a year.” The majority of witnesses emphasized, “the need for reinstating, maintaining and expanding the Court Challenges Program noting that ‘The federal government should not fear scrutiny of fair and equitable legislation and policies using this program.’” Again, the Conservative Party of Canada included a Supplementary Opinion in the Status of Women Report which did not address the merits or effectiveness of the CCP, except to reassert that the CCP was ineffective, stating, “In Budget 2006, our government promised to review ineffective programs to ensure each taxpayer dollar was well spent, and this is exactly what we have done.”

1.2 The CCP’s partial restoration

In June 2008, eighteen months after the Harper government defunded the CCP, it restored funding for Charter challenges involving minority language rights. The restoration was the result of an out-of-court settlement with the FCFA du Canada. The FCFA du Canada had filed a petition against the Harper government in federal court, arguing in part that defunding the CCP

35 Ibid. at 27.
37 Ibid. at 11.
38 Ibid. at 13.
39 Ibid. at 27.
violated the Charter. The restored funding for minority language rights litigation amounts to $1.5 million per year, or roughly half of the CCP’s previous total annual budget of $2.75 million. In September 2009, the Harper government rebranded the minority language rights component of the CCP, calling it the “Language Rights Support Program”. The program is operated from the University of Ottawa and focuses on mediation rather than litigation. The emphasis on mediation has created some concern among critics that there will be few resources available for launching court challenges, which produce important judicial precedents for the enforcement of minority rights.

2 The CCP: Victim of inefficiency or ideology?
The Harper government’s refusal to justify defunding the CCP with anything more than repeated but unsupported accusations of inefficiency and wastefulness deserves scrutiny. The minimal operating cost of the program has historically been one of the reasons for its popularity. The decision to cancel the CCP’s minute (in government budgetary terms) annual allotment of $2.75 million hardly represents a bonanza of savings for the Harper government. By comparison, the federal government recently spent $1 billion on security for a G8/G20 summit in Toronto. The CCP’s annual budget is also approximately the same as the interest which would accrue every twelve hours on the federal government’s planned purchase of F-35 fighter jets.

---

40 “Elimination of Funding to Court Challenges Program: FCFA Files a Petition in Judicial Review with the Federal Court” FCFA (October 26, 2006), online: FCFA <http://www.fcfa.ca/index.cfm?Voir=comm_autre&id=1696&Repertoire_No=-786718320>.
41 “Scrapped CCP”, supra note 14.
43 Marshall, supra note at 182.
46 The interest calculation is as follows; $16 billion (the cost of the jets) x 5% (interest rate) x 15 years (the life of the jets) = $4,223,224/day in cost of interest and principle, or $2,111,612 per 12 hour period. The CCP’s annual budget of $2.75 million/year in 1994 dollars was worth approximately $2,160,174 in 2006 dollars; see Statistics Canada, “The Consumer Price Index for Canada, 1987-2006”, online: Statistics Canada <http://www.statcan.gc.ca/pub/62-001-x/00206/t/4183301-eng.htm>.
Moreover, three separate reports, both prior to and after the program’s termination, attest to its effectiveness, efficiency, and contributions to Canadian equality and minority language rights jurisprudence. In response, the Conservative government failed to offer any arguments in support of its assertions that the program was defunded for administrative reasons. Democracy requires that government decisions be rendered with transparency and without arbitrariness. The manner in which the Harper government decided to defund the CCP does not meet this basic requirement of responsible government because merely repeating accusations is not a substitute for rationalizing policy decisions.

One explanation for the disconnect between the Harper government’s rhetoric about the CCP and the findings in the three reports is that the program’s defunding had nothing to do with its administrative efficiency. The issue was not the means by which the CCP achieved its aims, but rather the aims themselves. Support for this conclusion is found in a videotaped speech, leaked in 2009, in which Prime Minister Harper remarked to Conservative Party supporters in Northern Ontario that, “[i]nstead of subsidizing court challenges as the previous government was doing, subsidizing lawyers to bring forth court challenges by left-wing fringe groups, we have been bringing in laws to crack down on criminals and support victims in this country.”46 The clear implication is that Prime Minister Harper considers the recipients of CCP funds, including women, minorities, homosexuals, aboriginals and the disabled, to be “left-wing fringe groups” who are undeserving of government assistance in enforcing their rights.

More compellingly, the Harper government has aligned itself with Conservative academic theorists who oppose the Charter and the judicial review mandate it gives judges to overturn unconstitutional legislation. The three academics who I refer to as the CPT, Morton, Knopff, and Brodie, have written extensively over the past two decades about their opposition to what they see as an undemocratic insurgency. The insurgency is driven by special interest groups who obtain leave to intervene in rights cases from activist judges keen to radically expand the Charter rights of these groups, contrary to the will of the majority of Canadians. This

46 DeSouza, supra note 42.
perspective was crystallized in a popular book authored by Morton and Knopff entitled *The Charter Revolution and the Court Party* (the “CRCP”).

It bears noting that conservative academics are not alone in asserting that the Charter is undemocratic. Well-known left-wing professor Michael Mandel argues that, among other mischief, the judicial review power under the Charter has been used by corporations to oppose government regulation and quash the labour movement in Canada. This view is supported by at least one study which suggests that corporations litigate far more often than other interest groups:

Court dockets are still laden with corporations. They bring 468 legal actions, far more than the other interests. Companies engage in civil litigation against private parties, and challenge regulations governing banking, federal elections, international trade, environmental protection and the pharmaceutical industry.

In this context, Mandel sees the Charter as a tool for the powerful to oppress the weak and, “in those rare cases where it has arguably helped those without wealth and power, it has unequivocally helped those with it even more.” Mandel’s argument mirrors that of the CPT, except that his Court Party is comprised of right-wing business interests instead of left-wing special interests.

Examining the anti-Charter claims of those on the left of the political spectrum lies outside the scope of this paper, however the issue has generated some lively academic commentary in recent years.

From the CPT’s perspective, the CCP aggravates the problem of interest groups because it provides them with taxpayer money with which to pursue their rights-expanding agendas in court. One of the CPT, Ian Brodie, became Prime Minister Harper’s Chief of Staff shortly after the 2006 general election and only several months before the Harper government announced it

50 Mandel, supra note 48 at 455.
was defunding the CCP. Given Brodie’s opposition to the CCP, as expressed in much of his academic writing, it is reasonable to surmise that he may have influenced the decision to terminate the program’s funding.

It seems clear that the decision to defund the CCP was based primarily, if not entirely, on the Harper government’s ideological affinity for the CPT’s views on the Charter and the Court Party. The overlap between the Conservative Party’s ideology and that of the CPT has been observed by several academics who write that Morton’s and Knopff’s perspective, “has clearly been influenced by their neo-conservative ideological commitments” and this, “neo-conservative agenda…is reflected in many parts of the [CRCP]”. 53 They complain that the book is undermined by, “the partisan screed [which] surfaces time and time again.” 54 With respect to the decision to defund the CCP, Professor Laura Kloegman observes that, “the Conservative government appears to have adopted the analytical lens of Ted Morton & Rainer Knopff’s ‘Charter revolution’ theory to judge the merits of the program. Considered in this light, it should not be surprising that the CCP was deemed a nuisance and eliminated.” 55

If, as I argue, the Harper government opposes the CCP for ideological reasons, then it is perplexing that the government has justified defunding the CCP on the grounds of administrative efficiency rather than principle. One possible explanation for this inconsistency is that Prime Minister Harper, mindful of the tenuousness of his minority government, wished to avoid making the CCP’s defunding an overtly political issue, since both the Charter and the SCC enjoy widespread approval among Canadians. 56

Of course, the Harper government’s lack of transparency in defunding the CCP does not mean that the CCP’s cancellation was unjustified; in order to determine whether the CCP’s cancellation was merited, it is necessary to review the extent to which the claims underlying the CPT’s ideological opposition to the program are supported by concrete evidence. The CPT’s opposition to the CCP is inextricably entwined with their opposition to the Charter, interest

53 Elliot, supra note 3 at 271 and 327.
54 Sossin, supra note 6 at 532.
55 Kloegman, supra note 16 at 107.
groups, intervening status, and “activist” judges as well as their broader criticism of the judicial review power. From the CPT’s perspective, the CCP is both a catalyst for the advancement of the Court Party and a symptom of the underlying malady called the Charter Revolution, but it is not in and of itself the core problem. It is therefore necessary also to review some of the CPT’s claims about the Court Party and the Charter Revolution to evaluate their persuasiveness in justifying the program’s defunding.

3 The Court Party and the Charter Revolution

In this section, I briefly introduce the CPT before reviewing some of their key arguments, drawn primarily from the CRCP, but also from their numerous publications over the past two decades. While the CRCP was not authored by Brodie, his work is included in the book, with the authors acknowledging, “we have drawn freely and shamelessly from Ian Brodie’s 1997 Ph.D thesis, ‘Interest Groups and the Charter of Rights’; he taught us at least as much as we taught him.” A former student of Morton’s and Knopff’s, Brodie evidences the same ideological perspective as his mentors. As I discuss further below, this similarity is particularly apparent in Brodie’s 2002 book, Friends of the Court: the Privileging of Interest Group Litigants in Canada ("Friends of the Court") in which Brodie argues, among other things, that the government and the courts play a significant role in encouraging and supporting interest group litigation, and in doing so, favour some groups over others.

All three theorists are skeptical of the Charter, and this skepticism has informed their critique of judicial review, interest groups and the public funding of Charter litigation. While each of the three scholars have their own theories on various aspects of the Canadian political system, they agree that the interest groups which comprise the Court Party, fuelled by government funding and encouragement through the CCP, have persuaded Canadian courts to take an activist approach to judicial review which has undermined our democratic system.

57 Knopff & Morton, “CRCP”, supra note 4 at 10. See also Ian Brodie, Interest Groups and Supreme Court of Canada, (Ph. D Thesis, University of Calgary Department of Political Science, 1997) [unpublished] [“Interest Groups”].
58 Brodie, "Friends of the Court", supra note 11. See also Brodie, "Interest Groups in Court", supra note 11.
59 See e.g. Morton, "Political Impact", supra note 11.
3.1 Who are the CPT?
Both Knopff and Morton obtained Ph.D.s in political science from the University of Toronto and have taught at the University of Calgary for the past twenty years. Professor Morton is currently on a leave of absence from the University of Calgary in order to serve as the Minister of Finance and Enterprise for Alberta’s Conservative government. Brodie completed his Ph.D at the University of Calgary before teaching at the University of Western Ontario. He has twice left academia to work for Stephen Harper, most recently as his Chief of Staff, a position he left in 2008.

3.2 What is the Court Party Theory?
In a 1992 paper, Morton coined the term “Court Party” which he defines as “a coalition of social movements…which is the Canadian expression of the new politics of postmaterialism found in most Western industrial democracies. Canada’s new Court Party poses a renewed challenge to the constitutionalism established by such 19th century statesmen as Parent and Howe.” According to Morton and Knopff, the Court Party is a cabal of interest groups comprised of, “(1) national unity advocates, (2) civil libertarians, (3) equality seekers, (4) social engineers, and (5) postmaterialists.” Of the three CPT, Morton has written most extensively about the Court Party, which he claims is “concerned not with restricting government policy and intervention but with expanding it”. This government-expanding characterization of the Court Party seems at odds with civil libertarians’ extensive interventions in Charter cases, typically in support of reducing government interference with the rights of private individuals. The authors acknowledge that members of the Court Party may not share the same views on Charter issues, but argue that they nevertheless share the aim of using the courts to advance their policy goals.

---

64 Knopff & Morton, “CRCP”, supra note 4 at 59.
While civil libertarians may not fit neatly within the Court Party, other groups are excluded from it altogether. As Professor Lorne Sossin points out, despite the fact that corporations and interest groups brought a similar number of Charter challenges in the Charter’s early days, the authors specifically exclude corporations from the Court Party on the rather weak basis that there are many more corporations than interest groups in Canada and therefore a lower percentage of corporations as a whole have brought Charter challenges. The CPT’s exclusion of corporations from the Court Party also ignores the fact that business interests were the original instigators of judicial review. Professor Hogg provides a number of historical examples where businesses have appealed to the courts to “rewin policy battles lost in the elected legislative bodies.” Similarly, the authors do not include right-wing interest groups such as REAL Women, the NCC or Christian organizations in the Court Party, despite the fact that these groups have frequently intervened in or sponsored Charter litigation in furtherance of their right-wing social agendas.

The authors argue that the SCC is a tool of the Court Party since it, “sees itself as the authoritative oracle of the constitution, empowered to develop its standards for society as a whole, rather than just for the litigants before it.” The SCC has encouraged the Court Party by having an “open door” policy for litigants and interveners. According to Brodie, “The Supreme Court is well on the road to establishing itself as a legislative, rather than a judicial, institution.”

The federal government (presumably only when led by Liberal prime ministers) is also to blame for the rise of the Court Party because it has funded interest groups through the CCP and other programs. Brodie has described the government as “embedded” with special interest groups

---

67 Sossin, “Courting the Right”, supra note 6 at 533-534.
68 Hogg, supra note 51 at 2.
69 Ibid.
70 For further discussion of the NCC’s Charter litigation activities, see Sossin, “Courting the Right” supra note 54 at 534 and Dennis R. Hoover & Kevin R. den Dulk “Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada” (2004) 25.1 International Political Science Review 9 at 27 and Appendix A (in which the authors list Christian organizations which have participated in constitutional litigation in Canada). See also Lavigne, supra note 9 at para. 18 (where the court discusses the fact that the NCC underwrote the appellant’s costs in the litigation).
72 Ibid. at 9.
73 Brodie, “Friends of the Court”, supra note 11 at 124.
who pursue their cause through an activist judiciary. In its activism, the courts are aided by liberal lawyers and professors who interpret the constitution in a manner which permits greater judicial intervention. Law schools are an important contributor to the Court Party because they, “recruit, form and pay the salaries of the academics whose ideas drive the Charter movement. Law schools now produce a steady stream of ‘rights experts’ to staff the interest groups, bureaucracies, and courts that pursue the politics of rights.” Morton puts these academics and their work in dismissive quotations, referring to “Charter experts” with their “scholarship”. Rounding out the Court Party is the media, which, “provides a way to bypass governments and political parties and to go directly to the people – or more accurately, to public opinion.”

Ultimately, the CPT view the Court Party as a vast left-wing conspiracy whose members do not wish to operate within a democratic system of checks and balances. As Morton writes, with dramatic flair, “[a]s the vehicle for the Court Party, the Charter is the enemy of liberal constitutionalism, not its friend. This is not novel. The radically democratic forces vanquished by Parent and Howe have reformed and regrouped in our own time. The battle is joined once more!” However, the CPT’s outrage over the undemocratic nature of judicial review is belied by the fact that, as discussed earlier, they are not offended by judicial review sought by corporations or right-wing groups to advance their policy objectives. As Professor Sossin writes, “[t]he authors seem most offended by what they characterize as the elitist, equality-seeking, social engineering philosophy of a handful of gay and lesbian advocacy groups, feminist groups, and an ill-defined clatch of other groups representing the vulnerable classified under the alternating rubrics of ‘postmoderism’ or ‘postmaterialism.’” Nor do the CPT appear to have a bright-line test for how much judicial review is appropriate, “[w]ithout a theory that would help clarify and distinguish an ‘acceptable’ from an ‘excessive’ degree of judicial law-making in

---

75 Brodie, “Friends of the Court”, supra note 11 at 124.
77 Ibid.
78 Ibid. at 17.
79 Ibid. at 22.
80 Sossin, “Courting the Right”, supra note 6 at 534-535.
defining the scope of equality, criticism of excessive law-making seems to correspond more to disagreement with particular judicial outcomes.”

At times, the CPT trivialize the motivations of the interest groups which comprise the Court Party, with all three arguing that interest groups are status-seekers which use the courts and the Charter, particularly section 15, as a vehicle for obtaining political advantage to the exclusion of others; “Although virtually all significant political entities have come to see constitutional status as a good thing, its value is diluted the more widely it is dispersed…If too many rivals enjoy an equal constitutional status, this advantage disappears.” Meanwhile, Brodie applies the rational actor theory to “status-seeking” interest groups in an attempt to predict “status-seeking behavior”.

In characterizing interest-groups as mere consumers of status, bent on excluding others from the protection of the Charter, the CPT belittle the efforts of those attempting to enforce the human rights of individuals who have historically suffered discrimination and prejudice at the hands of their government. In my view, this portrayal of interest groups as exclusionary serves to divert attention from the fact that the Charter is directed at discriminatory exclusion perpetrated by governments, institutions which are still overwhelmingly dominated by wealthy, white men.

Further, by defining democracy narrowly as legislative action by elected officials, the CPT portray as illegitimate and undemocratic almost every political actor which has historically criticized government action, including the media, academics, lawyers, judges and social activists. A more inclusive definition of democracy might acknowledge that its essential features include an informed public, a marketplace of ideas, a vigorous opposition and a strong judiciary. An exploration of the intersection between judicial review and democracy is incorporated in Chapters Three and Four.

---

82 Knopf & Morton, “Charter Politics”, supra note 11 at 82.
83 Ian Brodie, "The Market for Political Status" (1996) 28.3 Comparative Politics 253-71 ["Political Status"].
4 Evaluating the CPT’s claims

In his review of the CRCP, Professor Robin Elliot creates a useful distinction between the authors’ descriptive and normative claims. While Elliot devotes most of his review to a critique of the authors’ approach to constitutional interpretation, the authors’ remaining arguments can also be categorized as either descriptive or normative. In this paper, I endeavour to critically assess three of the CPT’s central descriptive claims with reference to federal equality cases involving the Charter heard at the SCC or FCA during and after the CPP (the “federal equality cases”). Focusing on federal Charter litigation brought by the equality-seekers element of the Court Party provides a discrete case study against which to examine the CPT’s arguments.

I propose to examine the following three of the CPT’s descriptive assertions; first, that interest groups rather than individuals are the primary drivers of federal equality litigation under the Charter; second, that judges are inclined to radically expand the scope and application of the Charter’s equality provisions; and third, that interveners frequently influence the outcome of federal equality cases by convincing judges to adopt their rights-expanding agendas. Each of these claims is discussed in some depth below. While these three assertions are not the only ones the CPT have made, they have the twin virtues of being central to their Court Party Theory and verifiable, at least to some extent, through an examination of the caselaw.

The three descriptive claims are invoked by the CPT as support for their primary normative claim, namely that it is undemocratic for equality-seeking groups as unelected judges to overturn parliamentary legislation on the basis of a Charter violation. In Chapter Three, I assess the validity of this argument, in part through a doctrinal analysis of the nature and content of democracy in Canada. The CPT’s descriptive and normative claims lead them to the irrevocable conclusion that the CCP is, as a matter of public policy, a societal ill which must be eliminated. In the final part of this chapter, I review some of the CPT’s arguments in opposition to the CCP and discuss the need for objective research about the merits of the program.

---

84 Elliot, supra note 3 at 272-273.
85 Ibid. at 273.
4.1 The CPT’s descriptive claims

4.1.1 Interest groups, rather than individuals, drive Charter equality cases

The CPT have portrayed interest groups as an organized and powerful cabal of leftist activists who conspire to influence everything from the appointment of judges,\(^{86}\) to previous decisions to reinstate the CCP,\(^ {87}\) to the outcome of the Charter cases in which they intervene.\(^ {88}\) In my view, in order for the Court Party Theory to be persuasive, the CPT must prove that interest groups rather than individuals are at the centre of Charter litigation. This is because if it turns out that Charter litigation is primarily driven not by the interest groups which comprise the Court Party, but rather by individuals in Canada whose rights are alleged to have been violated by government, then the Court Party is at best irrelevant, and at worst, non-existent.

The CPT claim that interest groups have taken over Charter litigation in Canada; “[i]ndeed, with the important exception of criminal cases involving legal rights, the individual litigant is vanishing in Charter litigation. Corporations bring cases, and for policy charged cases, interest groups are increasingly prominent carriers of Charter litigation, if not as litigants, then as financial backers or interveners.”\(^ {89}\) In support of this contention, the authors offer seven examples of cases where groups have brought Charter challenges and five further examples where groups have financially supported an individual’s Charter litigation.\(^ {90}\) In three of these cases the groups in question were right-wing organizations which, as discussed above, the CPT do not include in the Court Party.\(^ {91}\) The authors also fail to offer any concrete evidence in aid of their bald assertion that individual cases are “increasingly” being funded by interest groups. In response, critics of the CPT cite anecdotal evidence refuting the CPT’s claim about the centrality of interest groups in Charter litigation. Professor Miriam Smith points out that the *Same Sex Marriage Reference*\(^ {92}\) was initiated by grassroots claimants despite opposition from gay rights groups about the timing of the litigation. She concludes that, “[i]n the Canadian legal system,
litigation most often occurs because an individual litigant brings it forward, not because of a planned and systematic campaign by an advocacy group.‖

Regardless of one’s perspective on the issue, anecdotal evidence is an unreliable means of proving claims about the role of interest groups in Charter litigation, especially when the identity of the parties in Charter equality claims is readily available from court decisions. For example, the CPT could have compared the total number of Charter cases brought by interest groups with the number brought by individuals or businesses, an exercise which I undertake in Chapter Two. Of course, determining the degree to which interest groups might be funding claimants is a somewhat more difficult enterprise since financial arrangements between clients, their supporters and their lawyers are private and often subject to solicitor-client privilege. However, the fact that this information is not very accessible might have given the CPT reason to refrain from making largely unsubstantiated assertions about whether financial support arrangements between interest groups and individuals are increasing.

If it turns out that interest groups do not participate either as extensively or as cohesively in Charter litigation as the CPT allege, then one would be forced to conclude that if the Court Party exists, it operates only on the margins of Charter litigation and therefore the Court Party Theory is of limited utility in explaining the nature and direction of Charter litigation in Canada. For this reason, a Court Party which functions only on the fringes of Canadian Charter litigation would seriously undermine the CPT’s rhetoric about the dangers of the Charter and judicial review. If the Charter’s main beneficiaries are ordinary Canadians seeking equal treatment from their government, the Charter is transformed from the sword of the powerful against the people’s government into a shield for the people against a powerful government. Since much of the CPT’s theory depends on their assertion that the interest groups which comprise the Court Party are driving Charter litigation, it is worth testing this claim against data from federal equality cases heard in Canada’s highest courts. The results of this analysis are discussed in Chapter Two.

93 Smith, supra note 5 at 201.
4.1.2 Judges are inclined to radically expand Charter rights

The definition of judicial activism is elusive and subject to much disagreement among academics. Knopff and Morton (along with Professor Peter Russell) define it as, “judicial vigour in enforcing constitutional limitations on the other branches of government and a readiness to veto the policies of those branches of government on constitutional grounds.”94 Although the authors warn of the dangers of, “making categorical statements about the Supreme Court’s orientation on the Charter”,95 Morton was prepared, after only four years of Charter jurisprudence and a total of fourteen SCC decisions, to state that a, “tone of judicial creativity and boldness flows through all the Supreme Court’s decisions,” and the SCC, “has matched the boldness of its words with its decisions” because in nine of the cases the individual litigant won.96 According to Morton, in the first four years of the Charter, the success rate for individual litigants in lower court Charter decisions was 26% in 1982, 28% in 1983, 28% in 1984 and 32% in 1985.97 Hardly a dramatic increase between years or an overwhelming success rate overall, yet Morton calls the 32% success rate in 1985 “remarkable” and predicts that, “[t]he trend toward a much more activist exercise of judicial review under the Charter is almost certain to continue.”98

In another article published in 1987, Morton concludes a review of the first twelve Charter cases decided by the SCC from 1982 to 1985 with the statement that the SCC, “has been the most activist and libertarian of all Canadian courts.”99 Although the Charter was still in its infancy, Morton proclaimed its deleterious effects on Canada’s judicial and political systems through the entwined ills of judicial activism and interest groups, including feminists and civil libertarians;

A review of the first four years under the Charter reveals three potentially negative dimensions of the “judicialization of politics.” First is the danger that judicial enforcement of constitutional principle will shade over into legal dogmatism, with inadequate regard for harmful policy consequences…A related danger is that of “hidden agendas”—that the rhetoric of rights may obscure the real issues at stake in a controversy. Third is the potential

95 Ibid. at 12.  
96 Morton, “Political Impact”, supra note 11 at 35.  
97 Ibid. For further discussion of the SCC’s early Charter cases see, Russell, Knopff & Morton, eds., “Federalism”, supra note 94 at 11-12.  
98 Morton, ”Political Impact”, supra note 11 at 36.  
for the further derogation of legislatures and “responsible government.” Interest groups may succeed in using the Charter and the courts to circumvent the traditional channels of policy-making. This problem could be aggravated both by judges who are overanxious to prescribe political remedies and political leaders who willingly abdicate their responsibilities to the courts.\(^\text{100}\)

According to the CPT, judges are not only eager to usurp the legislature, but they are also inclined to make up the law as they go along through “legal innovations”. The CPT assert that, “[c]ourts became much more activist after the Charter’s advent in 1982…In addition to being more activist, in the sense of squarely opposing the other branches of government, the courts have also been innovative in interpreting laws they uphold.”\(^\text{101}\)

In the CRCP, Morton and Knopff dubbed the court’s approach to the Charter as judicial “oracularism”, claiming that, “[i]n a dazzling exercise of self-empowerment, the Supreme Court has transformed itself from an adjudicator of disputes to a constitutional oracle that is able and willing to pronounce on the validity of a broad range of public policies.”\(^\text{102}\) Another like-minded author argued that the Charter, “became the foundation for the most unabashed aggressive and blatantly political judicial foray into every aspect of Canadian politics and public policy.”\(^\text{103}\)

If judges are power-hungry activists then those who appear before them are their enablers, in the CPT’s view. The authors of the CRCP argue that lawyers, “enjoyed a privileged position for influencing judges, especially appeal court judges. Having carefully observed the development of judicial power south of the border, they saw in the Charter an opportunity for empowering Canadian courts as an agency of political reform. After some initial hesitation by lower-court judges, the Supreme Court…followed the commentators’ advice and seized the opportunity.”\(^\text{104}\)

Similarly, left-leaning law clerks, the product of a liberal legal education system, are to blame for

\(^{100}\) Morton, ”Political Impact”, \textit{supra} note 11 at 22-23.

\(^{101}\) Knopff & Morton, “CRCP”, \textit{supra} note 4 at 15.

\(^{102}\) \textit{Ibid.} at 34.


\(^{104}\) Knopff & Morton, “CRCP”, \textit{supra} note 4 at 23.
influencing judges to adopt their rights-expanding interpretations of the Charter,\(^{105}\) and for foisting upon them similarly left-leaning legal scholarship.\(^{106}\)

Despite the forcefulness of their frequent accusations of rampant judicial activism by SCC judges, the CPT’s evidence in support of this assertion is scattered and unconvincing. Much of the CPT’s argument rests on the increased number of judicial interventions in government policy under the Charter as compared with the *Canadian Bill of Rights* (the “Bill of Rights”).\(^{107}\) \(^{105}\) Unlike the Charter, the Bill of Rights was an ordinary statute which was never constitutionally entrenched.\(^{108}\) The differences between the two documents and their treatment by the courts have been the subject of much commentary.\(^{109}\) Even Morton and Knopff admit that the courts’ handling of the Bill of Rights demonstrated undue judicial deference, pointing out that, “[s]uch excessive deference to the legislature leads a court to interpret entrenched rights to fit the legislation in order to avoid striking down the latter...this leads to a series of irreconcilable precedents which can hardly enhance the reputation of the judiciary or of the document it is interpreting. In effect, a judiciary which abandons principle to consent will not long retain public confidence.”\(^{110}\) The utility of comparing the court’s treatment of the Bill of Rights (which by the CPT’s own analysis represents a low-watermark of judicial intervention) to its treatment of the Charter as a means of measuring increased judicial activism is therefore questionable.

In his claim about rampant judicial activism, Morton also relies on a cursory assessment of a handful of cases rendered in the Charter’s early days. Meanwhile, the authors of the CRCP emphasize several landmark Charter decisions such as *M. v. H.*\(^{111}\) where the court found that the definition of common-law spouse under an Ontario statute violated the Charter’s equality

\(^{106}\) *Ibid.* at 146.  
\(^{108}\) R.S.C. 1960, c. 44.  
\(^{110}\) Knopff & Morton, “Judicial Statesmanship”, *supra* note 11 at 331.  
\(^{111}\) [1999] 2 S.C.R. 3 [*M. v. H.*].
provisions. The decision in *M. v. H.* clearly necessitated legislative change, not just to the impugned statute, but also to other legislation with similarly discriminatory language.\(^{112}\)

Further, the authors of the CRCP refer to a study by Professor Patrick Monahan showing that during the Charter’s first sixteen years, only 16 percent of Charter cases resulted in the nullification of a statute. With respect to this statistic, Monahan states that, “when you look at the overall record, it’s difficult to see where the court is usurping the role of the legislature…If anything, they could be faulted in some cases for not being active enough.”\(^{113}\) Morton and Knopff account for the Monahan study by shifting its parameters to include as “activist” cases where the court overruled police action. They also narrowed the data set to include cases only where the claimant requested that the impugned statute be nullified. These two changes resulted in an increased judicial intervention rate of 32% of Charter cases.\(^{114}\)

The inclusion of police action to demonstrate excessive judicial activism seems opportunistic and contradictory in light of Morton’s earlier approval of using judicial review to curb police abuse; “[t]wo-thirds of all Charter cases have been challenges to the conduct of public officials – mostly policemen. When courts intervene in this manner to check police excesses or heavy-handed government bureaucrats, they are usually enforcing legislative policy not obstructing it.”\(^{115}\) More recently, Monahan indicates that the overall success rate of Charter claimants before the SCC appears to be increasing, however the overall average success rate for Charter claims remains relatively low at 35 percent, while section 15 claims succeed in only 27.9 percent of cases.\(^{116}\)

The academic community’s reaction to quantitative research into the issue of judicial activism in Canada has become surprisingly heated, as the CPT’s response to the Monahan study demonstrates. One study by Professor Sujit Choudhry and Claire Hunter found that contrary to

\(^{112}\) Knopff & Morton, “CRCP”, *supra* note 4 at 20.

\(^{113}\) *Ibid.* at 19.

\(^{114}\) *Ibid.* at 19-20. See also Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 158-178 (the author agrees with Morton’s and Knopff’s critiques of Monahan’s study and offers his own view that judicial activism in Canada is increasing).

\(^{115}\) Morton, ”Political Impact”, *supra* note 11 at 23.

assertions by political scientists, “the government wins the overwhelming majority of constitutional challenges brought to majoritarian decisions; judicial activism has not increased over time; the government’s success rate in the section 1 analysis is highly dependent on whether or not an internal limit is placed on a protected right; and the level of judicial activism has not increased as a response to the deligitimation of the section 33 override.”

Two of the political scientists in question, Professors Christopher Manfredi and James Kelly, roundly criticized the study, arguing that “Choudhry and Hunter employ superficially sophisticated techniques to construct a largely straw figure argument.”

Much of the controversy over the accuracy of quantitative data on judicial activism stems from the nebulous nature of the subject matter. For instance, researchers disagree over whether the data should include both Charter and non-Charter cases, whether and how to measure “due” and “undue” judicial incursions into the legislative sphere and whether to include only statutory nullifications or broaden the analysis to include cases where the court overrules government policy and the actions of government officials, such as police officers and customs agents.

These changing data parameters reflect a lack of consensus on what constitutes judicial activism and, unsurprisingly, yield conflicting survey results about its existence in Canada.

While the existence of judicial activism in Canada is a contentious issue, the fact that claimants lose the majority of Charter claims is uncontroversial. Accepting either Monahan’s or Morton’s and Knopff’s statistics means that the court refrains from interfering with government policy or legislation in 68 or 84 percent of Charter cases, respectively. As Frederick Vaughan has observed with respect to the Monahan study, “[a] statistical review of the ‘success rate’ of Charter cases goes a long way to dispelling the notion that the Court has gotten out of hand since the Charter’s introduction and needs to be reined in. For the statistics show that, despite an

---

119 Ibid. at 745-746.
120 Choudhry & Hunter, “Judicial Activism”, supra note 117 at 532-534.
121 Manfredi & Kelly, “Misrepresenting”, supra note 118 at 744.
initial burst of activity in the early years, the Court has not been wielding the Charter as a broad sword.”

While statistics demonstrate that the court refrains from intervening in legislative decision-making in the overwhelming majority of cases, the numbers do not indicate the nature of the court’s intervention in cases where it overturned legislative action. For example, the CPT offer no information about whether the court voided, read into, severed or re-wrote the impugned statutory words or provisions. The absence of any evidence about the extent of judicial activism in the cases where the court found in favour of the complainant weakens the authors’ argument that judges are excessively activist in Charter cases.

Further, the authors do not assess whether the level of judicial intervention in the legislative sphere has increased or decreased with the passage of time. It would be reasonable to expect that, as Vaughan argues, judgments in the early years of the Charter were more “activist” as the court and the legislatures engaged in a dialogue about the parameters of the Charter’s provisions. A fruitful area of future research might be an examination of whether the number of statutory nullifications has declined with time as the boundaries of what constitutes unconstitutional government action have become clarified in the caselaw.

The assertion that judges are highly activist is essential to the CPT’s argument for two reasons. First, if judges are self-empowering usurpers of the legislature, then it is easy to dismiss the decisions where equality-seekers are successful as the work of a biased and self-serving judiciary. This relieves critics from having to examine objectively the merits of the claim for equality vis-à-vis the government’s action (or inaction). However, if judges are actually quite restrained in expanding Charter rights, especially where to do so would require overruling the

123 I note that in my assessment of the success rate of equality-seekers before the SCC and FCA, discussed in Chapter Two, I also do not explore the degree to which judges in successful cases intervened in legislative action. Rather, my assessment of success rates is aimed at assessing the number of times the court decides not to intervene to any extent.
legislature, then this increases the court’s credibility on the relatively rare occasions when it finds that the government has violated the rights of individuals in Canada. For the CPT to argue successfully that judicial review under the Charter is undemocratic, the degree of judicial activism and abuse of power must be significant enough that it unjustifiably alters the constitutional balance of power in Canada.

A second and related point is that if judges are generally deferential to the legislature in adjudicating the claims of Charter litigants, then the CPT’s concern about the influence of the Court Party is unfounded. If judges are the gate-keepers of Charter rights, and the judgments of the courts do not reflect the interventions of interest groups or the claims of individual litigants, then the Court Party’s ability to influence the Canadian democratic system is minimal. In Chapter Two, I test the CPT’s assertion that judges are rampantly activist in deciding Charter claims by examining the success rates of equality-seekers appearing before the SCC and the FCA.

4.1.3 Interveners frequently influence judges to adopt their agendas

Interveners are individuals or groups which apply for and receive permission to provide the court with written, and sometimes oral, submissions in a case where they are not direct parties. Permission to intervene is not automatic; the individual or group must convince the court that their “submissions will be useful to the Court and different from those of the other parties.” If an intervention is allowed, the court may determine the scope and length of the intervener’s written submissions. The court will also decide whether the intervener may make oral submissions and if so, how much time they will be given. In general, oral submissions by interveners at the SCC are short, measured in minutes rather than hours.

The CPT vigorously oppose what they argue was a dramatic expansion of the court standing rules by the judges of the SCC in the 1980s, which has allowed interest groups to intervene in cases where they have no direct interest. The CPT argue that this expansion was the result of a “furious public relations campaign” by interest groups who convinced judges of their

---

125 *Supreme Court of Canada Rules, r. 57(2)(b) [Rules].*
126 *Ibid.* at r. 59(1)(b).
127 *Ibid.* at r. 59(2).
position.\textsuperscript{129} Elliot points out that the authors’ implication that the judges of the SCC changed their policy solely in order to appease interest groups is not substantiated elsewhere in the CRCP.\textsuperscript{130} Further, he argues that in the early days of the Charter, the SCC granted intervener status more frequently to ensure that it was not hearing disproportionately from government representatives, since federal and provincial attorneys general were automatically allowed to intervene in constitutional cases. The court anticipated that this automatic right to intervene would mean that:

\ldots the Court was likely to hear many more submissions supporting restrictive interpretations of the rights and freedoms and a lower justificatory standard under section 1 than submissions supporting the opposite. By relaxing its policy insofar as non-governmental bodies were concerned, the Court was able to correct what would otherwise have been a significant imbalance in the kinds of arguments it was hearing on these critically important issues.\textsuperscript{131}

In any case, the CPT have argued that the increased role of interveners in Charter cases has given interest groups privileged access to the courts to pursue their agendas.\textsuperscript{132} The implicit, and sometimes explicit, implication of the CPT’s concern about access to the courts is that interveners are unduly influencing judges to accept their rights-expanding arguments; “the primary focus of their interventions is to change the meaning of constitutional rules and the policy outcomes shaped by these rules.”\textsuperscript{133}

For the CPT, access to the courts by groups which have typically been excluded from the echelons of power in Canada represents a serious democratic threat. This threat is so serious that a judge merely hearing and considering the brief arguments of an intervening group is unacceptable. Perhaps this is because the CPT’s rhetoric about the role of interveners in the Canadian court conveys a clear concern that judges are weak-minded naives who blindly follow the entreaties of intervening special interest groups; “[l]ike the Charter itself, judges are as much a means as a cause of the rights revolution in Canada. While they are in the vanguard of the revolution, they are being pushed as much as they lead; pushed by what we call the ‘Court

\begin{footnotesize}
\begin{enumerate}
\item[129] Knopff & Morton, “CRCP”, \textit{supra} note 4 at 55 and 141.
\item[130] Elliot, \textit{supra} note 3 at 306.
\item[131] \textit{Ibid}. at 307-308.
\item[132] Brodie, "Friends of the Court”, \textit{supra} note 11 at 123.
\item[133] Knopff & Morton, “CRCP”, \textit{supra} note 4 at 26.
\end{enumerate}
\end{footnotesize}
The CPT claim that in reaching their decisions, judges rely heavily on the written facta prepared by interveners, though they offer no evidence in support of this assertion. While it is true that using a very broad definition of success, feminist groups have been able to advance their policy objectives through Charter litigation, the CPT offer very little support for their assertions about the overall influence of interveners before the court. Nor do they explain why the interventions of some groups, such as LEAF, are problematic, while the interventions of others, such as the NCC, do not merit concern.

In Chapter Two, I assess the validity of the CPT’s concern about interveners’ increased access to the court by examining the extent to which interveners have been successful at persuading the courts to adopt an equality-rights expanding agenda.

4.2 The CPT’s normative claim: judicial review is undemocratic

The CPT use the descriptive claims discussed above, among others, to lay the foundation for their conclusion that judicial review under the Charter is fundamentally undemocratic because it allows unaccountable judges to overrule the majority. The CPT’s main objection to the, “Charter Revolution is that it is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperaments of representative democracy.” In this respect, the CPT adopt a simplistic definition of democracy, characterizing it as an exclusively binary relationship between a voting citizenry and an elected legislature. This limited definition permits them to label the activities of groups outside this binary, such as the judiciary, the media and academics, as illegitimate and undemocratic.

In addition to arguing that judicial review is undemocratic, the CPT insist that judicial checks on parliamentary power are unnecessary because elected representatives generally produce “policies

---

134 Ibid. at 24.
135 Ibid. at 137.
136 F.L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34.1 Canadian Journal of Political Science 55. This study is discussed further in Chapter Three with respect to the success of interveners in court.
137 Knopff & Morton, “CRCP”, supra note 447 at 149.
within the realm of reasonable disagreement” and so, “to transfer the resolution of reasonable disagreements from legislatures to courts inflates rhetoric to unwarranted levels and replaces negotiated, majoritarian compromise policies with the intensely held policy preferences of minorities.” This approach is problematic in two ways. First, it minimizes the historic and current depth of discrimination experienced by equality-seeking groups in Canada. Government-produced policies “within the realm of reasonable disagreement” have for centuries disenfranchised, disinherit, and dehumanized great swathes of people in Canada based on their gender, race, sexuality, and religion, among other inalienable characteristics. Second, the basic human rights of minority groups are not simply intensely held policy preferences to be subjected to whatever compromise the majority deems acceptable. By demoting equality rights to mere policy preferences, the CPT bolster their argument that the court should not interfere with legislative action for the trivial purpose of enforcing the desires of particular groups.

With respect to the CPT’s normative claim that judicial review of government action under the Charter is undemocratic, the aim of this paper is two-fold. To the extent that the CPT rely on the three descriptive claims discussed above to support their argument about democracy and judicial review, I endeavour in Chapters Two and Three to examine critically these claims using a quantitative analysis. Second, in Chapter Three, I also assess the CPT’s normative claim about judicial review from a doctrinal perspective by reviewing various arguments about the content of democracy in pluralistic societies such as Canada. I expand this argument in Chapter Four by evaluating access to justice as an essential feature of modern democracies, given my conclusion in Chapter Two that the number of provincial and federal equality cases in Canada has declined substantially in recent years.

5 The CCP as societal ill
The CPT’s practical and ideological disagreement with the CPP is a thread they weave through much of their writing. Distilled, their opposition to the public funding of Charter litigation takes the form of four main arguments. First, the idea that the government would pay interest groups to sue it in court is offensive because it doesn’t respect the separation of powers between the

---

140 Knopff & Morton, “CRCP”, supra note 4 at 166.
legislative and judicial branches of government; second, the CCP was administered in a way that excluded groups antagonistic to the Court Party’s agenda; third, taxpayer funds should not be used to support interest group litigation which only benefits certain groups within society; lastly, and most importantly, the CCP gave resources to the Court Party which enables them to pursue their rights-generating agendas before activist judges.\textsuperscript{141} I discuss each of these arguments briefly below.

Although all three of the CPT disagree with the CCP, Brodie has been the most vocal in his opposition to the program. He finds it problematic that, “[i]n effect, the Canadian government pays interest groups to launch court challenges to its policies”,\textsuperscript{142} a concern which evolved into his theory that the Canadian government is embedded with interest groups and the judiciary; “the state's involvement [in funding Charter litigation] is hard to square with the traditional view of judicial review and interest group litigation as a battle between the representatives of private individuals and governments.”\textsuperscript{143} In his book, Friends of the Court, he concludes that, “[t]he Court Challenges Program represents the embedded state at war with itself in court.”\textsuperscript{144}

Second, the authors of the CRCP emphasize links between the administration of the CCP and the Court Party entities it funds, such as LEAF and EGALE, arguing that because of these associations the program is discriminatory and exclusionary.\textsuperscript{145} Knopff calls the program, “a biased boondoggle that had gone well past its ‘best before’ date.”\textsuperscript{146} The CPT argue that groups which do not fit within the Court Party’s left-leaning policy agenda, such as REAL Women of Canada (an anti-feminist women’s organization), are denied CCP funding.\textsuperscript{147} In a similar vein, Brodie describes the program as a tool by which interest groups exclude others under his “status theory” of interest group litigation. In this regard, he argues that the CCP is controlled by groups

\textsuperscript{141} Ibid. at 96-99. See also Brodie, " Embedded State", supra note 87.
\textsuperscript{142} Brodie, "Political Status", supra note 83 at 254-255.
\textsuperscript{143} Brodie, " Embedded State", supra note 87 at 376.
\textsuperscript{144} Brodie, “Friends of the Court”, supra note 11 at 122.
\textsuperscript{145} Knopff & Morton, “CRCP”, supra note 447 at 96-99.
\textsuperscript{146} Tracey Tyler, “The Charter’s challenges” The Toronto Star (7 April 2007), online: Toronto Star <http://www.thestar.com/article/200519> [“The Charter’s challenges”].
\textsuperscript{147} Knopff & Morton, “CRCP”, supra note 447 at 97.
with section 15 protection who refuse funding to those with whom they do not want to share status.\textsuperscript{148}

The CPT’s concerns about possible biases and conflicts of interest in the administration of the CCP have been shared by others, who have called for stricter requirements to ensure fairness in the distribution of funds.\textsuperscript{149} While the CPT take issue with the way the CCP was operated, it is their ideological stance on the Charter, the Court Party and judicial review which drives their opposition to the CCP. For this reason, I do not address the means by which the administration of the CCP could be improved, which has been discussed extensively elsewhere.\textsuperscript{150} Instead, I focus on a critical examination of the CPT’s conceptual opposition to government funding of Charter litigation.

Third, the CPT and their supporters oppose using taxpayer money to fund claims with which they fundamentally disagree.\textsuperscript{151} Knopff argues that if a court case is in the public interest, the litigants should be able to raise the requisite funds from the public rather than taxpayers, and “[i]f they can’t raise the money – tough.”\textsuperscript{152} The national Vice-President of REAL Women of Canada agrees, maintaining that, “[i]f you have the support of the public, you can go to court, as we’ve done...simply because we’ve asked our members for the money and they’ve produced it...Why can’t other groups do it.”\textsuperscript{153} Similarly, outspoken CCP critic John Carpay says that, “[w]hat the Court Challenges Program is – or hopefully was – is an affront, a statement of disbelief and distrust in the wisdom and compassion of Canadians to give voluntarily to a just cause.”\textsuperscript{154} However, the importance of an issue is not always commensurate with the amount of financial support it receives. For example, poverty groups are perpetually at a loss for funds to pursue court cases, despite the fact that most Canadians do care about poverty and homelessness. Political scientist Laura Kloegman emphasizes that, “the reality [is] that not all groups and

\textsuperscript{148} Brodie, "Political Status", supra note 83 at 262.
\textsuperscript{149} Marshall, supra note 17 at 186-191.
\textsuperscript{150} See e.g. ibid. at 191-193.
\textsuperscript{151} J. Carpay, “A level playing field for classical liberalism: the abolition of the Court Challenges Program empowers a diversity of perspectives on freedom and equality” (2007) 16 Const. F. Const. 117 at 122.
\textsuperscript{152} Tyler, “The Charter’s challenges”, supra note 146.
\textsuperscript{153} Kloegman, supra note 16 at 108.
\textsuperscript{154} Ibid. at 108.
individuals are in a position to gather the funding needed to question government action or inaction.”

Lastly, and most importantly for the purposes of this project, the CPT lament the fact that CCP funding has been a catalyst for the rights-expanding agenda of the Court Party. Just after the program was expanded in 1985, Morton bemoaned the possibility that the CCP, “will allow – perhaps encourage – Charter litigation by groups and individuals who could not otherwise afford such an undertaking.” He later felt his concerns were justified, since, “the sudden increase in the amount of interest group litigation, combined with the new policy of government funding, belies the idea that such activity is still perceived as illegitimate.” According to Morton, interest group litigation is, “[r]egarded as an illegitimate American aberration [which] under the Charter…has become so accepted that it is now subsided by a government-funded ‘Court Challenges Program’. Brodie agrees that the “CCP provided substantial, stable funding for rights advocacy and laid the groundwork for rights-oriented interest group litigation at the appellate level in Canada.” The CPT’s concerns about the CCP fuelling interest group litigation were shared by conservative politicians Preston Manning and Mike Harris, who emphasize the degree to which the program, “equipped many small or marginalized groups for long court cases.”

5.1 Should the CCP be restored? The need for quantitative research

There are two compelling reasons for undertaking quantitative research regarding the effects of the CCP. First, it is necessary to examine critically the premises underlying the Court Party Theory since the theory may well have influenced the Harper government’s decision to defund the program. While the Court Party Theory is premised on several descriptive and normative claims about the nature of the Charter, interest groups and judicial review and the role they play

---

155 Ibid. at 109.
156 Morton, "Political Impact", supra note 11 at 12.
157 Ibid. at 14.
158 Morton & Allen, supra note 136 at 55.
159 Brodie, "Embedded State", supra note 87 at 374.
in the Canadian political system, these claims have not been subjected to current, qualitative research to test their persuasiveness.

Second, in addition to the lack of evidence in support of the CPT’s descriptive claims about the Court Party, there is a paucity of research about the effects of the CCP itself. Despite this, critics have speculated about whether CCP funding increased the success rate of equality-seekers before the courts:

Although correlation is not the same as causation, it stands to reason that more money provides a group with greater capacity to engage in more advocacy. More staff can be hired for legal research and involvement in more court cases as a sponsor or intervener, and larger and more effective networks of like-minded lawyers, law professors, and other academics can be developed.

Whether true of [sic] not, the thesis that more funding leads to more courtroom success has many adherents among CCP supporters and detractors. Both supporters and detractors point to the courtroom success of LEAF and EGALE as the reason why CCP funding should (or should not) be restored.\(^{161}\)

Although conservative commentators have sometimes assumed that increased funding leads to increased success in court, this theory has not been tested quantitatively. In Chapter Two, I compare the success rate for federal equality cases funded by the CCP with unfunded federal equality cases heard by the SCC and FCA, both during and after the latest iteration of the CCP. In Chapter Three, I apply my findings to the CPT’s descriptive claims about the Court Party, and indirectly, the CCP.

\(^{161}\) Carpay, *supra* note 151 at 121.
Chapter 2: 
Methodology and Data Summary

1  Methodology

The judicial review debate in Canada, and the related discussion about the merits of publicly-funded Charter litigation, has been dominated by assertions unsupported with more than anecdotal evidence. In order to test these assertions, this paper endeavours to measure three key aspects of the Court Party Theory against a quantitative analysis of the federal equality cases which reached the FCA and the SCC during and after the latest iteration of the CCP. These three claims are as follows; first, that interest groups, not individuals, are the central actors in Charter equality litigation; second, that judges are rampantly rights-expanding with respect to the Charter’s equality provisions; and third, that interveners regularly persuade judges expand equality rights.

My training is in political science and law rather than statistics; while I have sought to gather and document my research carefully and objectively, I do not present my findings as necessarily being statistically rigorous. However, given the paucity of research on the legacy of the CCP combined with the degree to which arguments for its demise or reinstatement have relied on belief rather than fact, I hope that this modest effort at assessing the role of interveners, interest groups, judicial activism and the CCP in Charter equality litigation might produce three outcomes; first, a rational measure against which Canadians might assess the CPT’s assertions about the public funding of Charter litigation; second, an analysis of the CCP’s relative merits and shortcomings, based on its impact on Canadian federal equality decisions; and finally, an assessment of the effect of the access to justice crisis on federal equality cases.

1.1 Selecting the Cases

In order to ensure an accurate comparison between CCP-funded and non-funded cases, I applied the CCP’s funding guidelines, as defined in the program’s mandate, in selecting the cases which comprise the data set. This has constrained the scope of the data collected in several regards.

---

162 I refer to the FCA and SCC Charter equality decisions collectively as “federal equality decisions” in various parts of this paper.

163 The reason the study is not statistically robust is that due to the criteria used to filter the cases, the data set is limited to 155 cases, consisting of 130 cases during the CCP and 25 cases after the CCP.
First, since the CCP only funded challenges to federal government action, the data set largely ignores provincial equality cases. Second, for the reasons discussed below, while the CCP funded both minority language rights and equality rights cases, this paper is limited to a consideration of the project’s equality rights decisions. In this regard, the CCP funded cases dealing with section 15 (equality generally), section 27 (multiculturalism) and section 28 (women’s equality) of the Charter, and therefore the data set is limited to decisions where these provisions were at issue.

Collecting the federal equality cases which comprise the data set was achieved in three stages. The first stage involved reviewing CCP annual reports, which contain brief summaries of the equality rights cases which received funding in each fiscal year, as well as updates from cases funded in previous years. I reviewed the CCP’s annual reports from 1994 to 2007 to identify funded equality cases heard before the FCA or the SCC. The CCP annual reports omitted summaries where the details of the case were not in the public sphere. However, since (with very limited exceptions) all cases which are heard at the FCA or SCC are publicly accessible, I do not consider that this resulted in any significant omissions from the data set.

I then retrieved the full text of the CCP-funded decisions from Quicklaw and entered data from the decisions into a spreadsheet. Upon reviewing the text of the funded decisions, I determined that seven decisions which had been included in the CCP’s annual reports did not actually deal with the equality provisions of the Charter, despite the fact that this was a requirement for CCP funding. It may well be that at the time funding was granted, the funded entity anticipated making Charter equality arguments, however the strategy changed at a later stage of the litigation. In any case, these decisions have been excluded from the data set on the basis that

164 I did, however, collect limited information on the number of provincial equality cases to help determine whether the total number of equality cases reaching the higher courts has declined since the cancellation of the CCP.
165 Court Challenges Program Annual Reports, 1994-2007, online: Court Challenges Program <http://www.ccppjc.ca/e/resources/resources.shtml#annual>. Note that although the CCP was cancelled in September 2006, I reviewed the CCP’s annual report for 2006-2007 to follow up on cases which had received funding in 2006 but which had not been heard in court until 2007.
167 Court Challenges Program Funding: Equality Cases, supra note 19.
it would be inaccurate to compare funded non-Charter equality decisions with unfunded Charter equality decisions.

The data collected from the funded cases includes the following: the decision year, the level of court (FCA or SCC), the name of the case, the citation, the name of the CCP-funded participant and their role (appellant, respondent or intervener), the Charter section at issue in the decision, the result of the decision (win, loss, non-equality win, mixed), the relevant area of law and a brief summary of the specific issue in the case.

At the second stage, I retrieved from Quicklaw all of the federal equality decisions from the FCA and the SCC\textsuperscript{168} during the life of the most recent CCP, from October 24, 1994 until September 25, 2006.\textsuperscript{169} I entered the following data from these cases into a spreadsheet; the decision year, the level of court (FCA or SCC), the name of the case, the citation, the name of any interveners, the Charter section at issue in the decision, the result of the decision (win, loss, non-equality win, mixed), the relevant area of law, a brief summary of the specific issue in the case, whether or not the case received CCP funding and finally, whether the case challenged provincial or federal government action.

At the third stage, again using Quicklaw, I collected all federal equality cases heard at the FCA and the SCC between the cancellation of the CCP on September 25, 2006 and June 18, 2010.\textsuperscript{170} I created a third spreadsheet using fields identical to the spreadsheet for cases during the CCP; the decision year, the level of court (FCA or SCC), the name of the case, the citation, the name of any interveners, the Charter section at issue in the decision, the result of the decision (win, loss, non-equality win, mixed), the relevant area of law, a brief summary of the specific issue in the case, whether or not the case received CCP funding and finally, whether the case challenged provincial or federal government action.

\textsuperscript{168} The Quicklaw search parameters were: ("section 15" or "s. 15" or "s.15" or equality) and Charter. The search included all Canadian cases at the SCC and FCA. I conducted separate searches for section 27 and 28 of the Charter using the same search parameters.

\textsuperscript{169} Subject to the limitations inherent in the CCP’s mandate, as discussed earlier.

\textsuperscript{170} The Quicklaw search parameters were: ("section 15" or "s. 15" or "s.15" or equality) and Charter. The search included all Canadian cases at the SCC and FCA. I conducted separate searches for section 27 and 28 of the Charter using the same search parameters. The data set is current to June 18, 2010.
1.2 Limitations

The collection of data at the second and third stages was limited in several respects. Despite the fact that the CCP funded minority language rights cases, I chose not to consider these cases both to limit the scope of this project and because federal funding for minority language rights cases was restored as part of an out-of-court settlement with the FCFA du Canada in June 2008.\(^{171}\) For this reason, the data set only includes cases where the court considered equality arguments based on sections 15, 27 and 28 of the Charter. Where the court discussed equality, multiculturalism or gender rights under the Charter, but did not explicitly refer to sections 15, 27 and/or 28, these cases have nevertheless been coded with the corresponding Charter provision.

In addition, I have omitted cases where the court did not consider equality arguments or simply stated in passing that the equality provisions in the Charter did not apply to the case.\(^{172}\) In my view, the small subset of cases which fall into this category are not equality cases since they do not deal with Charter equality rights in any substantive way. The survey is intended to assess the validity of the CPT’s three descriptive claims as they relate to Charter equality cases. For this reason, the inclusion of non-Charter equality cases, for example family and private law decisions, would dilute the data set and detract from this goal.

While the CCP funded equality cases at all levels of court, I have limited my analysis to federal equality cases which reached the FCA or the SCC. There are several reasons for this. Most importantly, the CPT direct most of their criticism of judicial review, interveners and the public funding of Charter litigation at the SCC, particularly its rules, judges and jurisdiction. It therefore makes sense to focus on SCC decisions in evaluating the CPT’s claims. Further, through the rules of precedent, decisions which reach the SCC and the FCA are likely to have a bigger effect on Canadian jurisprudence than lower court decisions, since they are binding on all provinces and territories in Canada. Finally, limiting the data set to decisions from the SCC and the FCA creates a manageable, yet geographically representative, group of cases to analyze.\(^{173}\)

\(^{171}\) “Scrapped CCP”, supra note 14.
\(^{173}\) An area for future research might include a comparison between the provinces with respect to their trial and appellate courts’ willingness to grant Charter remedies.
Note that for both funded and non-funded cases, where both the FCA and the SCC heard a case, only the SCC decision was included in the data set in order to avoid duplication.

With respect to the dates used to retrieve cases at the second stage, while the CCP was cancelled on September 25, 2006, three cases which had already received funding were heard by the SCC after September 2006. Conversely, several cases received funding at earlier stages of litigation but did not receive funding at the FCA or SCC level due to the CCP’s cancellation. Some of these cases nevertheless reached the FCA and SCC. This small subset of cases makes the delineation of cases during and after the CCP somewhat blurry. Where possible, I have identified cases which straddle periods of funding and non-funding.

2 Data Summary and Preliminary Conclusions

2.1 Trends in the number of federal equality cases

While the CCP was in effect, 45 federal equality cases reached the SCC while 85 cases were heard by the FCA, for a total of 130 cases. Of these, the CCP funded participants in 28 of the SCC cases (62% of the total number of cases the SCC heard during this time) and 16 of the FCA cases (19% of the total before the FCA in the same period). In sum, 44 FCA and SCC decisions were funded by the CCP (34% of the total).

Figure 1: Trends in CCP-funding of federal equality cases, 1994-2010
The CCP was in effect for almost twelve years, from October 24, 1994 until September 25, 2006. The average number of federal equality cases considered annually during the CCP years was 3.75 for the SCC (45 cases/12 years) and 7.08 for the FCA (85 cases/12 years). The combined average number of federal equality cases considered by both courts was therefore 10.83 per year (130 cases/12 years).

After the CCP was cancelled, in the roughly four years from September 25, 2006 until June 18, 2010, the SCC heard six federal equality cases, however three of these had received CCP funding prior to the program’s cancellation. Therefore, there were only three non-CCP funded federal equality cases before the SCC during the post-CCP period. Meanwhile, the FCA heard nineteen cases for a total of 25 post-CCP federal equality decisions. The average number of federal equality cases considered each year in the first four years post-CCP is therefore 1.5 per year for the SCC (6 cases/4 years)

and 4.75 per year for the FCA (19 cases/4 years). The combined annual average for both courts is 6.25 cases per year (25 cases/4 years).

The number of provincial equality cases during this period offers a helpful baseline against which to assess the fluctuations in the number of federal decisions. During the CCP years, the SCC considered 42 provincial equality cases, with an average of 3.5 per year. After the CCP was cancelled, from September 25, 2006 until June 18, 2010, the SCC considered five provincial equality cases, yielding an average of 1.5 per year. Provincial equality cases are not heard by the FCA, which is by definition a federal court, and so the provincial equality cases data is solely derived from the SCC.

2.1.1 The endangered federal equality case

It is clear from the data that during its latest iteration, the CCP was funding the majority of federal equality cases before the SCC (62% of all cases) and a significant number of those before the FCA (19% of all cases). There is a considerable difference between the average annual number of federal equality cases reaching the courts before and after the CCP’s cancellation at eleven per year and 6.25 per year, respectively. Given the degree to which the CCP funded federal equality cases and the fairly dramatic decline in the number of those cases reaching the

---

174 If only non-CCP funded cases are considered, the SCC heard an average of 0.75 cases per year (3 cases/4 years) in the post CCP period.
175 The number is reduced to 5.5 per year if only non-CCP funded decisions are included.
higher courts after the program’s cancellation, it would be tempting to assume that the number of federal equality cases declined because of the demise of the CCP. However, the steady decline in the number of federal equality cases started in 1999, several years before the CCP’s cancellation.

**Figure 2: Number of federal equality cases, 1994-2010**

While it is possible that the CCP’s cancellation contributed to this decline, it is difficult to state this conclusively for several reasons. First, it is possible that the paucity of federal equality cases currently reaching the SCC and the FCA recently is a mere aberration that will be corrected in coming years. Second, the downward trend in federal equality cases may well reflects broader social trends which are only tangentially related to the termination of the CCP. Support for this theory is found in the fact that during the last four years, the number of provincial equality cases reaching the SCC has also declined precipitously, from an average of 3.5 cases per year during the CCP era to 1.5 cases per year in the first four years since the program’s cancellation.

The simultaneous decline in the number of provincial and federal equality cases reaching the higher courts raises several questions. Foremost among them is whether the downturn is part of the much-discussed access to justice crisis in Canada, of which the demise of the CCP is but one

---

176 The data for 2010 is partial and includes federal equality cases decided on or before June 18, 2010.
contributing factor. The inaccessibility of courts in Canada and the role of the CCP’s cancellation in this problem are discussed further in Chapter Four, however it is clear that the amount of funding for civil legal aid has decreased significantly in recent years.\footnote{Melina Buckley, \textit{Moving Forward on Legal Aid: Research on Needs and Innovative Approaches} (Ottawa: Canadian Bar Association, 2010) at 46.} One side-effect of this decrease is that those providing legal services to low-income Canadians are triaging clients in need of legal assistance, leaving little time, money or expertise available for Charter equality challenges.\footnote{Ibid. at 9.}

Another possible explanation for the decrease in federal equality jurisprudence reaching the higher courts is that the most contentious and important Charter equality issues have already been resolved, leaving the parameters of the Charter’s equality provisions (at least for the most part) clearly defined for both litigants and the lower courts. In a speech delivered in Ottawa in 2002, Chief Justice McLachlin rejected this theory, commenting that:

> While the Charter is no longer in its infancy, these are still early years in its life. The Charter is still a work in progress, an unfinished project. Perhaps it will always be. Future generations will have a great role to play in shaping it. To borrow Viscount Sankey’s expression, the Charter is very much a living tree.\footnote{Beverley McLachlin C.J.C., “Coming of Age: Canadian Nationhood and the Charter of Rights” (Speech delivered at the Association of Canadian Studies Conference, \textit{20 Years Under the Charter, April 17, 2002}, Ottawa).}

While it would be comforting to think that the scope of equality rights in Canada has been neatly resolved, rendering future litigation in this area largely unnecessary, an examination of some emerging areas of Charter litigation discredits this theory. The content of the Charter, both procedurally and substantively, is fluid. For evidence of this, one need look no further than the SCC’s recent decision in \textit{R. v. Conway}\footnote{2010 SCC 22.}, in which the court found that administrative tribunals are competent to apply the Charter and grant remedies for the breach of its provisions. In so finding, the court noted that it had, “gradually expanded the approach to the scope of the Charter and its relationship with administrative tribunals”.\footnote{Ibid. at para. 23.} The decision in \textit{Conway} illustrates both the past evolution of the Charter and the prospective broadening of its reach into new areas. The Charter’s enlarged application will inevitably give rise to new factual matrixes with their own novel questions for the court to resolve.
It is not difficult to see examples of where these new factual matrixes might arise. One example is the growing issue of the “reasonable accommodation” of minority groups, particularly with respect to the right of Muslims in Canada to wear headscarves and other religious coverings. The recent wave of jurisprudence in European countries on this issue\(^\text{182}\) may portend a similar legal challenge in Canada, foreshadowed perhaps by the recent decisions of the SCC affirming the right to wear the Sikh kirpan in public schools\(^\text{183}\) and the requirement for photographic identification on driver’s licenses, despite the religious objections of the Hutterian Brethren in Alberta.\(^\text{184}\) These cases illustrate some of the conflicting values inherent in the right to religious freedom and, by extension, the right to equality, in an increasingly multicultural Canada.

The degree to which the Charter’s equality guarantees apply to social programs is another area which is the subject of conflicting and incoherent jurisprudence, as examined in some detail by Gwen Brodsky in a 1995 paper prepared for the CCP.\(^\text{185}\) In the fifteen years since Professor Brodsky’s paper, this area of constitutional law has become even murkier, particularly in light of the SCC’s decision in Chaoulli v. Quebec (Attorney General), in which the court found that lengthy health care wait times violate the Quebec Charter of Human Rights and Freedoms.\(^\text{186}\) While the decision did not directly involve section 15 of the Charter, several of the justices in that case found that the Quebec government also violated the Canadian Charter. Further, by making a government program the subject of a positive constitutional right, the Chaoulli decision arguably opened the door to future equality rights cases dealing with the federal government’s constitutional obligations to individuals with respect to social and economic rights.

Other issues which may trigger Charter challenges before the SCC include human trafficking, privacy and prostitution. The Harper government’s proposed bill to prevent human trafficking, which would allow asylum seekers to be detained automatically for up to a year, among other restrictions, is likely to be challenged in court, with Amnesty International arguing that the bill

\(^{182}\) See for example, Leyla Sahin v. Turkey (App no 44774/98), (2005), 41 EHRR 8.


violates the equality provisions of the Charter.¹⁸⁷ With respect to privacy, a recent decision of the SCC which found that the police’s use of a digital device to record a residence’s power consumption was constitutional raised important issues about the right to privacy in the information age.¹⁸⁸ Chief Justice McLachlin dissented in the case, warning that permitting the use of the devices represented, “an incremental but ominous step toward the erosion of the right to privacy guaranteed by s. 8 of the Canadian Charter of Rights and Freedoms.”¹⁸⁹ Finally, the court challenge by several sex workers to Canada’s prostitution laws, in particular the criminalization of bawdy houses, may include an equality rights dimension in addition to arguments under section 7 of the Charter.¹⁹⁰ The case was heard before the Ontario Superior Court of Justice in October 2009,¹⁹¹ and in September 2010, the court struck down all three of the challenged Criminal Code provisions; communicating for the purposes of prostitution, pimping and operating a common bawdy house.¹⁹² The Harper government has appealed the decision¹⁹³ and it seems likely that regardless of the outcome at the Ontario Court of Appeal, the matter will ultimately be decided by the SCC.

The foregoing are only some of the issues which are likely to be the subject of future Charter decisions by the SCC, however there are no doubt dozens more. As Richard Goreham notes in his 1992 report on language rights and the CCP, the program, “has shown that the process of seeking legal clarification of constitutionally protected rights, and ensuring their full respect and implementation, extends over many years.”¹⁹⁴ The authors of the Summative Evaluation agree; “[t]he evaluation findings indicate that there are dimensions of the constitutional provisions

¹⁸⁸ *R. v. Gomboc*, 2010 SCC 55 [“Gomboc”].
¹⁹⁰ *Bedford v. The Queen*, Court File No. 07-CV-329807PD1 (Ontario Superior Court of Justice), (Notice of Application of the Applicant).
covered by the Program that still require clarification and, most probably, there will be constitutional provisions requiring clarification indefinitely.”

While it is difficult to predict the content of future constitutional jurisprudence, it seems clear that the scope of the Charter and the manner of its application have not been determined by the SCC with any degree of finality. Those who assert that all the important Charter equality cases have already been decided are in danger of repeating the mistake of Charles Duell, the Commissioner of the U.S. Patents Office who famously declared in 1899 that, “everything that can be invented has been invented.”

Whatever the cause, it seems clear that the number of equality cases reaching the higher courts, both provincial and federal, has declined significantly in the last decade. Determining the degree to which the cancellation of the CCP has contributed to this decrease is difficult given the number of potential intervening variables. However, one approach to distilling the effect of the CCP’s cancellation on the number of federal equality cases would involve collecting information from Charter litigation lawyers about the degree to which the CCP’s cancellation has impaired their ability to take on Charter equality rights challenges. In this regard, a 2003 Department of Canadian Heritage evaluation of the CCP included a survey of funded applicants, the majority of whom concluded that their court case would not have proceeded without CCP funding. However, there has been no follow up study to determine how constitutional lawyers and would-be claimants are responding to the CCP’s cancellation. Such a study, in combination with information from the data used in this project, might be a fruitful area for future research.

2.2 The identity of the litigants

In this study, equality-seeking parties were characterized as individuals, groups, businesses, or government. Parties were considered “individuals” if the Charter challenge was brought in the complainant’s own name, and includes cases where there were several individual complainants. The category of “groups” includes, among others, aboriginal bands, unions, and non-profit and/or advocacy groups. A party was categorized as a “business” if the complainant was a for-profit entity, whether a sole proprietorship, partnership or corporation. The category of

195 Department of Canadian Heritage, supra note 23 at 55.
196 Ibid. at 59.
“government” refers to cases where the federal government used its constitutional reference power to ask the court for a ruling on a matter of public policy, as it did with the *Quebec Secession Reference*197 and the *Same Sex Marriage Reference*.198 I acknowledge that it is somewhat inaccurate to refer to the federal government as an equality-seeking group in this context, since the government is merely asking the court’s assistance in determining the constitutionality of some proposed course of action, however I have done so in this case simply for ease of reference.

During the CCP era, the SCC heard 45 federal equality cases, in which the equality-seeking parties were as follows; 39 individuals (87%), three groups (7%), one business (2%), and two government references (4%). Of the 85 FCA equality cases during this timeframe, there were 78 individuals (92%), six groups (7%), one business (1%), and no government references. When the 130 decisions of the SCC and FCA during the CCP era are aggregated there were 107 individuals (82%), nine groups (7%), two businesses (3%), and three government references (2%).

**Figure 3: Initiator of federal equality cases, 1994-2010**

---

198 *Same sex marriage reference*, supra note 9.
When only CCP funded cases are included, the equality-seeking parties in the 28 cases before the SCC consist of 25 individuals (89%), two groups (7%), one business (4%) and no government references. Of the sixteen funded FCA cases there were thirteen individuals (81%), three groups (19%), and no businesses or government references. Of the 44 combined FCA and SCC decisions, there were 38 individuals (86%), five groups (11%), one business (2%), and no government references.

Of the three non-CCP funded SCC decisions between September 25, 2006 and June 18, 2010, the equality-seeking entity was an individual in two cases (67%) and a group in one case (33%). Of the nineteen FCA decisions during this time, there were sixteen individuals (84%), one group (5%), one business (5%), and one government reference (5%). The combined results of the SCC and FCA decisions in this period are eighteen individuals (82%), two groups (9%), one business (5%), and one government reference (5%).

2.2.1 Individuals overwhelmingly initiate federal equality cases

A second conclusion from examining the data set is that the vast majority of federal equality cases before the higher federal courts during the CCP era were brought by individual complainants, with 87% of SCC decisions and 92% of FCA decisions falling into this category. The breakdown of complainants remained constant between funded and non-funded decisions and decisions before and after the termination of the CCP.

One caveat to the conclusion that equality rights litigation is driven primarily by individuals is that it is impossible to discern from the text of a decision whether the individual complainant was backed by an interest group which financed or steered the litigation. Launching “test cases” using a person who has suffered the alleged wrong as the face of the claim is a litigation technique used by interest groups to advance the law in a particular area. Despite this ambiguity, the requirement that the individual complainant must have a legitimate claim against the government in order to be successful at court means that, in my view, the degree to which the litigant is supported by outside sources is not particularly relevant. This issue is discussed further in Chapter Three.

The CCP’s own funding history also suggests that the individual is the central driver of equality rights litigation in Canada. In its 2007 annual report, the CCP provided statistical highlights of
the cases it funded during the life of the program. Of 416 grants for case development, 272 were provided to one of the parties at the first instance, appellate, and SCC level, while 144 grants were provided to interveners, primarily for appellate or SCC hearings.\textsuperscript{199}

2.3 The success rate of equality-seekers

In this study, I adopt what Morton describes as an “intramural” approach to the definition of success in federal equality cases. That is, success is measured by the court’s responsiveness to the equality-seeking group’s argument, and the “extramural” inquiry about what happens outside the courtroom is excluded.\textsuperscript{200} I have taken this approach because it is my intention to measure the court’s receptiveness to the arguments of the equality seeking group, rather than the impact of the case on policy or on future decisions.

The results of federal equality cases heard at the SCC and the FCA are therefore broken into four categories. Cases where the court found in favour of the equality-seeking party either wholly or partially on the basis of Charter equality arguments are categorized as “wins”. Cases where the court found in favour of the equality-seeking party on the basis of non-Charter equality arguments are categorized as “non-equality wins”. As I am attempting to measure the degree to which individuals and interveners are successful at persuading the courts to expand equality rights under the Charter, it is necessary to isolate cases where the claimant was successful, but the court did not find the Charter equality arguments convincing. Cases where the court found against the equality-seeking party are categorized as “losses”. Finally, cases where the equality-seeking party was only partially successful are characterized as “mixed”.

Further, only equality-seeking, non-government interveners were included in the data set. For this reason, government representatives such as attorneys general or the Commissioner of Official Languages are excluded. The rationale for this limitation is that the purpose of measuring the success rate of interveners is to assess the CPT’s claim that the Court Party effectively uses intervener status to persuade the court to adopt its rights-expanding agendas. Since government entities do not, according to the CPT, form part of the Court Party, their participation as interveners has been excluded from the data set.

\textsuperscript{199} CCP Annual Report 2006-2007, supra note 18 at 49.
\textsuperscript{200} Morton & Allen, supra note 136 at 64.
2.3.1 Federal equality cases during the CCP years

With respect to the 45 federal equality cases heard by the SCC during the life of the CCP\(^{201}\) the results are as follows; eighteen wins (40\%), seven non-equality wins (16\%), nineteen losses (42\%), and one mixed (2\%). Of the 85 FCA cases heard during the same period, the results are four wins (5\%), six non-equality wins (7\%), 75 losses (88\%), and no mixed (0\%). The combined results of the 130 cases are 22 wins (17\%), thirteen non-equality wins (10\%), 94 losses (72\%), and one mixed (1\%).

2.3.1.1 CCP-funded federal equality cases during the CCP years

The following results deal with the subset of SCC and FCA federal equality cases which were funded by the CCP. With respect to the 28 SCC decisions there were ten wins (36\%), six non-equality wins (21\%), eleven losses (39\%), and one mixed (4\%). There were sixteen funded FCA decisions which resulted in two wins (13\%), two non-equality wins (13\%), twelve losses (75\%), and no mixed (0\%). The combined results of the 44 cases are twelve wins (27\%), eight non-equality wins (18\%), 23 losses (52\%), and one mixed (2\%).

2.3.1.2 Non-CCP funded federal equality cases during the CCP years

Of the seventeen federal equality cases heard at the SCC which received no funding from the CCP from October 24, 1994 until September 25, 2006, the results were eight wins (47\%), one non-equality win (6\%), eight losses (47\%), and no mixed. There were 69 non-CCP funded FCA decisions during this time, which resulted in two wins (3\%), four non-equality wins (6\%), 63 losses (91\%), and no mixed. The combined results of these 86 cases are ten wins (12\%), five non-equality wins (6\%), 71 losses (82\%), and no mixed.

2.3.1.3 Post-CCP federal equality cases

From September 25, 2006 to June 18, 2010 there were three non-funded federal equality cases at the SCC which resulted in one win (33\%) and two losses (67\%). During this period there were nineteen non-funded federal equality cases at the FCA which resulted in two wins (11\%) and seventeen losses (89\%). The combined results of these 22 cases yielded three wins (14\%) and nineteen losses (86\%).

---

\(^{201}\) From October 24, 1994 until September 25, 2006.
2.3.2 Success rate by initiator of litigation

Since individuals bring the overwhelming majority of federal equality cases, the sample size of cases initiated by businesses, groups and government is limited. However, broken down by the initiating party, the 155 SCC and FCA decisions from 1994 until 2010 indicate that businesses and groups have an equally low success rate of 25% in Charter equality claims before the SCC and FCA, while individuals fared worse with a 15% success rate. Lastly, the equality-seeking position was successful in 67% of the government references.

**Figure 4: Outcome of federal equality cases by initiator, 1994-2006**

![Outcome of federal equality cases by initiator, 1994-2006](image)

2.3.3 Success rate of interveners

Interveners participated in 37 of the 45 federal equality decisions (82% of the total) before the SCC during the CCP era. Of these cases, there were fourteen wins (38%), six non-equality wins (16%), six losses (16%), and one mixed result (3%). During the same period, interveners participated in only seven of the 85 federal equality decisions (8% of the total), resulting in three wins (43%), one non-equality win (14%), three losses (43%), and no mixed results. Isolating the

---

202 As discussed earlier, a government reference does not result in a win or a loss for the government since the government is not an equality-seeker. For this reason, the section of the chart referring to government “wins” should be construed as wins for the equality-seeking position.
eleven SCC decisions where an intervener was the only CCP funded participant yields the following results; four wins (36%), four non-equality wins (36%), two losses (18%), and one mixed (9%). There were no FCA decisions where an intervener was the only recipient of CCP funding.

In the post-CCP years, there were six SCC decisions, all of which involved intervener participation. The Charter equality arguments succeeded in three of these cases (50%) and failed in the other three cases (50%). Interveners participated in only two of the nineteen FCA decisions during this time. In both cases, the court ruled against the intervener’s position.

2.3.4 Equality-seekers lose most of the time

2.3.4.1 Parties

During the CCP era, equality-seekers were unsuccessful in persuading the court of their position, either wholly or partially, in 58% of SCC cases and 82% of the combined cases considered by the SCC and FCA. Parties making Charter equality arguments at the FCA were unsuccessful an overwhelming 95% of the time. The difference between the SCC and the FCA in terms of the success of equality arguments may be due to two factors. First, in most situations the SCC must grant leave before an appellant may bring a case and leave will only be granted where the case raises an issue of public importance. In this sense, the leave requirement serves to filter out unmeritorious and inconsequential cases. By contrast, the FCA hears many more cases brought through an automatic right of appeal. Second, the FCA decides a tremendous number of cases concerning an individual’s entitlement to government benefits. The court seems reluctant to impose positive obligations on governments to extend benefits under the Charter’s equality guarantee and many of the claimants in these cases lose.

---

203 In three SCC decisions which received funding, it was unclear whether a party or an intervener was funded by the CCP and so these decisions have been excluded. In a further five SCC decisions, both an intervener and a party were funded, and therefore these decisions have been excluded from this set of calculations.
204 Calculated by subtracting “wins” and “mixed” results from “non-equality wins” and “losses”.
205 Supreme Court Act, R.S.C, 1985, c. S-26, s. 40 [Supreme Court].
Cases funded by the CCP were somewhat more successful than unfunded cases. Fully 29% of funded decisions before the SCC and FCA were “wins” or “mixed”, while only 12% of unfunded decisions were similarly successful.207

Figure 5: Trends in outcome of federal equality cases by CCP funding, 1994-2010

Of course, CCP funding may not be the cause of this increased success, since it is unclear whether funding increased the party’s ability to present its case or whether meritorious cases were simply more likely to receive funding from the CCP in the first place. One way to clarify this relationship would be to compare the success rates of CCP-funded cases with cases taken on a pro bono basis by civic-minded lawyers. At any rate, even CCP-funded parties failed to convince the court of their Charter equality arguments 71% of the time.

It bears noting that while the federal equality case success rates may indicate that the courts demonstrate restraint in interfering with government action, the success rates alone do not allow us to categorically state that the SCC and FCA is inclined to find against equality-seekers. This is because in some cases the “equality-seekers” making section 15 arguments actually seek to use the Charter to limit the equality of others. In these decisions, when the court rules against the party invoking the equality provisions of the Charter, the case is coded as a “loss” for the

207 Note however, that unfunded cases were more successful when only SCC results are considered, with 56% of those cases resulting in “wins” or “mixed”.
equality-seeking party, even though the effect of the decision is actually to uphold the equality rights of minority groups. This was the case in Grant v. Canada, where the appellants argued that the RCMP’s decision to allow Sikhs to wear turbans as part of their police uniform violated their right to equality under the Charter. The FCA dismissed the claim, finding that the RCMP policy did not affect the rights of non-Sikh RCMP members and therefore their Charter rights were not engaged. While the non-minority appellants’ Charter equality arguments were unsuccessful, the result of the decision respected the equality rights of Sikhs. Although such decisions represent only a small number of cases in the data set, they may artificially inflate the degree to which courts are seen as reluctant to find in favour of equality-seekers.

2.3.4.2 Interveners

Interveners before the SCC during the CCP era failed to persuade the court of their Charter equality arguments in 59% of cases, about the same success rate as parties appearing before that court. The success rate of interveners at the FCA during this time was slightly less, at 57%. Interveners funded by the CCP fared only somewhat better than their unfunded counterparts. In the eleven SCC decisions where the only CCP funded participant was an intervener, the intervener’s Charter equality arguments were unsuccessful 55% of the time. Finally, since the CCP was terminated, Charter equality arguments by interveners have failed in half of the six cases before the SCC as well as both of the FCA decisions where an intervener participated.

Overall, it appears that parties and interveners before the SCC and FCA have an uphill battle in convincing the court to accept their Charter equality arguments. While there have been a handful of SCC decisions in the past two decades which have significantly expanded equality rights under the Charter, the win/loss ratio for equality cases before the higher courts reflects a cautious judiciary that differs markedly from the perception by the CPT that judges are rampantly liberal, rights-expanding, and easily persuaded by the interventions of special interest groups. The implications of this difference between perception and reality will be discussed further in Chapter Three.

Chapter 3: Evaluating the Court Party Theorists’ Claims

“Citizens can enjoy the benefits of judicial activism without the costs of judicial supremacy. They can have the cake of justice, but they can eat it if they don’t like how it turns out.”\textsuperscript{209}

In Chapter One, I reviewed the Court Party Theory, including the CPT’s view that the Court Party advances its rights-expanding agenda through court interventions. I also identified some of the theory’s key descriptive and normative claims about the role of the judiciary, interest groups, and interveners in Charter litigation in Canada. In Chapter Two, I set out to test the CPT’s descriptive claims through a quantitative analysis of federal equality cases in Canada, both during and after the CCP. This Chapter will address two aspects of the CPT’s descriptive claims. First, I assess the degree to which these claims are supported by a quantitative analysis of the federal equality case data set. Second, I consider how the quantitative assessment of the descriptive claims affects the validity of the Court Party Theory as a whole.

The last part of the chapter discusses the CPT’s normative claim that judicial review is undemocratic, with a focus on the debate about judicial review under the Charter and its place in a modern, pluralistic constitutional democracy. I conclude the chapter by arguing that this debate obscures other ways of viewing the judicial review power which might yield valuable insights about its role in Canadian governance; including the perspective that judicial review serves as an audit of legislative compliance with the constitution.

1 A quantitative analysis of the CPT’s descriptive claims

1.1 Are interest groups at the heart of federal equality cases?

As discussed in Chapter One, a key premise of the Court Party Theory is that interest groups, rather than individuals, are driving Charter litigation in Canada.\textsuperscript{210} However, the data set of federal equality cases demonstrates that, at least in terms of the composition of complainants, exactly the opposite is true. Individuals bring the overwhelming majority of federal equality cases before Canada’s highest courts, with 87% of SCC cases and 92% of FCA cases during the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{209} Roach, “The Supreme Court on Trial”, supra note 124 at 296.
\item \textsuperscript{210} Knopff & Morton, “CRCP”, supra note 4 at 54.
\end{itemize}
\end{footnotesize}
CCP era comprised of claims by individuals rather than interest groups, businesses, or government references. These numbers remained constant both during and after the CCP and between CCP-funded and unfunded cases. By contrast, interest groups brought only 7% of the federal equality cases heard by the SCC and FCA during the CCP era. The CCP’s funding data reinforces the centrality of individual litigants; during its lifetime, the program funded almost twice as many individual cases as intervener applications.\(^{211}\) Far from engaging in strategic, coordinated attempts to overturn statutes, representatives of disability rights groups have commented that their participation in Charter equality litigation depends primarily on the available resources for a case and they lament that the expense of constitutional litigation prevents them from participating more regularly in court.\(^{212}\)

Further, by excluding provincial trial and appellate decisions, the data set may significantly understate the extent of individual involvement in federal equality decisions. This is because one would expect that individuals’ ability to navigate their Charter equality claims through the judicial labyrinth to Canada’s highest courts would be hampered by their relative lack of money, time and expertise. Interest groups and businesses are, conversely, generally more able to assemble the resources necessary for lengthy court battles than individuals. For this reason, it is possible that when the entirety of the Canadian legal system is considered, individuals may well make up an even greater percentage of the total number of Charter equality litigants. In short, the available evidence indicates that the CPT’s claims about the extent to which interest groups are entwined in Charter equality litigation appear to be baseless, at least with respect to litigants bringing federal equality decisions under the Charter.

However, the CPT argue that interest groups’ takeover of Charter litigation in Canada consists not only of bringing Charter claims in their own name, but also in their “increasing” propensity to finance the Charter litigation of individual complainants.\(^{213}\) The CPT’s argument in this regard is not compelling for two reasons. First, the CPT’s only evidence in support of this contention consists of a couple of examples of such arrangements between interest groups and individuals. For the reasons discussed in Chapter One, the federal equality case data set does

---

213 Knopff & Morton, “CRCP”, supra note 4 at 54.
not capture the degree to which individual claims may be backed by the financial resources of interest groups, primarily because this information is usually unavailable due to solicitor-client privilege. However, the onus surely lies on the CPT to support such a sweeping allegation with concrete proof, the absence of which requires that the allegation be given little weight.

Second, even if it is the case that individual claims are increasingly backed by interest groups, it is unclear how the litigation’s financing affects the validity of a person’s claim; in order to reach the SCC, an individual’s case must usually deal with an issue of national importance. Further, to succeed in a Charter claim, the individual must prove that the government infringed a protected right. In the end, no matter who pays the legal bills, the litigation boils down the delineation of boundaries between the state and the individual and between the public and private spheres. Despite the CPT’s portrayal of Charter litigation as dominated by a cabal of faceless interest groups, there is no escaping the individual aspect of these cases. Courts can only expand rights when the factual matrix before them involves a litigant legitimately aggrieved by the government. In roughly ninety percent of federal equality cases, that litigant is an individual.

When all available evidence points to the fact that individuals, rather than interest groups, are overwhelmingly driving federal equality Charter cases, the CPT’s insistence that the opposite is true merits closer scrutiny. The CPT’s assertion that interest groups play an expansive and expanding role in Charter litigation is fundamental to the Court Party Theory. As discussed in Chapter One, if the Court Party brings less than ten percent of federal equality cases and there is little to no evidence of its role “behind the scenes” of individual Charter litigation, then it follows that the Court Party, to the extent it exists, participates only sporadically in federal equality litigation. Since the CPT argue that the Court Party plays a central role in convincing activist judges to expand Charter rights, assisted by a colluding collective of left-wing academics, media, lawyers and law clerks, it is difficult to see how the theory holds together if it turns out that the interest groups responsible for driving this alleged rights expansion are only occasionally before the courts as litigants.

The CPT’s tendency to minimize the individual rights at stake in Charter claims has been noted by Professor Kent Roach, who reminds us of the individual litigant’s fundamental, personal

---

214 Supreme Court, supra note 205 at s. 40.
interest in many landmark SCC cases, including *Vriend v. Alberta*, \textsuperscript{215} *M. v. H.*, \textsuperscript{216} and *United States v. Burns*. \textsuperscript{217} Portraying Charter litigation as a tool of privileged interest groups serves to aggregate and anonymize individual fundamental rights. The human, and often empathy-inspiring, face of the equality-seeker is obscured by rhetoric about left-wing fringe groups, greedily manipulating judges to obtain more status through rights-expansion. \textsuperscript{218} Individual rights become subsumed into interest groups, which in turn are reduced to the status of any other stakeholder in a democracy; they may lobby for their position, but ultimately their demands are subject to the “ordinary vicissitudes of democratic politics.” \textsuperscript{219} Morton laments what he calls the “demonization temptation” of pro-Charter advocates who, “turn what might, on a dispassionate analysis, be reasonable disagreements between plausible alternatives into implacable oppositions of good and evil.” \textsuperscript{220} This dispassionate analysis of plausible alternatives to individual rights is made easier when the putative rights-holders are faceless interest groups. However, when as a society we recognize that individual rights and freedoms are at the heart of Charter litigation, it becomes more difficult to subject these rights to the vagaries of majority will because, as Roach argues, government violations of individual rights amount to denying equal citizenship. \textsuperscript{221}

### 1.2 Has judicial review led to the radical expansion of Charter equality rights?

In Chapter One, I reviewed some of the CPT’s allegations about the degree of judicial activism in Canada with respect to Charter rights. While I acknowledged the difficulty in defining, and therefore also in measuring judicial activism, I nevertheless concluded that the CPT’s evidence in support of their accusations of judicial usurpation of the legislature was weak because it relied on three flawed premises; a comparison of the courts’ treatment of the Charter and the Bill of

\textsuperscript{215} [1998] 1 S.C.R. 493 [Vriend].
\textsuperscript{216} *M. v. H.*, supra at note 111.
\textsuperscript{217} [2001] 1 S.C.R. 283.
\textsuperscript{218} See e.g. Knopff & Morton, “CRCP”, supra note 4 at 24, Morton, "Political Impact", supra note 11 at 35 and Knopff & Morton, "Charter Politics", supra note 11 at 82.
\textsuperscript{219} Roach, “The Supreme Court on Trial”, supra note 124 at 215.
\textsuperscript{220} Rainer Knopff & Andrew Banfield, “‘It’s the Charter Stupid!’: The Charter and the Courts in Federal Partisan Politics” in Joseph Magnet and Bernard Adell, eds., The Canadian Charter of Rights and Freedoms After Twenty-Five Years (Markham: LexisNexis, 2009) at 52.
\textsuperscript{221} Roach, “The Supreme Court on Trial”, supra note 124 at 215.
Rights, a limited analysis of some of the SCC’s early cases, and an overly inclusive reconfiguration of Monahan’s study of judicial activism.

Despite the lack of compelling evidence for its existence, the term “judicial activism” is prevalent in the contemporary political lexicon; “[t]he professors and others who have defined judicial activism as a problem that Canadians should be concerned about now see their ideas reflected in newspapers, party platforms, and even the judgments of the Supreme Court.”222 How do we determine whether judicial activism under the Charter is a problem worthy of Canadians’ attention? As a means of measuring judicial activism, assessing the success rates of equality-seekers has some clear disadvantages and advantages. As discussed in Chapter One, success rates do not tell us anything about the nature of the court’s remedy when an equality-seeker is successful, nor do they indicate whether the rate of judicial intervention is increasing or decreasing over time. However, as both Vaughan and Roach have pointed out, success rates are useful in demonstrating an overall pattern of judicial intervention or restraint.223 Roach argues that the definition of judicial activism includes four strands, one of which is that, “judges engage in judicial activism when they are eager to make law and do not avoid or minimize constitutional judgments whenever possible.”224 We would expect that judges eager to make new law would be inclined to treat the arguments of equality-seekers with favour whenever possible. However, this is not what an analysis of federal equality cases demonstrates.

During the CCP era, from 1994 until 2006, judges rejected the claims of equality-seekers in 82% of the combined equality cases before the SCC and FCA.225 When the FCA decisions are considered alone, the equality-seeking party lost an overwhelming 95% of the time. Equality-seeking parties that were funded by the CCP won their case before the SCC or FCA, either wholly or partially, 29% of the time. While this represents a higher than average success rate, it

---

222 Ibid. at 69.
225 Included as losses are cases where the court found a rights violation under section 15 of the Charter, but upheld the violation under section 1. This categorization may obscure some significant human rights victories, for instance the SCC’s decision in Egan v. Canada, [1995] 2 S.C.R. 513 is viewed as a landmark victory for the recognition of same sex equality rights, even though a slim majority of the SCC upheld the impugned provision under section 1.
is unclear to what degree this is attributable to the CCP, for the reasons I discuss in Chapter Two. These statistics undermine the CPT’s claims that the judiciary is eager to expand Charter rights at the behest of interest groups. Rather, the very high failure rate for those making Charter equality claims suggests just the opposite is true, that Canadian high courts are cautious about expanding Charter rights and the judiciary is generally deferential to the legislature.

This statistical picture is supported by looking at the court’s approach to equality law; as former SCC Justice Ian Binnie has written, “the section 15 jurisprudence does not disclose a judicial appetite for a general overhaul of the legal landscape.” Roach agrees, arguing that the SCC’s record, particularly in recent years, is not exactly replete with examples of the CPT’s alleged judicial innovations and ocularism:

[T]he Court has not read the economic agenda of either the right or the left into the Charter, nor has it decided on a specific and detailed abortion policy that displaced a role for Parliament. Similarly, the Court has been very cautious when interpreting equality rights not to require governments to justify all the distinctions they draw in legislation under section 1 of the Charter. The Court has not interpreted Aboriginal rights at large or attempted to craft a national policy on Aboriginal matters. Instead, it has proceeded in a case-by-case fashion and has relied on historical evidence about the existence of Aboriginal rights in particular locations and treaties.”

The SCC’s restraint in enlarging equality rights under the Charter can also be seen in its reluctance to find that section 15 of the Charter includes extensive social and economic rights, to the chagrin of poverty and feminist groups. For example, Professor Sheila McIntyre laments that judicial deference in equality decisions acts, “contrary to the fundamental purpose and declared imperatives of the Charter. It is rendering the constitutional entrenchment of equality rights entirely empty for subordinated groups whose interests are discounted or disregarded in majoritarian political processes…Deference thus serves dominance in the name of dignity.” Similarly, Roach argues that, “[t]he greatest tragedy of the judicial activism debate is that

---

227 Roach, “The Supreme Court on Trial”, supra note 124 at 140.
unwarranted concerns about judicial supremacy may persuade the Court to err on the side of underenforcement of rights. This outcome would ensure that values and groups that are neglected in the legislative process will continue to be neglected.”

If there is no evidence of judicial activism in federal equality cases, as commentators on the left maintain and as a quantitative analysis of the federal equality case data set supports, then the consequences for the validity of the Court Party Theory are significant. The CPT’s contention that judges are inclined to expand Charter rights in defiance of legislative intent is a necessary component of their Court Party Theory for two reasons. First, by characterizing judges as power-hungry, it is easy to dismiss decisions where equality-seekers are successful as the work of biased judges. This excuses critics from objectively examining the merits of the individual rights claim at stake. However, if judges rarely find in favour of equality-seekers, their credibility is heightened when they determine that the government has unjustifiably violated a person’s right. It is difficult to argue that a restrained and cautious judiciary is nevertheless circumventing its constitutional mandate as a check on legislative power. Second, if judges are generally deferential to the legislature, then the necessary corollary is that courts are largely unmoved by the activities of the Court Party and their alleged collaborators; legal academics, lawyers, the media and law clerks. If the Court Party’s impact on the Canadian judiciary is minimal, then the Court Party Theory is not particularly useful in explaining patterns of Charter rights litigation.

1.3 Do interveners unfairly influence the outcome of federal equality decisions?

As discussed in Chapter One, the CPT view court interventions as the primary means by which the Court Party advances its rights-expanding agenda and they fault the court for enlarging the standing rules to enable more of these interventions. According to Brodie, the interest groups that make up the Court Party are friends of the court with privileged access to the judiciary which they use to increase their political status by persuading the court to carve out more and

---

more rights for group members. However, the CPT are unable to point to any conclusive evidence that interveners, whether on the left or the right of the political spectrum, have any effect on the outcome of Charter equality cases.

In 2001, Morton co-authored an article entitled, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" in which he discusses the results of a study he conducted on the success rates of feminist interest groups in court. As evidence for the success rate of feminist interveners in Charter litigation, the study is not very persuasive. The authors include as successes for “feminist interest groups” not only cases where LEAF or another feminist group was an intervener, but also cases where the litigation dealt with an issue deemed by the authors to be “feminist”. These cases were included even if the litigant was an individual and there was no indication that an interest group participated in the case. In addition, the authors included in their study non-Charter decisions if they considered that the litigation dealt with a “feminist issue”. Using this logic, the authors incorporated fourteen non-Charter decisions where LEAF was an intervener. Obviously, as non-Charter cases, these decisions neither invoked the court’s judicial review power nor did they involve the judicial expansion of Charter rights. Since Morton’s study does not isolate the success rate for interveners in Charter litigation it does little to further the CPT’s claim that the Court Party has been able to use intervener status to persuade the court to enlarge Charter rights.

In fact, as discussed in Chapter Two, the data set shows that interveners were not able to persuade the court to adopt their equality arguments in the majority of SCC decisions during the CCP era, failing to do so in 59% of cases. This represents about the same failure rate as parties before the SCC during this period. The failure rate of interveners before the FCA during this time was slightly less at 57%. Interveners funded by the CCP also had a similar failure rate at 55%. While there have only been a small handful of SCC federal equality decisions since the CCP was cancelled, in half those cases the intervener’s arguments have not been adopted by the court.

---

232 Brodie, “Friends of the Court”, supra note 11. See also Brodie, "Political Status", supra note 83.
233 Morton & Allen, supra note 136.
234 Ibid. at 59.
235 Ibid. at 59-60.
236 Calculated by tallying the “losses” and “non-equality wins”.

These statistics may actually overstate the degree to which the courts are persuaded by intervener arguments because interest groups appear to concentrate their resources on cases where there is both an important issue at stake and a reasonable chance of success. This explains why the number of interveners is higher in high-profile SCC decisions and quite low in most FCA decisions. In this regard, the strategic use of resources by interveners may result in a success rate that is higher than if they had participated in all of the federal equality cases before the SCC and the FCA. Also, the mere participation of an intervener in a case does not disclose the degree to which the court relied upon that intervener’s arguments. For this reason, it is likely that the sheer number of times that the court adopts a position supported by an intervener significantly overinflates the degree to which interveners influence the courts in Charter equality litigation.

Even acknowledging the data set’s likely exaggeration of the effect of interveners in the courts, the statistics nevertheless seem to support the court’s own view of the role of interveners; that they provide the court with a broader range of perspectives on the content of a Charter right than is likely to be offered by the parties themselves. This egalitarian view of the role of interveners is supported by the fact that the SCC has been prepared to hear from both right-leaning and left-leaning groups. Further, interest group interveners supply a necessary counter to the submissions of government attorneys general who intervene as of right in Charter cases and almost always support a restrictive interpretation of Charter rights. The SCC’s and the CPT’s views on the role of interveners are not mutually exclusive, however the court’s view suggests that rather than merely serving their own interests, interveners play an important role in broadening and balancing the perspectives to which the court is exposed.

If interveners are not unduly influencing the court to accept their perspectives, then it is difficult to see what Brodie means when he says that interest groups are privileged in their access to the courts as interveners. In the end, the access to which the CPT take exception boils down the few minutes allotted to interveners in Charter cases before the SCC. All that can reasonably be concluded from the effect of intervener submissions is that they are heard and considered by the courts. And yet this brief opportunity to have their perspective heard and considered is more

238 Elliot, supra note 3 at 307-308.
239 Brodie, “Friends of the Court”, supra note 11 at 123.
attention than many groups in Canada have traditionally been accorded. Many of the interest
groups identified by the CPT as members of the Court Party have not historically had access to
Canada’s public decision-making bodies. Women, aboriginals, disabled people, visible
minorities, homosexuals and immigrants have been disenfranchised (often literally) from the
political system in Canada. While political participation by minority groups in Canada has
increased in the last century, the fact remains that the membership of legislatures and court
benches in Canada does not come close to reflecting the diverse demographics of Canadian
society. Intervener standing is one of the few ways for disadvantaged groups to ensure that, at a
minimum, the court considers the impact of a particular decision on an otherwise silent and
largely invisible part of Canada’s population. In this regard, the opportunity for the arguments of
disadvantaged groups to be heard and considered by judges does represent a threat to the status
quo of political participation in Canada. However, in the absence of any evidence that
interveners are unduly influencing judges, it is my view that their participation does not also
amount to a threat to Canadian democracy.

2 A doctrinal analysis of the CPT’s normative claim

2.1 Is judicial review undemocratic?

The CPT’s descriptive claims, namely that interest groups are the drivers of Charter litigation,
that judges are rampantly rights-expanding, and that interveners persuade the courts to adopt the
agendas of interest groups, are expounded in aid of their normative conclusion that judicial
review is fundamentally undemocratic. These descriptive claims aim to illustrate judicial
review’s threat to democracy; its alleged corruptive and self-empowering influence on judges
and its devolution of policy-making power to self-interested, status-seeking groups. Having
addressed the lack of foundation for the three descriptive claims when assessed against
quantitative data, it seems clear that the CPT’s apprehension of democratic harm is more
theoretical than actual. Although it is difficult to find evidence that judicial review has corrupted
our democratic system, it is still necessary to examine whether, regardless of the way it is
exercised, the power of judicial review under the Charter is inherently undemocratic.
The CPT’s key argument in this regard is that it is undemocratic for the court, which is not elected, to have the power under the Charter to overturn the policy decisions of the legislature, which is elected. While this statement has intuitive appeal, a closer look raises a number of important issues. Chief among them are two questions; first, can judicial review be called undemocratic if the legislature can nevertheless enact laws which the court has deemed unconstitutional? Second, does democracy require that only elected institutions have policy-making power? Specifically, is a counter-majoritarian body set up to protect minority rights necessarily anti-democratic or inconsistent with democracy? I will discuss both of these issues in assessing the merits of the CPT’s argument that judicial review is undemocratic.

2.2 The democratic dialogue gives government the last word

The debate surrounding the court’s use of the judicial review power often includes the argument by Charter supporters that the democratically-enacted Charter mandates judicial review, and judges are therefore simply doing their job by subjecting government policy to constitutional review. The counter-argument is that both the extent of the review and the scope of the rights required by the Charter have been significantly enlarged by judges, an enlargement that was not constitutionally mandated. The academic literature is replete with this volley, and I do not propose to rehash these arguments. Rather, I argue that despite Canada’s status as a constitutional democracy, the scope of judicial review under the Charter reinforces legislative rather than judicial supremacy.

Opponents of a strong constitutional review power point to the United States Supreme Court as an example of how judicial review can evolve into judicial supremacy. The CPT rely heavily on historical examples of American judicial activism which paralyzed Congress and harmed the public good. Such examples are not hard to find. From the court’s validation of slavery laws to its unanimous ruling that programs under Roosevelt’s New Deal were unconstitutional, despite the fact that they were meant to assist millions of unemployed Americans, to upholding the persecution of members of the Communist Party, the United States Supreme Court has a history

of halting progressive social policy on the basis of flimsy constitutional justifications. While the United States Supreme Court may be much more politically constrained than its Canadian counterpart, the fact remains that in the United States, the court’s judicial review power makes it the final arbiter of the constitutionality of a government policy. This is because in the face of a ruling that a policy is unconstitutional, the government’s choice is to ignore the court ruling, try to amend the constitution or wait until the justices can be replaced and try again. The first option destabilizes the system of checks and balances in the country and undermines the constitution, the second option is difficult to the point of impossibility, and the last option may involve decades-long delays, since United States Supreme Court justices are appointed for life. In the American context, the concern about the dangers of judicial activism is valid because Supreme Court rulings in that country represent an almost certain end to the debate about a particular policy, regardless of the will of the legislature and executive.

Ultimately, judicial review presents a paradox for modern democracies; “[o]n one hand, the separation of power and its implementation by judicial review are an indispensable element of liberal democracy because [they] ensure that the legislature and the executive are not acting *ultra vires*. On the other hand, if judicial review evolves so that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then the judicial power, which had previously acted as a restraint, is no longer constrained by constitutional limits.”

The drafters of the Charter had this paradox in mind when they scrupulously attempted to avoid the imbalance of power which has evolved in the United States’ political system. They did so by building in the twin safeguards of sections 1 and 33 of the Charter, neither of which exists in the American Bill of Rights. Although sections 1 and 33 offer important protections against judicial overreach, it is worth noting that long before the Charter was enacted, Canadian

---

243 Hogg, *supra* note 51 at 5.
244 *Ibid.* at 5. See also Roach, “The Supreme Court on Trial”, *supra* note 124 at 29-33.
245 Hirschl, *supra* note 242 at 421.
246 Roach, “The Supreme Court on Trial”, *supra* note 124 at 56.
247 For a more in-depth discussion of section 1 and section 33 see Roach, “Dialogic Judicial Review”, *supra* note 124 at 57-63.
248 Hogg, *supra* note 51 at 5-6.
judges had a history of enforcing fundamental rights under the common law. Prior to 1982, judges sometimes used the blunt instrument of the separation of powers between provincial and federal governments to invalidate rights-violating statutes. In this sense, the Charter did not create judicial review, but rather increased the transparency and legitimacy of its use by the judiciary.

Section 1 of the Charter preserves the balance between the courts and the legislature by requiring the court’s scrutiny of government action to transcend the simple question of whether the policy contravenes a protected right. It accords the government the opportunity to show that limiting the right “is demonstrably justified in a free and democratic society”. In this sense, section 1 of the Charter creates a constitutionally-protected space for majoritarian policies which are proportional to proper legislative aims, despite their contravention of protected individual rights.

Section 33 of the Charter, the so-called “notwithstanding” or “override” clause, permits the provincial and federal governments to enact legislation despite the fact that it unjustifiably violates the rights protected in sections 7 to 15 of the Charter, so long as the reliance on section 33 is expressly stated in the legislation. The impugned legislation is only valid for five years, at which point the government has the option of re-enacting it for another five year term. In effect, section 33 of the Charter provides the government with the last word on policy-making. Unconstitutional and fundamentally rights-breaching legislation can nevertheless become the law in Canada if the legislatures so choose. In the early days of the Charter, Morton agreed that, “section 33 can be seen as avoiding the American dilemma of allowing constitutional supremacy to degenerate into judicial supremacy.”

The requirements that the legislature expressly state its reliance on section 33 combined with the five-year “sunset clause” underscore the fact that the decision to violate individual rights should not be taken lightly. The restrictions in section 33 ensure that such violations are subject to public scrutiny and ongoing public dialogue. In addition, at least once per election cycle, legislatures must justify their use of section 33 to the public by re-enacting the impugned legislation and putting it through the parliamentary process anew.

---

249 Roach, “The Supreme Court on Trial”, supra note 124 at 261.
250 Morton, "Political Impact", supra note 11 at 55.
251 Lorraine Weinrib, “Learning to Live with the Override” (1980) 35 McGill L. J. 541 at 569 [“The Override”].
While section 33 of the Charter, along with section 1, ensures a dialogue between the legislature and the public, it also fuels an institutional dialogue between the legislature and the court:

> [t]he important point about the idea of dialogue is that judicial decisions striking down laws are not necessarily the last word on the issue, and are not usually the last word on the issue. The legislative process is influenced by but is not stopped in its tracks by a Charter decision. The ultimate outcome is normally up to the legislative body.\(^{252}\)

The democratic dialogue theory has been endorsed by a number of legal and political science scholars, who argue that section 33 effectively creates a legislative veto over the judicial review power.\(^ {253}\) As Hogg points out, the democratic dialogue theory presents a serious challenge to the Court Party Theory, “[i]f Charter decisions are ultimately reviewable by elected legislative bodies, using the distinctively Canadian vehicles of sections 1 or 33, then it becomes much less significant whether the decisions have been achieved through the efforts of the Court Party or have been made in disregard of popular sentiment.”\(^ {254}\)

The CPT agree that the dialogue theory is true “in the abstract” but argue that it is too simplistic because, as Morton says, it, “fails to recognize the staying power of a new, judicially created policy status quo, especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus.”\(^ {255}\) Ironically, some legal scholars on the left, such as McIntyre, share this concern, “when the Supreme Court of Canada pronounces discriminatory laws constitutional, it lends such laws a powerful legitimacy that helps immunize them from political change.”\(^ {256}\)

The staying power and legitimacy of judicial decisions to which Morton and McIntyre refer is a short-hand for the hesitation that elected leaders experience before legislatively overriding the court. This hesitation derives from a calculation of the political costs of overruling the judiciary,

\(^{252}\) Hogg, supra note 51 at 7.

\(^{253}\) See e.g. Roach, “The Supreme Court on Trial”, supra note 124, Weinrib, “The Override”, supra note 251 and Hogg & Thornton, supra note 124.

\(^{254}\) Hogg, supra note 51 at 6.


\(^{256}\) McIntyre, “Deference and Dominance”, supra note 229 at 114.
which enjoys a very high degree of public confidence,\textsuperscript{257} as well as the negative optics of appearing to quash fundamental individual rights. As Morton says, the government must weigh the public and caucus support for the court decision and determine whether introducing legislation under section 33 is worth the political capital it would cost to do so.

This confrontation between competing caucuses, regions and interests on divisive issues, such as the recent debate over the long-gun registry, happens frequently in Canada and is a feature of the "political compromise" that the CPT view as a foundation of our democratic system.\textsuperscript{258} The CPT’s central argument then is not that the courts take away legislative decision-making power, but simply that judicial review has, "raised the political costs of saying no to the winning minority".\textsuperscript{259} However, there is nothing undemocratic about requiring the legislature to think hard before using section 33. As Hogg points out, it should not be especially easy to directly overturn a Charter decision.\textsuperscript{260}

The CPT’s concern about the persuasive sway of Charter court decisions does not amount to a compelling argument that judicial review is fundamentally undemocratic. Rather, the CPT appear to be frustrated with the legislatures’ lack of resolve in confronting controversial moral issues, even if that means invoking section 33 to override a decision by a popular court. A sound concern lies at the core of this frustration, which is that if our society is too confident in the court’s decisions we may not be able to confront social policies that warrant a public and democratic debate.\textsuperscript{261} In this respect, it should be noted that the political cost of using section 33 has not prevented either the provincial or federal governments from overruling the courts in cases where the government’s cost versus benefit analysis has supported doing so, for example in enforcing the Quebec commercial sign law,\textsuperscript{262} in barring intoxication as a defense to sexual assault,\textsuperscript{263} and in reinforcing the traditional definition of marriage.\textsuperscript{264} While it is true that

\textsuperscript{257} J.F. Fletcher & P. Howe, "Canadian Attitudes towards the Charter and the Courts in Comparative Perspective" (2000) 6:3 Choices 4.
\textsuperscript{258} Morton, "Political Impact", \textit{supra} note 11 at 55.
\textsuperscript{259} Knopff & Morton, "CRCP", \textit{supra} note 4 at 165.
\textsuperscript{260} Hogg, \textit{supra} note 51 at 6.
\textsuperscript{261} Roach, "The Supreme Court on Trial", \textit{supra} note 124 at 8.
\textsuperscript{262} \textit{Ford v. Quebec}, [1988] 2 S.C.R. 712 [\textit{Ford}].
\textsuperscript{264} Roach, "The Supreme Court on Trial", \textit{supra} note 124 at 78.
section 33 has only been used a handful of times in Canada, its infrequent use does not change the fact that section 33 is a decisive weapon against judicial overreach. Ultimately, the decision to apply section 33 rests with elected officials and therefore, “[a] committed democrat should not complain if the elected government of the people is not prepared to use the override.” 265

2.3 The participation of unelected bodies in policy-making

Judicial review critics argue that regardless of whether the legislature has the last word on whether to enact a statute, it is undemocratic to subject the policies of elected bodies to the scrutiny of unelected judges. Judicial review defenders generally take one of two positions in response to this argument. Some agree that judicial review is undemocratic, but argue that this deviation from democracy is necessary for the defense of minority rights, which should be a value of all modern democracies. Others argue that judicial review is democratic, since the protection of fundamental rights is an essential feature of modern democratic societies such as Canada and judicial review enforces individual rights and promotes democratic values such as inclusiveness. 266 This distinction rests simply on whether we adopt the CPT’s traditional view of democracy, defined simply as majoritarian rule, or whether we adopt a more expansive description which includes the protection of minority rights and public access to policy-making fora, among other features.

Some legal scholars dedicate themselves to the irresolvable struggle to fit the square peg of judicial review into the round hole of traditional democracy. 267 However, this exercise is only relevant if we put an unwarranted value on the traditional definition of democracy. The commonly accepted definition of democracy has changed dramatically since ancient times, and these changes have accelerated in the last few hundred years with the Enlightenment, the

265 Ibid. at 221.
267 Monahan, “Judicial Review ”, supra note 266.
American Revolution, postmodernism, and the rights revolution.\textsuperscript{268} For this reason, using a static formulation of “democracy”, defined simply as majority rule, is arbitrary and not particularly useful in understanding the extent of personal freedom or public participation which exists within a nation. Instead, if we accept that majoritarian governance is an important objective which exists in concert and in tension with other equally important social values, such as individual freedom and minority rights, then “democracy” is put in perspective and we are relieved of the imponderability of how to subsume one value within another.

The supremacy of majoritarian rule was challenged by the SCC in the \textit{Quebec Secession Reference}, where the court found that, “[d]emocracy…means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values…values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities.”\textsuperscript{269} In this regard, Roach argues that the idea that we live in a traditionally democratic society is a fallacy when we examine the loci of power and influence in political decision-making in Canada, which continues to be exclusionary and largely unrepresentative of Canadian society.\textsuperscript{270}

Despite the SCC’s ruling in the \textit{Quebec Secession Reference}, arguing that “democracy” should not be the paramount measure of a society is heretical to the conventional wisdom borne from the state failures of the twentieth century produced by fascism and communism. However, these failures produced not only a renewed focus on democratization but also the recognition that democracy by itself is insufficient to prevent tyranny and oppression. This recognition, in turn, motivated states to adopt bills of individual rights and freedoms at an astonishing rate over the last sixty years.\textsuperscript{271}

Arriving in 1982, the Charter was a latter-day child of this rights revolution. In approving an entrenched Charter, the majority of Canadians set out a code of conduct for their government and delegated the adjudication of the government’s respect for minority rights to the judiciary.

\textsuperscript{269} \textit{Secession reference, supra} note 196.
\textsuperscript{270} Roach, “The Supreme Court on Trial”, \textit{supra} note 124 at 219-222.
\textsuperscript{271} Lorraine Weinrib, “Constitutionalism in the Age of Rights: A Prolegomenon” (2004) 121 S. A. L. J. 278 [“Prolegomenon”].
Although amending the constitution is no easy task, this delegation of decision-making authority to the judiciary is revocable. The Canadian constitution does not contain anything akin to Article 79 of Germany’s Basic Law, which prohibits amendments to key constitutional provisions.272 Canadians’ decision to delegate to the court the adjudication of Charter disputes between individuals and their government is an implicit acknowledgment that, for a variety of reasons, the majority is not good at respecting the rights of disadvantaged groups within society. Nor do Canadians seem prepared to revoke this delegation of authority; as discussed above, both the Charter and the SCC continue to be well-respected by a large majority.273 In fact, previous federal governments have also viewed the judicial review power under the Charter as a public good, and have encouraged Charter litigation through the CCP in order to ensure that disadvantaged groups could participate fully in a multicultural and pluralistic society.274

With regard to the public’s participation in decision-making, Monahan argues Canadian democracy requires:

…a broadening of opportunities for and the scope of collective deliberation and debate in political community; it means identifying and reducing the barriers to effective and equal participation in the process by all citizens; it means ensuring that there are no arbitrary and permanent boundaries around the scope of political debate.275

However, some academics, such as Mandel, argue that the proper forum for this collective deliberation and debate is the political arena, and that activists should pursue their aims through legislative channels rather than the courts.276 In my view, this argument is flawed for two reasons, one theoretical and the other practical. On a theoretical level, the enforcement of constitutionally enshrined human rights should not be subject to the vicissitudes of day-to-day politics. The Charter guarantees certain fundamental rights and freedoms and makes them enforceable through recourse to the courts. Those whose rights have been violated, whether their advocate is an individual or an interest group, should not have to appeal to political discretion for the enforcement of that which has already been deemed by the Charter to be theirs by virtue of

---

272 Basic Law for the Federal Republic of Germany, Article 79(3).  
273 Fletcher & Howe, “Public Opinion”, supra note 56 at 256-60  
276 See e.g. Mandel, supra note 48.
being human. The argument that political channels should be used to achieve the social change found in the mandate of some interveners conflates human rights with progressive social policy; human rights are inherent and inalienable, and some of these rights are guaranteed by the Charter. By contrast, social change outside the scope of these inalienable rights is rightly achieved through the democratic legislative process. However, where the enforcement of a constitutionally-enshrined right, such as the equality of homosexuals, entails the creation of a socially progressive policy, such as the recognition of same-sex marriages, then the individual or interest group is not obliged to appeal to the majority simply because the enforcement of a fundamental right includes social change as the inevitable remedy. To require otherwise would nullify the Charter, since any enforceable right would be subject to the will of the majority as soon as the remedy required any change in government action.277

A practical reason why activists should not be obliged to seek social change solely through political channels is the current scarcity of opportunities for individuals and groups to be heard in the political process in Canada. As Kloegman argues, Charter litigation is one of the few remaining public points of access to decision-making under Prime Minister Harper’s increasingly insulated and muzzled Parliament. Parliamentary committees have traditionally provided an opportunity for Members of Parliament to speak for their constituents and to hear directly from members of the public through witness testimony. However, the Harper government has repeatedly and intentionally disrupted parliamentary committees, particularly through filibusters and unilaterally shutting down meetings. Further, the media has been denied traditional opportunities to ask questions of the Prime Minister and Conservative Members of Parliament, who have been directed not to give interviews. Finally, Kloegman expresses concern that Harper has centralized power in the Prime Minister’s Office and has restricted the openness of both cabinet ministers and the bureaucracy.278

In the end, whether unelected bodies should be accorded policy-making power in a democracy depends largely on the breadth of one’s definition of democracy. For better or for worse, it appears that both Canadians and the legislatures have decided that delegating some policy-

278 Kloegman, supra note 16 at 110-112.
making authority to the courts is an appropriate way to ensure that Canadian values, particularly respect for minority rights, are upheld by our government. Clearly, Charter litigation has taken on more importance in recent years as other points of access for politically disempowered groups have dwindled. Unfortunately, the access to justice crisis in Canada is also gradually removing the courts as a forum for the enforcement of individual rights, an issue to which I return in Chapter Four.

3 Beyond the democracy debate: judicial review as constitutional audit

The debate about whether judicial review is democratic, while important, has polarized discussion about the role of the courts and has obscured other perspectives from which judicial review might be considered. I argue that one such perspective is a functional approach to judicial review which sees the courts, and particularly the SCC, as auditors of the government’s compliance with its constitutional obligations. As I discuss in more detail below, elected officials have an inherent conflict of interest with respect to individual rights because the electing majority is often opposed to the minority rights which the elected officials are constitutionally bound to respect. The judicial review power under the Charter resolves this conflict of interest by delegating the enforcement of minority rights to an unelected body; the court. Under this view, Charter litigation by individuals is the catalyst which drives the court’s auditing function. I argue that by sporadically subjecting statutory provisions to constitutional analysis, Charter litigation tends to strengthen the overall constitutionality of legislative action in Canada.

Section 32 of the Charter provided for a three-year delay in its implementation in order to allow the provincial and federal governments to bring existing legislation into compliance with the new constitutionally-entrenched rights guarantees. Despite the reports of numerous provincial committees which detailed the necessary statutory amendments, Canada’s legislatures did little to ensure that their laws conformed to the Charter’s requirements, and instead adopted a very formalistic approach to equality, changing only the most overt examples of legislative discrimination.

280 Ibid. at 49-50 and 53.
Ultimately, it fell to the courts to ensure that government legislation conformed with the Charter; an endeavour which resulted in Charter litigation that closely mirrored the recommendations of the provincial committees with respect to aboriginal rights, sexual orientation, criminal law reform, family law and immigration law among other issues.\textsuperscript{281} The failure of Canada’s governments to abide by their self-imposed commitment to comply with the Charter speaks to the inherent conflict of interest that governments face in protecting minority rights; the majority they rely upon to put them in office may well disagree with the minority rights the government is constitutionally bound to protect. This conflict of interest, borne out of majoritarian rule, can create a powerful disincentive for governments to act in accordance with the Charter. Because elected officials cannot be trusted to act contrary to their future electoral ambitions, it makes sense to remove this conflict of interest by delegating the enforcement of Charter rights to the courts, an independent body which is, at least structurally, immune to political influence.

As an example of the government delegating authority to arms-length institutions to increase its accountability, judicial review by courts is not unique. In existence for over 100 years, the Office of the Auditor General of Canada (the “OAG”) is an independent institution which conducts annual performance and financial audits of federal government departments and agencies to ensure accountability in the expenditure of public funds.\textsuperscript{282} Sheila Fraser, the current Auditor General, has not hesitated to call public attention to the wasteful or corrupt use of taxpayer dollars, even when her reports have embarrassed or angered the government of the day.\textsuperscript{283} Without the OAG, the federal government would be in an obvious conflict of interest; it would be spending money and operating programs while assessing its own success in doing so. By delegating the auditing function to an independent organization, the government resolves this conflict of interest and preserves its integrity.

Admittedly, there are some important differences between the OAG and the SCC. The most significant difference is that the OAG chooses which subjects to audit, while the SCC examines

\textsuperscript{281} Ibid. at 55.
\textsuperscript{283} See for example, Office of the Auditor General of Canada, November 2003 Report of the Auditor General of Canada (Ottawa: Office of the Auditor General, 2003) at Chapter 3: The Sponsorship Program, in which Fraser discusses the manner in which millions of dollars of taxpayer money was misappropriated and misused by the federal government under former Liberal Prime Minister Chretien.
only issues which others bring to it, a distinction I return to later in this chapter. Ironically, in having the power to determine which government programs and policies to audit, the OAG arguably plays a significantly more activist role in intervening in government activity than the SCC. Also, unlike the SCC, the OAG is mandated to comment only on the government’s implementation of policy, and not the merits of the policy itself. Finally, while the Auditor General may make recommendations for improvement in its reports to Parliament, the government is not obliged to proceed in accordance with her advice. However, if we view judicial review from the perspective of the dialogue theory, this difference is diminished. This is because section 33 of the Charter permits the legislature to treat the court’s decisions in the same way as it treats the OAG’s reports; as non-binding recommendations.

The OAG and the SCC also share some key similarities. Both institutions enjoy a high degree of public confidence which motivates the federal government to act in accordance with their views. Parliament does so by implementing the OAG’s recommendations and abiding by, rather than overriding, SCC decisions. Like the OAG, the SCC operates as an auditor in the sense that it assesses the government’s compliance with its constitutional obligations by analyzing the constitutionality of selected government legislation in the course of Charter litigation. In reviewing legislation the SCC refrains, wherever possible, from dictating government policy, but does intervene when the government crosses the line between enacting constitutionally permissible and impermissible laws. It should be noted that this is not a new role for the SCC. Prior to the Charter, the SCC applied the British North America Act as an audit of government adherence to the separation of powers between federal and provincial governments.

The SCC’s work as a constitutional auditor achieves several entwined societal purposes. First, it allows citizens to measure the degree to which their government, in enacting legislation, respects individual constitutional rights. Canadians overwhelmingly approve of the Charter, and many identify it as one of Canada’s defining features. However, without an assessment of whether our legislatures actually adhere to the constitution, there exists the potential for an increasing gulf between Charter values and legislative values.

Further, the prospect that any given statute might be subjected to judicial scrutiny deters the government from passing discriminatory legislation generally. As discussed above, the court’s declaration that a statute violates the Charter is embarrassing for the enacting government,
suggesting that it is prepared to violate both individual rights and the constitutional order in Canada. To avoid this embarrassment, the government carefully vets draft legislation for potential constitutional violations, an exercise which promotes the protection of individual rights without requiring rights-holders to seek redress from the court.

As discussed earlier, the SCC does not undertake audits of government legislation on its own motion. The courts rely on individuals to bring constitutional challenges to legislation when there is an alleged violation of the Charter. Without litigants willing to expend the time, money and effort necessary to enforce their rights in court, the SCC’s auditing function would be nullified and the legislatures would be free to pass unconstitutional legislation unimpeded by Charter challenges. In this regard, individual Charter legislation achieves two goals beyond the enforcement of the litigant’s own rights claim. First, as discussed above, the SCC usually refuses to hear cases unless they deal with issues of national importance, which generally means that the litigant’s claim is shared by others in Canada. For this reason, whether the litigant fails or succeeds, the issue of whether the government violated the individual’s right is resolved through a SCC decision, creating a precedent which settles tens, hundreds or thousands of other potential claims by individuals similarly affected by the impugned legislation, without their having to go to court. In this sense, the SCC aggregates individual claims by auditing alleged rights violations through Charter litigation.

Second, as discussed above, Charter litigation challenging the validity of individual statutes, regardless of their subject matter, may increase the overall constitutionality of government legislation. Since the government does not know (although in some cases it can predict) which statutory provisions will be the subject of a Charter challenge, it is more likely to thoroughly vet all legislation for potential constitutional violations. By encouraging governments to reduce the number of rights-violating statutory provisions, individuals who launch Charter challenges on issues affecting only a small minority of Canadians effectively inoculate all Canadians from government rights violations.

However, if the government is able to predict that certain statutes will not be subjected to judicial scrutiny, then both the aggregating and inoculating effects of individual Charter litigation are negated. One way for the government to make this prediction is if individual litigants’ access to the court becomes limited by a lack of resources. When this happens, the capacity of equality-
seekers to challenge government legislation which affects minority rights is severely curtailed. Viewed from the perspective of the SCC as constitutional auditor, the current access to justice crisis in Canada is damaging not only to minority rights, but also to the rights of Canadians generally. This view is supported by research conducted by Professor Charles Epp which indicates that Canada’s rights revolution has been driven by legal mobilization:

Interpreting and developing the often ambiguous provisions of a bill of rights depends on mobilization of the law by individuals, but they typically lack the capacity to take cases to a country's highest court... in the absence of adequate resources for legal mobilization, few noneconomic cases are likely to reach the judicial agenda, and judges will have few occasions to use their constitutional authority. Thus, constitutional reform alone, in the absence of resources in civil society for legal mobilization, is likely to produce only empty promises.284

Indeed, the number of federal and provincial equality cases before Canada’s higher courts has declined steadily since 1999. Further, the cases heard by the SCC and the FCA decreased from a combined average of approximately eleven per year during the CCP era to just 6.25 annually in the almost four years since its cancellation. During the same time frame, the number of provincial equality cases fell from an average of 3.5 cases per year during the CCP era to 1.5 cases per year after the program. If we accept that Charter litigation brought by individuals is a necessary prerequisite for the SCC to exercise its auditing function, it is worrisome that the court’s opportunities to assess the constitutionality of legislative action are dwindling. In the next chapter, I explore the origins and impact of the access to justice crisis in Canada as well as the merits of publicly funding Charter litigation through programs such as the CCP.

4  Conclusion

Measured quantitatively, the CPT’s descriptive claims are largely unsupported by evidence. Individuals, not interest groups, drive federal equality litigation, often in order to enforce basic rights which other Canadians take for granted. Judges refrain from overturning legislative policy in an overwhelming number of cases, and only rarely strike down statutory provisions. Interveners participate in constitutional cases to a greater extent than they did before the Charter, but there is no evidence that their submissions have any effect on judicial decision-making. Far

from supporting the existence of a conspiracy between judges, interest groups, lawyers and the media, a quantitative analysis of the federal equality case data set paints a picture of the use of the judicial review power which arguably looks much like Canada itself; balanced, moderate and maybe even a little boring. The fact that the CPT’s descriptive claims are unsupported by evidence also casts doubt on their normative claim that judicial review is undemocratic. It is difficult to view the judicial review power as a threat to our system of governance if those entrusted with it appear to exercise it fairly and sparingly.

Despite this, the debate about whether judicial review has a place in a democratic society such as Canada has escalated in recent years. The CPT maintain that it is undemocratic for unelected judges to overturn laws made by elected officials, and point to American examples of judicial overreach in support of this argument. However, the CPT discount two important differences between the Canadian and American powers of judicial review; the opportunity for the government to justify its infringement of rights under section 1 of the Charter, and the legislative override in section 33 of the Charter which permits governments to enact rights-violating legislation. While the CPT lament the fact that a court’s determination that a legislative provision is unconstitutional makes it politically fraught for a government nevertheless to enact the impugned statute, this amounts to a public relations problem rather than a problem with our democratic system, since legislatures retain the ultimate power over lawmaking.

Finally, I argue that the debate over whether judicial review is democratic eclipses other vantage points from which to critically assess the value of judicial review in our society. One such perspective is that judicial review operates as an audit on the government’s adherence to the constitution. There is little debate that the Auditor General of Canada plays a valuable role in our democratic society by encouraging government transparency and accountability. In my view, the courts, through their judicial review power, similarly encourage governments to respect the boundaries of their constitutional mandate by striking down unconstitutional exercises of power and deterring the enactment of unconstitutional legislation. However, since the court cannot review legislation on its own motion, this constitutional auditing function is powered by rights claims brought by individuals. Unfortunately, the data set shows that the number of Charter equality claims has dwindled substantially in recent years, compromising the court’s ability to audit statutes and reducing the disincentives for the government to pass unconstitutional litigation. In my view, the decline in rights cases is attributable to the access to justice crisis in
Canada. In the next Chapter, I examine the effects of the access to justice crisis on the development of Charter rights in Canada, arguing that the consequences of making courts inaccessible greatly transcend the direct interests of would-be litigants. In this context, I also discuss the need for the public funding of Charter litigation through programs such as the CCP.
Chapter 4: Access to Justice in Charter Litigation

1 Introduction

In my view, the CCP served an essential purpose in our democratic system, not just in terms of assisting people to enforce their fundamental human rights but also because it enabled the court to perform a constitutional audit of the government’s adherence to the Charter. The program’s absence has created a funding gap for constitutional cases which has been made more acute by the current access to justice crisis in Canada. In this final chapter, I discuss the status of the access to justice crisis in Canada as well as its consequences for would-be Charter litigants and by extension, Canadians generally. I then briefly review anecdotal evidence of the impact of the CCP’s cancellation before discussing some of the existing and emerging models for financing constitutional litigation, which have helped to fill the funding gap created by the program’s cancellation.  

In my view, there are eight primary characteristics of an effective and accessible program for Charter litigation which can be distilled from an assessment of the strengths and weaknesses of the existing funding models. I conclude that although legal assistance from a variety of sources is essential to resolving the access to justice crisis, the public funding of Charter litigation through a program such as the CCP is the best option for safeguarding the court’s role in auditing the constitutionality of government legislation which in turn preserves the fundamental rights and freedoms of Canadians generally.

2 The Canadian access to justice crisis

The crisis of access to justice in Canada receives less public attention than other pressing social issues such as health care and education. This may be due to the perception that access to justice is a problem primarily affecting those charged with criminal offenses, a group which our society views as undeserving of financial or political support. However, since legal aid coverage is

285 There are several smaller funding models for Charter test cases which usually focus on a particular demographic or area of the law. I have confined my examination of funding for Charter litigation to the primary broad-based funding models which have the potential to fill the gap left by the cancellation of the CCP.
available for low-income people charged with serious criminal offenses, the issue of access to justice is arguably more pressing in civil law matters, which affect a much higher percentage of the population. Further, the inaccessibility of legal services has direct and indirect consequences for Canadians both because of its implications for the constitutional auditing function discussed earlier and because access to justice enhances democracy and is a necessary component of the rule of law, a key constitutional value.

There are many definitions of access to justice, ranging from ensuring equality of access in reaching decision-making institutions to equality in the sources of law applied to a case, to equality in the language used by those seeking justice. For the purpose of this paper, I have adopted the procedural definition of access to justice used by Madam Justice Newbury of the British Columbia Court of Appeal (“BCCA”), who stated that in a constitutional law context, access to justice consists of, “reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals.” While other definitions of access to justice include substantive as well as formal equality requirements, Madam Justice Newbury’s procedural definition has the advantage of creating an unambiguous minimum standard against which to measure the level of access to justice in Canada. Applying her two criteria, the ability to use the courts and to obtain legal services from qualified professionals, to what degree can we say that access to justice exists in Canada? The answer to this question depends on the area of law at issue, the identity of the party, the party’s resources, and to an increasing extent, the region in which the party resides.

---


288 See William Conklin, “Whither Justice - The Common Problematic of Five Models of Access to Justice” (2001) 19 Windsor Y.B. Access Just. 297 (in which the author describes five formulations of access to justice; procedural, sources thesis, semiotic, social conventions and “Law and...”). The procedural model of access to justice requires only that the applicable legal process or method is fair and that parties have equal access to decision-making institutions).


290 Buckley, *supra* note 177 at 3 (where the author notes that one of the biggest gap in access to justice is in rural and remote areas).
While there is a great deal of variation in the provision of legal services in Canada, one commonality across all jurisdictions is the simultaneous decrease in funding and increase in demand for legal assistance in recent years. In this chapter, I distinguish between “legal aid”, which refers to legal services funded partially or entirely by provincial and federal governments, and “community legal assistance groups”, which refers to the provision of legal services by non-profit organizations. Note that community legal assistance groups are sometimes charged with the delivery of legal aid, which they fund through a combination of government and private sources.\footnote{See e.g. Legal Services Society, How We’re Funded, online: Legal Services Society <http://www.lawfoundationbc.org/files/LF_2009Annual_Report.pdf>.
\footnote{Karen Hindle & Philip Rosen, Legal Aid in Canada (Ottawa, Library of Parliament, 2004) at 3.}
\footnote{Ibid. at 4. For a review of earlier efforts at providing legal assistance to low-income Canadians, see ibid. at 2-3.}
\footnote{Vicki Schmolka, ed., Making the Case: The Right to Publicly-Funded Legal Representation (Ottawa, Canadian Bar Association, 2002) at 3E. See also Buckley, supra note 177 at 4.}
\footnote{Hindle & Rosen, supra note 292 at 6-7. For statistics on the provinces’ per capita expenditures on legal aid, see Hindle & Rosen, supra note 292 at 9.
\footnote{Buckley, supra note 177 at 5.}}

The access to justice crisis in Canada is not new, although it has been exacerbated in recent years by a confluence of factors. Some provinces initiated publicly-funded legal assistance programs in the 1960s,\footnote{Hindle & Rosen, supra note 292 at 6-7. For statistics on the provinces’ per capita expenditures on legal aid, see Hindle & Rosen, supra note 292 at 9.} while the federal government initiated a legal aid program in 1972 which was paid for by both levels of government; the provinces delivered the programs in accordance with regulations set forth in funding agreements with the federal government.\footnote{Ibid. at 4. For a review of earlier efforts at providing legal assistance to low-income Canadians, see ibid. at 2-3.} In the 1990s, funding for civil legal aid was amalgamated with the general social services transfer from the federal government to the provinces. Funding guidelines were removed, enabling the provinces to determine unilaterally how legal aid should be administered.\footnote{Vicki Schmolka, ed., Making the Case: The Right to Publicly-Funded Legal Representation (Ottawa, Canadian Bar Association, 2002) at 3E. See also Buckley, supra note 177 at 4.} This change has led to a wide discrepancy between provinces in terms of both the scope of legal aid and the financial eligibility requirements to qualify for it.\footnote{Hindle & Rosen, supra note 292 at 6-7. For statistics on the provinces’ per capita expenditures on legal aid, see Hindle & Rosen, supra note 292 at 9.}

Further, while the cost of living has increased over the years, wages have not kept pace, pushing greater numbers of people into a category best described as “working poor”. Despite the fact that the working poor have no means to afford legal services, they nevertheless do not meet the financial eligibility requirements for legal aid, which have not been adjusted to account for the disparity between the cost of living and wages.\footnote{Buckley, supra note 177 at 5.} For example, to be eligible for legal aid, an
individual must earn less than $8,870 annually in Quebec and $14,172 annually in Prince Edward Island.\textsuperscript{297} The income cut-offs in the other provinces all fall within this limited range.\textsuperscript{298} In addition, legal aid funding has dropped by ten percent in recent years, while the number of working poor, criminal charges and the complexity of legal issues has increased substantially.\textsuperscript{299} Department of Justice legal aid researcher Ab Currie observes that:

An environment of financial constraint has become a fixture. The law is becoming increasingly complex. Canadian society is becoming increasingly complex and socially diverse. Clients have more problems and more complex problems. In this environment of increasing complexity of problems, and fiscal constraint, both existing access to justice organizations and new ones could be straining under the load.\textsuperscript{300}

Recent studies examining the unmet need for legal services in Canada confirm this strain on resources and present a grim picture, especially for those living in poverty. An assessment of legal aid in criminal cases indicates that, “fairly large percentages of criminal accused are convicted without the benefit of counsel. Even more troubling, up to 27 per cent of unrepresented accused receive jail sentences.”\textsuperscript{301} In the family law context, Legal Aid Ontario (“LAO”) reports that the number of low-income applicants refused legal aid because they failed to meet the financial eligibility requirements rose by 26\% in 2006.\textsuperscript{302} The lack of legal aid coverage for family law matters is particularly devastating for abused women, whose ability to safely resolve access, custody and support issues often depends on securing legal

\textsuperscript{297} Hindle & Rosen, \textit{supra} note 292 at 10.
\textsuperscript{298} \textit{Ibid}.
\textsuperscript{301} \textit{Ibid}. at 11.

representation.\textsuperscript{303} In non-family civil cases, provincial coverage is extremely limited, with few resources for people seeking assistance with social services or employment matters.\textsuperscript{304}

The paucity of legal aid services also disproportionately affects low income people living in rural and remote areas. Per capita, these areas have fewer legal resources than in urban areas but more people living in poverty.\textsuperscript{305} One British Columbia legal aid mapping project found that rural residents often experienced a “total lack of legal services in many of their communities” and found “almost no lawyers willing to do legal aid in many parts of the north” among other barriers to access.\textsuperscript{306} One report estimates that in order to provide the required levels of civil law assistance in Canada, the legal aid capacity in this country would have to increase by five times the current level.\textsuperscript{307}

This lack of access to legal services compounds the problems of people who are already marginalized and impoverished:

A majority of low-income people experience one or more serious legal problems that make their day-to-day lives more difficult. These legal problems usually exist in context with related social problems: economic vulnerability, mental health, physical health, safety and security issues, discrimination, and language barriers. As a result, unresolved legal issues can have a cascading negative effect in people’s lives, causing significant economic, social, and health consequences, particularly additional stress. Physical and mental illnesses have been directly attributed to unresolved legal problems among low-income people.\textsuperscript{308}

In the constitutional law realm, the nexus between poverty, disadvantage and discrimination means that those who are least likely to be able to afford Charter equality litigation are also those most likely to experience discrimination because they fall under one of the protected enumerated or analogous grounds in section 15 of the Charter. Poverty law groups acknowledge the need to

\begin{footnotes}
\footnote{Legal Aid Ontario provides more civil legal aid than most provinces, however these services have recently been subjected to dramatic funding cuts, see Legal Aid Ontario, Civil coverage and clinic services, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/news/mediaenquiries/media_enquiries-april2010a.asp>.

\footnote{Buckley, supra note 177 at 47.}
\footnote{\textit{Ibid.}}
\footnote{\textit{Ibid.} at 46.}
\footnote{\textit{Ibid.} at 2. See also Carol McEown, Civil Legal Needs Research Report, 2d ed. (Vancouver: Law Foundation of B.C., 2009) at 32.}
\end{footnotes}
challenge government action which disadvantages their clients but do not possess the funding to do so:

The capacity to launch Charter litigation is crucial, but virtually impossible without additional funding given that existing public interest advocacy organizations are already overburdened. In particular they identified the need for one constitutional law specialist in any core group of poverty law lawyers. In their view, creating a funded position in this area would provide some public capacity for carrying out test case litigation, as well as a resource for others with respect to understanding the application of the Charter to administrative regulations. 309

Current funding levels require community legal assistance groups to triage client needs, expending resources on resolving clients’ immediate and urgent legal issues rather than on constitutional law test cases which are expensive, protracted and require considerable legal expertise. 310

Given that legal aid is often unavailable, even where a person’s liberty interest is at stake, it is unsurprising that there is so little funding available for Charter litigation outside the criminal law sphere. This lack of assistance for constitutional cases does not just affect those living in poverty. The inability of the average Canadian to go to court has caused Beverly McLachlin, the Chief Justice of the SCC to remark that; “[t]he Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other.” 311 Another commenter observes that when faced with an intractable legal problem, “[t]he middle class get squeezed by both sides of the cost equation: they cannot afford really to go out and hire lawyers without depriving themselves of life’s necessities, and they cannot afford the downside risk of losing if they do pursue a case with any significant risk of losing.” 312

Further, government cutbacks and employment and human rights tribunal backlogs have led to the diversion of potential Charter cases away from the courtroom. Professor Brian Etherington

309 Ibid. at 106.
310 Ibid. at 4 and 9.
311 Beverley McLachlin, C.J.C., “The Challenges We Face” (Speech delivered at the Empire Club of Canada, Toronto, 8 March 2007) [unpublished].
has warned of, “a trend toward the privatization and collectivization of processes to resolve individual Charter and human rights complaints” through the use of mediation in employment-related human rights cases and private arbitrators in human rights commission cases. In both situations, the concern is that rights enforcement is compromised by diverting complaints to private organizations which may have an incentive to prioritize the economic use of resources over careful human rights enforcement.

The decline in government funding for legal aid has renewed interest in the academic and legal community about the existence of a constitutional right to access to justice. Legal scholars generally agree that the constitution offers no such explicit right, noting that the oft-cited right to legal counsel in criminal cases does not actually require the government to pay the accused’s legal fees. Despite this, courts have found that the common law, the constitution and the principle of the rule of law do mandate a right to legal aid in some circumstances. For example, this right exists in some criminal cases where there is a possibility of a jail sentence and in civil cases involving government-initiated challenges to child custody.

Despite the courts’ reluctance to find an overarching constitutional right to access to justice, some legal experts are hopeful that the courts’ refusal to rule out such a right combined with helpful statements in some access to justice decisions might someday pave the way for the judiciary to increase the scope of the government’s obligation to provide legal aid. Much of this hope derives from an SCC decision dating back to 1988 where the court stated, “[w]e have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens.” However, the SCC has since rejected the argument that that the rule of law entails an overarching right to legal aid, while

314 Ibid. at 56-59.
315 Schmolka, supra note 294 at 2E.
316 Ibid.
317 See New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46
leaving the door open to the possibility that certain situations may require the government to provide legal assistance.  

At the forefront of the movement to establish a judicially-imposed right to legal aid is the Canadian Bar Association (“CBA”), which commissioned legal opinions from leading access to justice lawyers and professors on the issue. Unfortunately, a subsequent test case on the constitutional right to access to justice was dismissed for lack of standing at the pre-trial stage by the British Columbia Supreme Court (“BCSC”). The BCCA upheld the dismissal and the SCC did not grant leave to appeal. It remains to be seen whether the test case can be reconfigured to remedy the standing problems which led to its dismissal. Until then, the scope of the right to legal aid remains unresolved. However, it is clear that measured against Madam Justice Newbury’s two criteria, the ability to use the courts and obtain legal services from qualified professionals, access to justice is not widely available in Canada.

3 The effects of the CCP’s cancellation, four years later

While it is difficult to know how many Charter cases would have proceeded but for the CCP’s cancellation, anecdotal evidence suggests that some Charter cases have been derailed midway through litigation because continued CCP funding was unavailable after 2006. For example, the Status of Women Report discusses the case of Sharon McIvor, who, with CCP funding, successfully challenged in a BCSC hearing the discriminatory manner in which the Indian Act determines status. However, with the cancellation of the CCP, Ms. McIvor testified that she did not have the funds to defend the government’s appeal:

The B.C. Court of Appeal is going to cost about $120,000. I do not have $120,000. My family does not have $120,000. … I have no resources, and lack of resources means we cannot mount a defence of this excellent decision … they've stripped from me the access to the resources I might have had to defend my excellent decision. This is a mechanism I cannot overcome. If I cannot mount a defence, the decision will be lost.”

321 Schmolka, supra note 294 at iiE.
323 Indian Act, R.S.C. 1985, c. I-5.
324 Canada “Status of Women Report”, supra note 2 at 12. Note that Ms. McIvor’s appeal was heard in 2009 at McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153, with Gwen Brodsky as one of her
Another example of a Charter case which was adversely affected by the end of the CCP is Gilles Caron’s language rights challenge involving traffic tickets in Alberta. In that case, the Alberta Court of Appeal stated that:

Caron initially sought and obtained funding from the Government of Canada under the Court Challenges Program (CCP). However, that funding proved insufficient to complete the trial, and additional funding from the CCP was unavailable because of the program’s abolition in September 2005 [sic]. Funding through the CCP was re-instated in June 2007, however there was a gap during which CCP funding was not available.  

As discussed below, the court went on to consider the gap in CCP funding in deciding to uphold an advance costs award to Mr. Caron. This anecdotal evidence is consistent with the observations of several legal scholars and constitutional lawyers about the effect of the CCP’s cancellation. Human rights expert Gwen Brodsky remarks that “[w]hen [the CCP] is not in place, there is virtually no access to the use of constitutional equality rights for anyone but the very well-off. Organizations and individuals who would bring forward cases to challenge laws and policies that exacerbate or maintain poverty are shut out. When there is no CCP, the government is barring the door to the exercise of constitutional equality rights.”

Similarly, Louise Arbour and Fannie Lafontaine note that “the cancellation of the Court Challenges Program, a program that had proved a significant ally to equality in the country and been hailed as uniquely Canadian, was a hard blow for access to justice. Many had identified the program as central to the rights revolution that occurred in the country.”

An attempt to quantify the number of Charter cases which have not proceeded due to the program’s cancellation, perhaps through interviews with Charter litigation lawyers, might be an interesting project for future research.

---

325 [2009] A.J. No. 70 (C.A.) at para. 3 [Caron].
326 Ibid. at paras. 62-63.
4 The financing of Charter litigation

In light of the absence of a constitutional right to legal aid in civil matters, the decreased resources of both provincial legal aid programs and community legal assistance groups, and the cancellation of the CCP, it is not surprising the number of provincial and federal Charter equality cases reaching the SCC and FCA has steadily declined since 1999. That the cost of litigation in Canada is unacceptably high is widely accepted, however statistics on the actual expense of taking a Charter case through a trial, a provincial appeal and an appeal to the SCC are difficult to find. This may be due to the high degree of variation between cases as well as the confidential nature of fee arrangements and legal expenses. However, a general idea of the cost of civil litigation in Canada can be pieced together from a few disparate sources. According to one estimate based on a model by the Civil Justice Review in Ontario, the cost of a three-day civil trial is likely to be at least $60,738, a figure which exceeds the average annual household income in Canada.\(^{329}\)

The resolution of complex issues, such as those raised in Charter cases, tend to require longer, more expensive trials, as can be seen from the *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* decision where the SCC noted that the trial was likely to cost well over $1 million while a related appeal was pegged at $300,000.\(^{330}\) One veteran constitutional lawyer, Doug Elliott, who has acted in several landmark equality cases, including *Vriend v. Alberta*,\(^{331}\) *M. v. H.*\(^{332}\) and the *Same Sex Marriage Reference*\(^{334}\) confirms that, “[t]hese cases cost millions of dollars. Millions – because governments fight them tooth and nail. Forget about legal aid. In most cases, you’re not going to get it.”\(^{335}\)

\(^{329}\) Tracey Tyler, “A 3-day trial likely to cost you $60,000” *The Toronto Star* (3 March 2007), online: Toronto Star <http://www.thestar.com/News/article/187854>.

\(^{330}\) *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para. 69 [Little Sisters 2].


\(^{332}\) *Vriend*, *supra* note 215.

\(^{333}\) *M. v. H.*, *supra* at note 111.

\(^{334}\) *Same sex marriage reference, supra* note 9.

\(^{335}\) Tyler, “The Charter’s challenges”, *supra* note 146.
The tremendously high cost of navigating a case through multiple court levels requires resources beyond the means of the overwhelming majority of Canadian residents. The inaccessibility of Charter litigation, due in large part to its expense, is quickly eroding the Charter’s value as a practical tool for rights-enforcement. Elliot has lamented that Charter litigation is becoming, "like the Dom Perignon that's locked behind the door at the [liquor store]. It may taste great, but if you can't get at it, what does it matter?"\(^{336}\)

In the wake of legal aid cuts and the CCP’s termination, it is especially important to examine alternative sources of funding for constitutional litigation. Below, I review both established and emerging funding models, which I classify as legislative, judicial or private in nature.\(^{337}\) Finally, I assess the degree to which these alternatives, whether alone or in combination, have been successful in allowing the court to fulfill its constitutional auditing function. This examination of the strengths and weaknesses of the existing funding models reveals the essential characteristics of an effective and accessible future program for funding constitutional litigation.

4.1 Judicial assistance for Charter challenges

4.1.1 Advance costs awards

Parties who are unable to afford the cost of litigation may be able to apply to the court for an order for interim or advance costs, which requires the opposing party to pay the applicant’s legal expenses before the trial is heard. An order for advance costs is unusual, but in *British Columbia (Minister of Forests) v. Okanagan Indian Band*,\(^{338}\) the SCC discussed the necessity of such an order in cases where meritorious litigation would otherwise not proceed simply because the claimant is impecunious. The court noted that the BCCA had concluded that a constitutional right to legal assistance did not exist in the circumstances in *Okanagan*, however this point was not argued at the SCC.\(^{339}\) In any case, the court was able to make the order on the basis of its jurisdiction over costs; “[i]n special cases where individual litigants of limited means seek to

\(^{336}\) *Ibid.*

\(^{337}\) I have adapted this classification from Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's Law Journal 139, in which the author discusses access to justice initiatives in Canada.

\(^{338}\) [2003] 3 S.C.R. 371 [*Okanagan*].

\(^{339}\) *Ibid.* at paras. 15 and 18.
enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.\textsuperscript{340} The court in Okanagan emphasized the extraordinary nature of an advance costs award and set out a strict three-part test for applicants:

There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a prima facie case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. [Emphasis added.]\textsuperscript{341}

The court went on to explain that the third criterion, the existence of special circumstances, might be met where the case involves a broad public interest.\textsuperscript{342} In addition, even if all three criteria are met, the court retains discretion over whether to make the order for advance costs.\textsuperscript{343}

The decision in Okanagan provoked much controversy; supporters heralded it as an important tool for improving access to justice\textsuperscript{344} while opponents warned of a flood of advance cost applications and pointed out some of the practical and ideological problems with the court making these orders.\textsuperscript{345} One of these issues is the possibility that judges who order advance costs will either prejudge or be seen to prejudge the outcome of the trial. Critics argue that since the traditional costs rule requires the losing party to pay some of the legal expenses of the winning party, an advance costs award can be perceived as predetermining the fault of the paying party.\textsuperscript{346} This possibility is increased by the fact that one of the criteria for an advance costs order is whether the claim is prima facie meritorious. In my view, this concern is overstated for two reasons. First, applications for interim orders, of which advance costs applications are but

\textsuperscript{340} Ibid. at para. 27.
\textsuperscript{341} Ibid. at para. 36.
\textsuperscript{342} Ibid. at para. 38.
\textsuperscript{343} Ibid. at para. 41.
\textsuperscript{346} Ibid. at 122-124.
one example, often include an assessment of the strength of the applicant’s case. For instance, the test for ordering an interim injunction requires the applicant to prove that there is a serious question to be tried, or in the case of a mandatory injunction, that there is a strong *prima facie* case. The intention is to exclude frivolous or unmeritorious cases rather than to engage in an in-depth assessment of the parties’ chances of success. Further, if there is an apprehension of bias, this concern could be addressed by having the application for costs heard by someone other than the trial judge. While the court in *Okanagan* acknowledged the concern about prejudging the trial, it stated that this issue should not preclude an advance costs order if all the criteria are met.

Another question is whether it is appropriate for courts to make what is essentially a policy decision about who bears the cost of litigation, especially since, as in *Okanagan*, some advance cost applications ask for costs to be paid by the opposing party in any event of the cause (in other words, the non-applicant party pays both parties’ costs regardless of the outcome of the litigation). One critic argues that Parliament, through the provision of legal aid, is better placed to make the resource allocation decisions inherent in advance costs awards. Also, if the legislatures decided to finance Charter litigation through legal aid, the decision about the merits of the case would be transferred from the court to an arms-length agency which would remove the concern about whether judges are prejudiced by the outcome of advance costs applications. In a possible acknowledgment that it was treading on the edges of its discretionary power to award costs, the court in *Okanagan* noted that the requirements for an advance costs award could be modified by the legislature. While there is a good rationale for moving decisions about the allocation of litigation funding from an adjudicative to an administrative arena, the reason that the issue of advance costs has become a matter of debate is that it is a judicial response to a legislative failure to adequately fund civil legal aid.

---

349 *Okanagan*, supra note 338 at para. 37.
350 *Gourlay*, supra note 345 at 143.
351 Ibid. at 135.
352 *Okanagan*, supra note 338 at para. 36.
Finally, the concern that the decision in *Okanagan* would lead to a flood of successful advance costs applications seems to be unfounded. The court has set very high standards for meeting the impecuniosity and public importance aspects of the test for advance costs and has often exercised its residual discretion in favour of dismissing applications, a development which has dampened some of the euphoria surrounding the decision in *Okanagan*. However, the recent decision of the Alberta Court of Appeal to uphold an advance costs award in *R. v. Caron* has the potential to expand the scope of such awards. In *Caron*, the accused challenged the constitutionality of a traffic ticket on the basis that it was not written in French. Mr. Caron had initially received funding for his challenge from the CCP, however he could not obtain additional funding because the CCP was cancelled. Although his funding was later restored with the reinstatement of the language rights component of the CCP, the program’s cancellation created a gap in financing the litigation.

The Alberta Court of Appeal’s decision in *Caron*, which has been appealed to the SCC, was significant in several respects; it extended the application of advance costs awards to quasi-criminal cases; it clarified that courts other than the one seized of the trial can make advance costs awards (i.e. a superior court can make a costs order with respect to a provincial court trial); and it rejected the argument that costs cannot be awarded against the Crown. More importantly, the court in *Caron* declined to take a narrow view of the scope of the decision in *Okanagan*. It found that a disparity of resources between the parties is a relevant consideration in making an advance cost order, in part because:

...a gross imbalance of resources in a constitutional case leads to the possibility of future arguments that the case was not fully litigated and that the underlying issue should be reconsidered because, for example, the expert evidence only applied to one side. When government is involved in constitutional litigation, it is preferable if the issues are fully

---

353 See e.g. *Little Sisters 2*, supra note 330 and *Re Criminal Code of Canada*, 2010 BCSC 517.
354 *Caron*, supra note 325.
357 *Caron*, supra note 325 at para. 36.
359 *Ibid.* at para. 44.
resolved. A victory for government because of a lop-sided case will be no victory, since the issue will likely arise again in the future and have to be re-argued.\textsuperscript{361}

Further, in assessing the second Okanagan criterion, Mr. Caron’s impecuniosity, the court found that the CCP’s cancellation and the resulting gap in funding were relevant considerations which helped Mr. Caron meet the this requirement.\textsuperscript{362} In so finding, the court drew a direct link between judicially-ordered advance costs and legislative policies limiting access to justice. Finally, the court lessened the stringency of the requirement to explore alternative sources of litigation funding, clarifying that:

\[\text{when pursuing other funding models, an Okanagan applicant will have to make exhaustive efforts to obtain that funding. Provided those efforts are demonstrated, the applicant does not need to show that it checked with absolutely every person, organization or institution that might be remotely interested in the question. It is sufficient if the applicant sought funding from the primary players interested in the constitutional question before the court. The chambers judge determined that Caron took all possible steps to obtain legal aid and private funding, and the Crown has not shown that this factual determination is palpably wrong.}\textsuperscript{363}

The Alberta Court of Appeal’s decision in Caron went beyond a rote application of the Okanagan test by expanding the scope of advance cost orders and reducing the barriers to obtaining them. Depending on the outcome of the SCC appeal, Caron has the potential to fill a widening gap left by the cancellation of the CCP and the reduction in legal aid funding in Canada.

\textbf{4.1.2 Costs in public interest litigation}

The uncertainty about the law of advance costs is mirrored in the wider debate about costs in public interest litigation generally. In Canada, costs are normally paid by the winning party to the losing party in civil court cases. In this sense, costs orders can be either an excellent source of funding or a powerful disincentive to future litigation, depending on the outcome of a case.\textsuperscript{364} However, the uncertainty about whether a party will win or lose, as well as the variation in the size of a resulting costs award, prevents individuals and groups from being able to plan public

\textsuperscript{361} \textit{Ibid.} at para. 56.
\textsuperscript{362} \textit{Ibid.} at para. 63.
\textsuperscript{363} \textit{Ibid.} at para. 64.
interest litigation strategically. In addition, some commentators argue that since public interest litigation, by definition, holds benefits for the greater population, the individual litigant should not bear the entire cost of attempting to secure these benefits. This argument is particularly compelling in the context of Charter litigation, where the remedy sought is rarely a pecuniary award to the claimant.

For this reason, some critics of the costs system in Canada have advocated for the adoption of the American rule in public interest litigation, which would require that each party bears its own costs, also referred to as the “no-way” costs rule. Advocates of the no-way costs rule argue that since costs are purely discretionary, the courts could, with relatively little delay, make judicial policy in this area. However, the discretionary nature of costs also means that the issue is far from settled, especially with respect to the costs liability of interveners and litigants with outside financial support. While some judges have declined to order costs against an unsuccessful plaintiff in Charter cases, with respect to public interest litigation generally, courts have been reluctant to embrace a no-way rule for costs. For this reason, the public interest litigant’s entitlement to, and liability for costs presents an enormous gamble for groups and individuals alike.

4.1.3 The delegation of Charter litigation to administrative tribunals

While not a constitutional test case funding model, the potential to use administrative tribunals to secure Charter rights and remedies presents a cost-effective and time-sensitive alternative for equality-seekers. While the jurisdiction of administrative tribunals to grant Charter remedies

---

366 Tollefson, "Public Interest", supra note 364 at 317 and 337.
368 Friedlander, supra note 365 at 70.
369 Ibid. at 51.
370 Tollefson, “Public Interest”, supra note 364 at 320-322. See also Fox, supra note 367 at 385-389, and Lavigne, supra note 9 for a discussion of the costs-liability of a party to a Charter case who has been sponsored by an outside organization.
371 Tollefson, Gilliland & DeMarco, supra note 344 at 492.
372 See e.g. Tollefson, “Public Interest”, supra note 364 at 338-339.
was a source of confusion in the caselaw for decades, a recent SCC decision, *R. v. Conway* has clarified that tribunals are competent to award remedies under section 24(1) of the Charter:

We do not have one Charter for the courts and another for administrative tribunals…with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions.

The jurisprudential evolution has resulted in this Court’s acceptance not only of the proposition that expert tribunals should play a primary role in the determination of Charter issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the Charter.

This development has been cited as a victory for access to justice because administrative tribunal hearings tend to be inexpensive, timely, and more conducive to self-representation than courtroom litigation. However, while the decision in *Conway* represents a step towards more accessible Charter remedies, it is not a panacea for the accessible resolution of Charter equality litigation in Canada for three reasons. First, administrative tribunals are often comprised of a combination of lawyers and lay people. Since Charter law is a relatively recent specialization within the legal field, it is quite possible that both groups will have neither the experience nor the expertise necessary to effectively navigate the complex area of Charter rights adjudication. Even for tribunals with some constitutional law expertise, there is almost certainly going to be a steep learning curve with respect to the application of Charter remedies to the tribunal’s enabling statute, unless the tribunal is one which had previously been engaged in this area. This lack of constitutional expertise combined with the absence of previous Charter tribunal decisions to draw on may mean that equality-seekers appearing before administrative decision-makers will be less likely to receive a fair and balanced decision than those litigating in courts.

A second related issue is that tribunal decisions are generally subject to judicial review by provincial superior courts or the Federal Trial Court depending on the subject matter of the

---

374 *R. v. Conway*, 2010 SCC 22 [*Conway*].
375 Ibid. at paras. 20-21.
administrative body. From there, the decision can be further appealed to higher levels of court, and ultimately to the SCC. For this reason, if a tribunal’s decision to grant a Charter remedy is appealed to the court, the equality-seeker faces the same access to justice issues which confront litigants who bring a Charter challenge to court directly, including the prospect of an adverse costs award if they are unsuccessful in defending the appeal. Of course, parties have the option of not participating in judicial reviews of administrative decisions in order to avoid this financial cost. However, deciding not to participate deprives the court of the opportunity to hear the equality-seeker’s arguments, which may decrease their chance of winning the appeal. Conversely, if the equality-seeker is unsuccessful before the administrative tribunal, their recourse is to appeal the decision to the court, with all the attendant costs and risks. In this regard, Charter decisions by administrative tribunals may only delay an inevitable court action.

Finally, where an administrative tribunal’s Charter remedy is not appealed in court, there is a risk that the remedy will not benefit groups beyond the claimant. This is because administrative decisions have little precedential effect since they do not bind future decisions of the tribunal, much less other administrative bodies or the courts. If tribunals become the primary venue for the determination of Charter rights and remedies, there may be little potential for the development of the kind of equality rights cases which aggregate claims by creating precedent-setting decisions on national equality rights issues and allow the court to fulfill its constitutional auditing function.

4.2 Legislative assistance for Charter challenges

The CCP and government-funded legal aid programs are the two primary examples of legislative initiatives which have funded constitutional litigation. I have reviewed the history, structure and funding sources of both programs earlier in this paper, and so will focus on a third legislative source of Charter litigation funding; the LAO Group Applications and Test Cases Program (the “LAO Test Case Program”). The LAO Test Case Program is classified as a legislative funding

377 Braverman, supra note 373 at 89-90. See e.g. Immigration Act, supra note 376 at s. 72 and Employment Insurance Act, supra note 376 at s. 118.
378 Macaulay & Sprague, supra note 376 at 1-7 (1994, release 1).
379 Bhabha, supra note 337 at 152-166.
model because it grants legal aid coverage to test cases which meet certain prerequisites, discussed further below.

4.2.1 The LAO Test Case Program

Legal aid programs, faced with funding cuts and increased demand, have generally been unable to allocate resources to the development of Charter rights challenges outside of the criminal law context. One exception to this trend is the LAO Test Case Program. Founded in 1977, the program considers applications by groups and individuals for legal aid funding of test cases. The LAO Test Case Program defines a test case as, “a legal proceeding that is representative of a larger number of existing or potential actions. Test cases are brought on behalf of one or more litigants to ‘test’ the relevant law, legislation or practices for the benefit of a larger group.”

These test cases include, but are not limited to, constitutional challenges to government action either by the provincial or federal government. The LAO Test Case Program shares many similarities with the CCP; like the CCP, LAO is operated by an arms-length agency and recommendations about test case funding are made by a volunteer committee which considers a number of factors including the strength, novelty and potential benefits and cost of the test case. The committee also considers financial factors, including whether, “the applicant or group [is] financially eligible under Legal Aid's financial criteria.”

The requirement that the committee consider whether the claimant meets the stringent test for legal aid funding is problematic because the income cut-off for legal aid in Ontario is so low that the vast majority of residents would not qualify. In 1989, there was a proposal by LAO to expand test case funding through an investment by the Law Foundation of Ontario. One of the proposed changes involved removing the requirement to consider whether applicants qualify for legal aid, with the rationale that “in cases where a Charter issue of significant public interest is raised, individuals or members of a group should not be expected to divest themselves of savings or have a lien placed on their property in order to litigate the issue themselves or to meet with

---

380 Fox, supra note 367 at 393.
381 Legal Aid Ontario, Group and Test Case Certificates, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/info/test_cases.asp>.
382 Ibid.
383 Ibid.
384 Hindle & Rosen, supra note 292 at 10.
This proposal was not accepted by the Law Foundation of Ontario, and a person’s eligibility for legal aid continues to be a consideration for funding under the LAO Test Case Program.

Information about the subject matter, amount of funding, and outcome of the cases funded by the LAO Test Case Program is only beginning to be compiled by LAO, which expects to have finished this process by early 2011. LAO is able to report that the program has an annual budget of $550,000 and issues 50 to 60 legal aid certificates per year which clients can redeem for legal services from a legal aid lawyer. Each certificate is approved for a maximum dollar amount, however LAO cannot yet retrieve information about the actual amount billed by legal aid lawyers for cases under the program. The LAO Test Case Program grants funding primarily to individuals rather than groups, and a significant number of these cases involve Charter challenges, although LAO is unable to provide data with respect to each of these categories.

Unfortunately, the LAO Test Case Program appears to be unique among provincial legal aid providers in Canada, which effectively limits legal aid coverage for civil Charter litigation to Ontario residents.

4.3 Private assistance for Charter challenges

Private assistance for Charter challenges can take several forms, from organizations which undertake advocacy and research, such as the David Asper Centre for Constitutional Rights (the “Asper Centre”) to those which provide grants for test cases, such as the Law Foundation of British Columbia (the “LFBC”) to the provision of pro bono services by academics and private lawyers, either on their own or with assistance from pro bono organizations. I examine each of these models below.

---

385 Fox, supra note 367 at 395-396.
4.3.1 The Asper Centre

Conceived as a response to the CCP’s cancellation, the Asper Centre was established in 2008 within the University of Toronto, and is dedicated to constitutional law advocacy, research and education in Canada. Through the work of its faculty, staff and supporters, the Asper Centre operates a constitutional law clinic for students, intervenes in constitutional law cases and organizes workshops and conferences, among other activities. The centre was founded with a $7.5 million private donation, allocated between capital costs and an endowment for operating expenses. In its first two years, the Asper Centre partnered with several organizations to intervene in cases and this year participated in the Conway case as an intervener in its own right. The centre hopes to have the capacity to launch a constitutional case in the next three to five years with the assistance of the private bar and law students, however at the moment the organization’s focus is on court interventions rather than the conduct of litigation. For the time being, the Asper Centre is taking a top down approach to access to justice, which makes it unable to assist individual litigants in undertaking Charter challenges at the lower court levels. There are no plans for the Asper Centre to finance grassroots Charter litigation as the CCP did, nor would its budget likely allow it to engage in this area. The Asper Centre has a wealth of legal expertise within its faculty, supporters and students, which will allow it to become an invaluable constitutional law resource in Canada. It is likely that the Asper Centre is better placed to become a source of litigation support, research and advocacy rather than a significant funding source for Charter challenges. However, a private source of funding for Charter test cases is offered by some law foundations, such as the Law Foundation of British Columbia.

---

388 David Asper Centre for Constitutional Rights, *Strategic Plan 2009-2014*, (Toronto: David Asper Centre for Constitutional Rights, 2009) at 1 [“Strategic Plan”].
4.3.2 Law Foundation of British Columbia

In addition to funding legal aid programs using the interest generated from mixed trust accounts held by lawyers and notaries, some law foundations, such as the Law Foundation of British Columbia (the “LFBC”), provide grants for test cases, including Charter challenges, on an *ad hoc* basis. In 2009, the LFBC funded test case litigation brought by five public interest groups including the West Coast LEAF Association, the B.C. Civil Liberties Association and the Community Legal Assistance Society. However, it is unclear from the LFBC’s annual reports what percentage of this funding is earmarked for constitutional versus non-constitutional litigation. Funding decisions are made by subcommittees of the LFBC’s volunteer board of directors based on the foundation’s mandate, “to fund legal education, legal research, legal aid, law reform and law libraries for the benefit of British Columbians.”

The LFBC’s financial support for test cases is a crucial source of funding for public interest groups in British Columbia. Yet, as a potential replacement for a publicly-funded program like the CCP, the LFBC’s funding model holds several disadvantages. First, test case funding is only available to non-profit groups, rendering it inaccessible to individuals attempting to finance a Charter challenge. Also, given the limited number of cases in which interest groups participate as parties, as discussed in Chapter Two, it is possible that a substantial amount of LFBC funding to interest groups is used for intervener submissions rather than initiating test cases directly. While interveners no doubt play an important advocacy role in the Canadian judicial system, they participate after the Charter challenge has been launched, and therefore they do not directly generate the Charter cases relied on by the courts in fulfilling their constitutional auditing function. Also, consistent with the LFBC’s mandate, the subcommittee making funding decisions is required to consider the potential benefit to British Columbia of a

---


grant proposal. While this consideration does not preclude test cases with national ramifications, it certainly narrows the scope of organizations and test cases which are likely to receive funding.

Finally, since the LFBC is funded by interest collected on pooled trust accounts, its revenue is heavily dependent on the health of the global financial system. When interest rates are low, the LFBC’s income declines significantly, and despite having reserves in anticipation of interest rate fluctuations, income shortfalls can affect the foundation’s ability to fund legal assistance programs.397 Unfortunately, low interest rates tend to coincide with economic downturns, leading to cuts just when people are most in need of legal services. For this reason, LFBC’s test case grants to public interest groups cannot be considered a stable source of future funding for Charter litigation. Of course, assistance for Charter cases does not only take the form of litigation funding. For example, many lawyers donate their legal services by taking constitutional test cases on a pro bono basis.

4.3.3 Pro bono legal services

The private bar and legal academics are acutely familiar with the access to justice crisis in Canada; for litigation lawyers and academics alike, the increasing demand for legal services from low-income individuals is apparent both from the high number of self-represented litigants in the courtroom398 and their increasingly frequent requests for help pro bono.399 The provision of pro bono assistance is one of the finest traditions of the legal profession, but it is one that has taken on a greater importance in the wake of cuts to legal aid.400 Increasingly, private lawyers and professors are relied upon to fill the gap between the need for legal assistance and the resources available to meet this need.401 For example, in a recent survey of British Columbia lawyers, 78 percent of respondents indicated that they were providing pro bono services.402

399 Pro bono is a latin expression which means “for the public good”.
400 Bauman C.J. BCSC., supra note 398 at 4.
401 See Buckley, supra note 177 at 12 and Trerise, supra note 299 at 67. See at 2.
There are a myriad of pro bono organizations in Canada, including provincially-based groups such as Pro Bono Law Ontario and the Access Pro Bono Society of B.C., as well as groups for law students such as Pro Bono Students Canada and the Law Students’ Legal Assistance Program. Among other activities, these organizations provide lawyers and law students with opportunities to engage in volunteer legal work, encourage law firms to integrate pro bono work into their business model, and operate clinics which provide summary legal advice to those in need.  

Pro bono work, whether offered under the auspices of an organization or by an individual lawyer on an *ad hoc* basis, has a number of advantages and disadvantages. Clients of pro bono lawyers report an extremely high degree of satisfaction with the legal assistance they receive. Lawyers providing pro bono services are often well-trained, have access to an established legal infrastructure within their firm, and are generous with their time and advice, since they are generally motivated by public service and professional responsibility in taking on a pro bono file.

However, since the provision of pro bono legal services is purely voluntary, lawyers are free to accept whichever cases they wish, without regard to the client’s means or the merits of the case. While pro bono organizations have done much to coordinate pro bono activities by lawyers, the *ad hoc* nature of most pro bono work means that there is no consistency between lawyers with respect to how pro bono cases are accepted or rejected. In addition, a lawyer’s capacity or inclination to perform pro bono work is subject to the demands of their paying clients, the economic needs of their practice, family demands, etc. Further, while some organizations, such as Access Pro Bono B.C. and Pro Bono Law Ontario provide coverage for disbursements, many lawyers doing pro bono work are forced to either absorb the non-legal fee expenses related to a pro bono case, or attempt to recover these from the low-income client. For these reasons,

---

404 The Ontario Civil Needs Steering Committee, *supra* note 286 at 18.
405 Whitcombe, *supra* note 302.
406 Ibid.
407 Ibid. at Appendix A.
the *ad hoc* and discretionary nature of pro bono work makes it unlikely to constitute a realistic substitute for a program such as the CCP.

Having reviewed a number of resources which assist individuals and groups in bringing Charter cases to court, it is necessary to compare the degree to which they offer a useful model for funding Charter challenges in Canada.

## 5 Comparison of Charter litigation funding models

Each of the constitutional litigation funding models discussed above plays an important role in providing access to justice in Canada, although no one mechanism is able to fill the gap in Charter litigation funding left by the CCP. However, each of these models has strengths and weaknesses from which we can distill the minimum requirements for an effective and accessible program for funding Charter challenges. In addition to operating at arm’s length from the government, it is my view that there are eight such requirements.

*First*, the program should have a national mandate in order to enable applicants to initiate Charter litigation regardless of their province or territory of residence. In addition, a national body would be well-placed to implement a strategic approach to Charter litigation and avoid some of the duplication which can occur when similar public interest test cases originate from multiple provinces.

This leads to the *second* requirement, which is that the program should be capable of prioritizing test cases to allocate limited resources fairly and efficiently in order to maximize the public benefit of Charter litigation. The importance of purposefully distributing limited funds for public interest litigation is one argument in favour of leaving the issue of how to finance Charter litigation to the legislature rather than the judiciary, which allocates funding through advance costs awards on a sporadic and *ad hoc* basis.\(^{408}\)

The *third* requirement is that this prioritization must derive from a merit-based process to assess applications for funding. A merit-based process ensures that limited funds are used efficiently and improves public confidence in the fairness and transparency of the program.

---

\(^{408}\) Gourlay, *supra* note 345 at 143.
Fourth, the program should provide funding for Charter challenges to both provincial and federal government action. Including Charter claims against the provincial governments is necessary to ensure that the court’s constitutional auditing function is fulfilled at both a federal and provincial level. In addition, the province’s jurisdiction encompasses many areas in which a person may experience discriminatory government action, for example, in the administration of education, health care, and social housing.

The fifth feature is that the program must fund Charter litigation brought by individuals as well as interest groups. Since individuals face significantly more hurdles than interest groups in securing the resources necessary for a Charter challenge, providing a source of funding which is available to individuals ensures that the court hears a broad range of Charter cases, and not solely those which fall within the mandate of interest groups.

Sixth, whether from private or public sources, the program must have a stable and adequate revenue base to ensure continuity in the number of Charter cases reaching Canadian courts each year. This requirement benefits claimants by making funding available regardless of the economic climate while also meeting the broader goal of fostering the generation of Charter litigation which enables the court to properly audit government adherence to the constitution. Both private and public revenue streams can be susceptible to ideological interference, as the Harper government’s cancellation of the CCP’s funding demonstrates. For this reason, the degree to which funding is stable also depends on the funding source refraining from ideological or political interference.

The seventh feature is that the program must have reasonable financial eligibility requirements. This does not mean that an applicant’s personal finances should be ignored; it is appropriate to consider the applicant’s resources and alternative sources of litigation financing in deciding whether to grant funding. However, this requirement does mean that an applicant should not need to live a subsistence existence or liquidate personal assets in order to qualify for funding. For example, a reasonable financial eligibility requirement might create a cut-off which includes individuals with average incomes and assets and excludes those who fall above this mark. In this respect, information about the average household and individual income in Canada is regularly published by Statistics Canada. Increasing the financial eligibility threshold may substantially
increase the number of applications for funding, and this would mean that an examination of the merits of the application would operate as an important filter for the distribution of funds.

Finally, the program should not be limited to challenges under sections 15, 27 and 28 of the Charter; rather it should include funding for the enforcement of a broad array of constitutional rights through litigation. For example, several of the significant Charter decisions which have reached or are expected to reach the SCC in coming months involve section 7 and section 8 Charter rights.409

In Table 1 below, I compare the degree to which the funding models discussed earlier in this Chapter, along with the CCP, meet these eight requirements for an effective and accessible Charter litigation funding program.410 The table provides a useful summary of the relative strengths and weaknesses of the various funding models described above but it does not capture the relative importance of some of the features over others. For example, the requirement that the program have a national mandate is arguably more important than having a stable source of funding, since some coverage in all provinces is preferable to no coverage in some provinces. Further, by providing “yes” or “no” responses to the requirements, the table does not include the extent to which a particular funding model fulfills each of the criteria. For this reason, the assessment of which funding model is preferable depends largely on the value placed on each of these requirements, or perhaps on requirements that differ from the ones I have chosen to include.

409 See e.g. Bedford, supra note 192 and Gomboc, supra note 188.
410 I have excluded the capacity of administrative tribunals to award Charter remedies from this analysis because, as I noted earlier, while this development may improve access to justice for Charter claimants, it is not a model for funding test cases generally.
Table 1: Comparison of primary Charter litigation funding models

<table>
<thead>
<tr>
<th></th>
<th>National mandate</th>
<th>Prioritize cases</th>
<th>Merit-based decisions</th>
<th>Funds prov. &amp; fed. cases</th>
<th>Individual &amp; group funding</th>
<th>Stable &amp; sufficient funding</th>
<th>Reasonable financial eligibility criteria</th>
<th>All Charter rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advance Costs awards</td>
<td>✓</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Costs awards</td>
<td>✓</td>
<td>❌</td>
<td>❌ 411</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>n/a</td>
<td>✓</td>
</tr>
<tr>
<td>LAO Test Case Program</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>✓</td>
</tr>
<tr>
<td>Asper Centre</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>n/a</td>
<td>❌</td>
<td>❌</td>
<td>n/a</td>
<td>✓</td>
</tr>
<tr>
<td>Law Foundation Grants</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Pro Bono Services</td>
<td>❌</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>CCP</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
</tr>
</tbody>
</table>

In my view, the best funding model for an accessible and effective constitutional test case program consists of a combination of the CCP and the LAO Test Case Program. The CCP had a national mandate, it prioritized cases using a merit-based system, and it funded individuals as well as groups through the application of reasonable financial eligibility guidelines. In addition, as a publicly-funded body with five-year budgets, the CCP had a secure revenue base from

---

411 While it may appear that costs awards are made based on the merits of a litigant’s case, such awards are really meant to compensate the winner and/or punish the loser, see Tollefson, “Public Interest”, supra note 364 at 309-312. Whether a litigant wins or loses a case is not necessarily determinative of whether the litigant’s case was, prima facie, meritorious.

412 As I explain earlier in this paper, I am confining my assessment of constitutional litigation funding models to an examination of the structure of the model, rather than its internal organization or operation. In this regard, the CCP has been criticized for the manner in which it has administered funding decisions, see Marshall, supra note 2 at 185-190.
which to fund a consistent number of cases from year to year.\textsuperscript{413} By all accounts, the program’s modest budget was sufficient to fulfill the CCP’s mandate.\textsuperscript{414} Meanwhile, the LAO Test Case Program provides coverage for challenges to both provincial and federal government action and challenges under all sections of the Charter. Broadening the CCP to incorporate these two changes would remedy the shortcomings of an otherwise widely-lauded,\textsuperscript{415} and internationally-recognized funding model for constitutional challenges.\textsuperscript{416}

The CPT vigorously oppose the CCP on the grounds that it fuels the undemocratic activities of the interest groups which comprise the Court Party. It is therefore ironic that the CCP may actually serve as a safeguard against both judicial activism and the takeover of Charter litigation by interest groups, for two main reasons. First, the decision of the Alberta Court of Appeal in \textit{Caron} suggests that courts are beginning to use cuts in legal aid funding, and specifically the cancellation of the CCP, as a rationale for ordering advance costs. In Charter cases, advance costs awards can be seen as a form of judicially-ordered public funding,\textsuperscript{417} since the defendant and advance costs payer in such cases is almost always the government. There are good reasons for the legislature, rather than the judiciary, to make policy decisions about how to allocate legal aid funding, however where the legislature cuts access to legal services to an untenable degree, the courts seem prepared to intervene by exercising their discretion over costs. This means that one way to discourage judicial intervention in the policy-making sphere is to re-establish a national funding model for Charter litigation through a program like the CCP.

Further, whether intentionally or not, the current funding models are not particularly accessible to individuals seeking Charter litigation funding. Cost awards compensate litigants after they have managed to finance their case through the trial, advance cost award applications are procedurally and substantively complex, which puts them out of reach for most individual

\textsuperscript{413} One obvious threat to the CCP’s revenue base is the government’s ability to change policy priorities, as the Harper government did in cancelling funding for the CCP in 2006. In this regard, the CCP’s stable and sufficient funding source assumes a government for whom a national Charter litigation funding program is a legislative priority.

\textsuperscript{414} Department of Canadian Heritage, \textit{supra} note 23 at 59.


\textsuperscript{417} Gourlay, \textit{supra} note 345 at 141.
complainants, and organizations like the LFBC do not fund test cases brought by individuals. In addition, interest groups are generally more adept than individuals at preparing grant applications, fundraising, communicating with the media and the public, and marshalling legal resources – all important elements of successfully launching a Charter test case. Although the cuts to legal aid and the cancellation of the CCP undoubtedly affected interest groups, they have continued to participate in Charter litigation, despite the steady decline in the number of federal and provincial Charter equality cases since 1999.\footnote{See e.g. \textit{Canada (Attorney General) v. Hislop}, [2007] S.C.J. No. 10 (in which EGALE intervened), \textit{Ermineskin Indian Band and Nation v. Canada}, [2009] S.C.J. No. 9 (in which the Assembly of First Nations intervened) and \textit{Veffer v. Canada (Minister of Foreign Affairs)}, [2007] F.C.J. No. 908 (in which Canadians for Jerusalem intervened).} In a second irony for the CPT, the cancellation of the CCP and cuts to legal aid may mean that, by virtue of decreased individual participation in the courts, a greater proportion of Charter equality litigation in Canada will involve interest groups. Restoring the CCP may dilute interest group participation in the courts by making Charter litigation more accessible to individuals.

The CPT’s opposition to funding constitutional challenges ignores the underlying access to justice issues which give rise to the need for litigation funding. The CCP’s termination directly impacts ordinary Canadians who are unable to enforce their Charter rights in court because they simply cannot meet the financial cost of doing so. With the cost of taking an equality rights case from trial to the Supreme Court of Canada estimated at millions of dollars in some cases, it is clear that access to effective Charter rights enforcement is becoming the purview of the very wealthy.\footnote{Tyler, “The Charter’s challenges”, \textit{supra} note 146.} While there are judicial, legislative and private initiatives aimed at improving access to the courts, none have succeeded in filling the void left by the CCP’s cancellation, in part due to their limited funding and scope. Unfortunately, with the elimination of the CCP, the existence of Charter equality rights has not changed, but the means by which they can be enforced and delineated by Canadian residents has been significantly impaired.
Conclusion

“The Charter is simply a document, and documents are not self-enforcing. Without groups ready to litigate, the Charter can have little impact.” 420 – Ian Brodie

It seems clear that despite the Harper government’s claim that it was defunded for administrative reasons, the CCP was in fact a casualty of the ideological debate between social conservatives and liberals about the role of judicial review in the Canadian democratic system. The argument that judicial review is antagonistic to democracy has been most ardently expressed by the CPT, whose Court Party Theory posits that interest groups comprise an unelected Court Party, which uses intervener status to persuade activist judges to expand Charter equality rights. Although the CPT have published variations on their Court Party Theory almost since the inception of the Charter, there has been little challenge to some of the assertions underlying the theory.

I have examined three of these assertions by testing the Court Party Theory’s descriptive claims against a quantitative analysis of Charter equality cases before the SCC and FCA, both during and after the CCP. The results of this assessment lead to the inescapable conclusion that the Court Party Theory’s key descriptive claims are unsupported by evidence. The CPT claim that the individual Charter litigant is vanishing, yet individuals bring the overwhelming majority of Charter cases to the higher courts, while interest groups bring only a handful of cases. The CPT claim that interventions by members of the Court Party unfairly influence the outcome of Charter cases, however equality-seekers, whether parties or interveners, are largely unsuccessful at persuading the court to accept their arguments. Finally, the CPT claim that judges are highly activist, and are inclined to radically expand the scope of Charter rights, however the high failure rate for equality-seekers evidences a judiciary which is deferential to the legislature and cautious about expanding Charter rights.

Despite their lack of evidentiary support, the CPT’s descriptive and normative claims about activist judges, status-seeking interest groups and the undemocratic threat posed by judicial review have found popular expression in the public statements and policy decisions of the Harper government, for example with respect to defunding the CCP. However, basing government

action on the Court Party Theory is problematic because the theory’s underlying premises are both unsubstantiated by the CPT’s own arguments and disproved by a review of the federal equality decisions heard by Canada’s highest courts.

The lack of foundation for the CPT’s three descriptive claims also erodes the CPT’s normative argument that judicial review is undemocratic. This is because to the extent that the quantitative analysis demonstrates that the Court Party and its influence on the judiciary are illusory, it is difficult for the CPT to maintain that the Court Party’s access to the courts poses a serious threat to Canadian democracy. The CPT’s normative argument is also undermined by the fact that the Charter gives the legislature the final veto over judicial decisions involving fundamental rights. In this sense, the CPT’s frustration with the judiciary is misplaced; the CPT’s criticism should instead be directed at elected representatives who are unwilling to expend the political capital required to override the court on constitutional matters.

Though unsupported by evidence, the CPT’s rhetoric about the rightness of untempered majority rule holds an intuitive appeal which prevents a more nuanced public debate about the role of judicial review in Canada. A less polarized discussion might consider that courts exercising their judicial review function perform an important audit on the government’s adherence to Canada’s constitution. This constitutional audit serves two important purposes; first, the SCC tends to hear cases of national importance, which means that the court’s resolution of a constitutional issue also settles the potential claim of many others in the same situation as the plaintiff. In this sense, the SCC aggregates individual rights claims by auditing alleged rights violations through Charter litigation. Second, the court’s auditing function increases the overall constitutionality of government legislation by creating an incentive for the government to proactively ensure that proposed statutes meet the requirements of the Charter.

However, since the court cannot perform this constitutional audit on its own motion, it relies on individuals and groups to bring Charter challenges to the court. For this reason, when individuals and groups lack the financial resources necessary to challenge state action in court, the government also loses its incentive to respect Charter rights and Canadians lose the opportunity to have their Charter rights adjudicated by proxy. Unfortunately, the access to justice crisis in Canada has significantly jeopardized the ability of the average Canadian to bring a Charter claim to court, a reality which is reflected in the precipitous decline of both federal and
provincial Charter equality cases before Canada’s highest courts in the last decade. While this decline began before the cancellation of the CCP in 2006, the program’s absence has contributed significantly to making the enforcement of Charter rights unobtainable for all but the very wealthiest Canadians.

In response to the access to justice crisis generally, and the challenges faced by those bringing Charter claims in particular, several alternative funding models for Charter litigation have arisen, including legislative, judicial and private initiatives. An examination of these funding models yields some valuable insight into their strengths and weaknesses as well as their potential to fill the void left by the cancellation of the CCP. On balance, I have concluded that the funding model best placed to ensure an accessible and efficient program for constitutional test case litigation includes many of the features of the CCP, expanded to include Charter claims against provincial governments and cases dealing with all Charter rights. Whether a form of publicly-funded CCP will be reinstated remains to be seen. In this regard, the public and academic focus on whether judicial review is compatible with democracy is problematic because it casts doubt on the importance of access to justice for individuals bringing Charter claims; if judicial review is a social ill, then why should we be troubled by the fact that it is inaccessible?

The answer to this question is that the access to justice crisis affects a disproportionately high number of Canadians. At the heart of cases funded by the CCP are individuals who otherwise would never have their perspective heard by a public body with the ability to protect their rights. The cases which are successful before the SCC are most often initiated by ordinary people attempting to do ordinary things in which they are prevented somehow by discriminatory government action; for example, hanging an English sign in Quebec, being employed regardless of sexual orientation, or practicing law as a non-citizen. Since opposition to government intervention in personal liberties is a foundational precept of traditional conservatism, one would think that at least in this regard, opponents of the CCP might have something in common with the interest groups with which they take issue.

421 The Ontario Civil Needs Steering Committee, supra note 286 at 8.
422 Ford, supra note 262.
423 Vriend, supra note 215.
In my view, at the heart of the Court Party Theory lies a frustration that the landscape of political power in Canada has shifted in the last thirty years to include groups which have been traditionally excluded from all three branches of government. The de-marginalisation of interest groups does not represent a democratic threat, but it does represent a threat to the long-standing social order in Canada, which has had white middle-class men at its centre. The creation of a rights regime through the Charter, as well as the means to enforce it through litigation funding, has challenged traditional power structures in Canada. By objecting to the mere hearing and consideration of a multiplicity of perspectives in the Canadian marketplace of ideas, the CPT are advocating a profoundly undemocratic direction for Canada. The stifling of new ideas and the desire to shield the court from considering them is an attempt to maintain existing power structures within Canada at the expense of ordinary Canadians. What appears to be a majoritarian, populist position is really quite elitist, in that it protects those in power and stifles those who cannot afford to have their rights claims properly heard.
Bibliography

Legislation

Basic Law for the Federal Republic of Germany.

Canadian Bill of Rights, R.S.C. 1960, c.44.


Immigration and Refugee Protection Act, R.S.C. 2001, c. 27.

Indian Act, R.S.C. 1985, c. I-5.


Supreme Court of Canada Rules.

Jurisprudence


Christie v. British Columbia (Attorney General), 2007 SCC 21


Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2.

McIvor v. Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153.


Secondary Material: Monographs


--- ed., Interest Groups in Court: "Beyond the Political Disadvantage Theory" (Calgary: Research Unit for Socio-Legal Studies, 1992).


Bryant, Michael & Lorne Sossin. Public Law (Toronto: Carswell, 2002).

Buckley, Melina. Moving Forward on Legal Aid: Research on Needs and Innovative Approaches (Ottawa: Canadian Bar Association, 2010).


Harris, Mike & Preston Manning. Vision for a Canada Strong and Free (Canada: The Fraser Institute, 2007).


Morton, F.L. *Charting the Charter* (Calgary, Alta: Research Unit for Socio-Legal Studies, 1987).


---. *The Political Impact of the Charter of Rights* (Calgary, Alta.: Research Unit for Socio-Legal Studies, 1986).


---. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).


**Secondary Material: Articles**


Carpay, J. “A level playing field for classical liberalism: the abolition of the Court Challenges Program empowers a diversity of perspectives on freedom and equality” (2007) 16 Const. F. Const. 117.


Other Material


Bauman, Robert C. J. BCSC. “Address by Chief Justice Bauman” (Speech delivered at the Pro Bono Appreciation Breakfast, March 26, 2010, Vancouver).

Bedford v. The Queen, Court File No. 07-CV-329807PD1 (Ont. Sup. Ct. J.), (Notice of Application of the Applicant).


Canada, Protection of Language Rights under the Court Challenges Program, Report of the Standing Committee on Official Languages (Ottawa: Library of Parliament, 2007) (Chair: S. Blaney)


Court Challenges Program, Annual Reports, 1994-2007, online: Court Challenges Program <http://www.ccppcj.ca/e/resources/resources.shtml#annual>.

Court Challenges Program Funding: Equality Cases, online: Court Challenges Program <http://www.ccppcj.ca/e/funding/funding-equality.shtml#funding>.


---. Unmet Need for Criminal Legal Aid: A Summary of Research Results (Ottawa: Justice Canada, 2003).


David Asper Centre for Constitutional Rights, Strategic Plan 2009-2014, (Toronto: David Asper Centre for Constitutional Rights, 2009).


---, *Group and Test Case Certificates*, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/info/test_cases.asp>. 


McLachlin, Beverley C.J.C. “Coming of Age: Canadian Nationhood and the *Charter of Rights*” (Speech delivered at the Association of Canadian Studies Conference, *20 Years Under the Charter*, 17 April 2002, Ottawa) [unpublished].

---. “The Challenges We Face” (Speech delivered at the Empire Club of Canada, Toronto, 8 March 2007) [unpublished].


Taber, Jane. “Pressed on prostitution law, PM jokes about dominatrix” *Globe and Mail* (2 December 2010), online: Globeandmail.com


Tyler, Tracey. “A 3-day trial likely to cost you $60,000” The Toronto Star (3 March 2007), online: Toronto Star < http://www.thestar.com/News/article/187854>.
