A submission to the

House of Commons Standing Committee on Canadian Heritage

For its study of

BILL C-316

AN ACT TO AMEND THE DEPARTMENT OF CANADIAN HERITAGE ACT (COURT CHALLENGES PROGRAM)

44th Parliament, 1st Session

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An individual

April 2024

Truths and half-truths in Bill C-316

Bill C-316 tries to mandate the Department of Canadian Heritage to have a court challenges program.

However, since it is a private member's bill it cannot appropriate money and therefore does not create the Court Challenges Program. And since it cannot bind future governments, it does not protect the Court Challenges Program either. A future government could stop funding the Program through the estimates and repeal Bill C-316 in a budget implementation act.

So, to be clear: Bill C-316 is a hollow measure with no real-world impact.

But even as a hollow measure, Bill C-316 is based on half-truths.

The first half-truth is in the first clause of the preamble:

> Whereas the Government of Canada first created the Court Challenges Program in 1978 to help official language minority communities take legal action to clarify and affirm their language rights…

The Government of Canada created the Program to attack Quebec's Bill 101 without using the defunct disallowance power or challenging the law directly. Bill C-316 should be amended to ensure the Court Challenges Program only finances challenges to federal legislation, regulations, or programs.

The second half-truth comes later in the preamble:

> [W]hereas Parliament recognizes the need to entrench into law an independently administered program to give a voice to those who might not have the ability to bring court challenges forward … and to hold government to account…

A government program cannot give voice to genuinely disadvantaged groups or hold government to account.

Finally, there is truth in one section of the preamble:

> Whereas, in 1992, the Government of Canada cancelled the Court Challenges Program before restoring it in 1994 and then cancelling it and restoring it several times over the years…

The Court Challenges Program funds only one side of inherently political court cases. This undermines its political support and has led to the cycle of cancellation, recreation, and cancellation. Bill C-316 should be amended to ensure it can survive future changes of government.

The Court Challenges Program and provincial jurisdiction

In 1976, the federal government began searching for ways to challenge the constitutionality of Quebec's Bill 101. Cabinet initially considered two options. The first was to resurrect the defunct power of disallowance under which Cabinet could simply have declared Bill 101 invalid. The second was to challenge Bill 101 directly by suing Quebec and depending on federally appointed superior court judges to find it unconstitutional.

Mr. Trudeau's government knew it would have paid a political price if it pursued either of these options.

Instead, it worked with local activists to create English-language rights groups in Quebec, used federal money to set them up, and created the Court Challenges Program to pay for their court challenges to Bill 101. To avoid looking like it was singly out Quebec's actions, it also paid for court challenges to language legislation in other provinces. This tactic worked, and when Mr. Trudeau had new language rights added to the Constitution in 1982, his government expanded the Program to pay for court cases involving the new rights as well.

Setting aside the legal merits of these court cases and the judicial decisions that resulted from them, the Court Challenges Program was designed to replace the defunct power of disallowance. The federal-provincial dimension of the Program has never rested on a principled basis. I therefore recommend that Bill C-316 be amended to limit federal funding to challenges of federal laws, regulations, and programs.

> Recommendation 1
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> Bill C-316 should be amended to limit its ambit to federal laws, regulations, and programs by adding additional text as follows:
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> (a.1) establish and implement an independently administered program whose objective is to provide financial support to Canadians to bring before the courts test cases of national significance that aim to clarify and assert certain constitutional and quasi-constitutional official language rights and human rights to the extent that they involve laws, regulations, and programs of the Parliament or Government of Canada …

A government program cannot give voice to disadvantaged groups and hold government to account

The drafters of the Constitution Act, 1867 argued that Canada's system of government would protect the rights and freedoms of Canadians. By dividing the House of Commons and the provincial legislatures into two sides, government and opposition, they had ensured there would always be an opposition party in a position to hold the government to

account. Regular elections would ensure government and opposition swapped roles from time to time. Canadian federal politics eventually developed a tradition of new political parties emerging to challenge the dominance of the two oldest parties. This provides further opportunities to hold government to account.

Supporters of the Court Challenges Program argue that our system of government has failed to protect the rights and freedoms of disadvantaged groups. They hope that pushing public issues into the courts increases the authority of judges, reduces that of parliamentarians, protects disadvantaged groups, and holds government to account.

These are not valid arguments. Judges are, on average, wealthier, better educated, and older than parliamentarians. They are invariably senior lawyers and lack the occupational diversity of parliamentarians. As a group, judges are not better placed to protect disadvantaged minorities.

Moreover, the groups and individuals with the resources to get funding from the Court Challengers Programs also have the resources to be heard in Parliament, Cabinet, and the bureaucracy. Once government determines which groups or individuals should get funding to launch court cases, rights litigation ceases to be a grassroots, ground-up process of holding government to account.

Government does continue to be held to account in court by privately funded groups. During the recent pandemic, privately funded groups like the Justice Centre for Constitutional Freedoms challenged government actions that oppressed our rights and civil liberties. The Court Challenges Program has funded challenges to government regulations that limited the ability of Canadians to earn a living, visit family or friends, travel, or shop for the necessities of life based on their medical records. The recent invocation of the Emergencies Act was successfully challenged by the Canadian Constitution Foundation. Whether one agrees with these challenges or not, the most oppressive program of government regulation since 1970 was challenged with private funding, not the Court Challenges Program.

The Court Challenges Program as a political effort

When the Court Challenges Program expanded to finance equality rights issues in 1985, it was drawn into inherently divisive issues of social reform and program design. These issues are subject to partisan debate. As government changed hands, a cycle of cancelling, recreating, then cancelling again became an inevitable fact of life for the Program. Without reforms to the Program, that cycle will continue.

Moreover, in many cases equality rights come into conflict with other *Charter* rights like the right to freedom of expression, peaceful assembly, and religion. In the cases, the Court

Challenges Program funded only one set of *Charter* arguments in this contentious litigation. That further sapped the Program's political support.

The protection of human rights should be above partisan politics. If there is to be a legislative mandate for the Court Challenges Program, it should be a broader Program than we have had in the past.

For example, why would the Program not finance free speech litigation by journalists like Ezra Levant and Mark Steyn? One need not agree with either of them to recognize that they have challenged oppressive provisions of federal and provincial human rights codes. If a religious university creates a teacher training program or a law school that respects the beliefs of a minority religious faith, why not would the Program not finance challenges to the narrow accreditation processes of some professional colleges?

Going beyond *Charter* issues, why not let the Program finance litigation against interprovincial trade barriers? If the Program had a broader governance structure reflecting the breadth of Canada's political spectrum, it could survive changes of government.

Recommendation 2

Bill C-316 should be amended to ensure that the board of directors of a court challenges program has nominees from each of the political parties represented in the House of Commons.

(a.1) establish and implement an independently administered program under a board of directors with members representing each of the political parties represented in the House of Commons and whose objective is to provide financial support to Canadians to bring before the courts test cases of national significance that aim to clarify and assert certain constitutional and quasi-constitutional official language rights and human rights ...

Recommendation 3

Bill C-316 should be amended to prevent a court challenges program from financing any court case that involves the collision of one *Charter* right with another.

(a.1) establish and implement an independently administered program whose objective is to provide financial support to Canadians to bring before the courts test cases of national significance that aim to clarify and assert certain constitutional and quasi-constitutional official language rights and human rights that do not involve possible conflict between those rights ...

Conclusion

As currently drafted, Bill C-316 would continue to allow the federal government to fund challenges to laws, regulations, and programs within exclusively provincial jurisdiction. It would also perpetuate the cycle of cancellation, recreation, and cancellation that has affected court challenges programs since 1985. Finally, Bill C-316 does not deal with the problem of funding court challenges that involve conflict between *Charter* rights. These problems should be resolved before Bill C-316 is passed.

About Ian Brodie

- PhD Political Science, University of Calgary, 1997
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Ian Brodie is Professor in the Department of Political Science and a Fellow at the Centre for Military, Security and Strategic Studies, both at the University of Calgary. He is Program Director at the Canadian Global Affairs Institute, a Fellow of the Halifax International Security Forum, and Chair of the Research Committee of the Board of Directors at the Institute for Research on Public Policy.

He is author of many books and articles, including the Amazon.ca Politics bestseller, *At the Centre of Government* (McGill-Queens, 2018), and *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (SUNY Press, 2002). He has written extensively about the Court Challenges Program, including the peer-reviewed article "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program," *Canadian Journal of Political Science*, 34:2 (2001), pp. 357–76, and chapters in various editions of *Law, Politics, and the Judicial Process in Canada* (University of Calgary Press).

Prof. Brodie has served at the highest level of government and politics. He was a senior member of the team that created the Conservative Party of Canada and propelled Stephen Harper into the Prime Minister's Office. He served Chief of Staff to the Prime Minister of Canada from 2006 to 2008. Prior to that, he worked as Executive Director of the Conservative Party of Canada and as Chief of Staff to the Opposition Leader. Prof. Brodie returned to campus in 2013 after four years with the InterAmerican Development Bank. In 2022, he served as Chair of the Conservative Party's Leadership Election Organizing Committee. He also taught for six years at the University of Western Ontario before heading to Ottawa and has been a visiting scholar at the McGill Institute for the Study of Canada.