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Egale Canada Human Rights Trust

COURT CHALLENGES PROGRAM

Recommendations for a modernized Court Challenges Program

Submitted to:
The House of Commons Standing Committee on Justice and Human Rights
19 May 2016

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Executive Summary

- Egale strongly supports the reinstatement of the Court Challenges Program (CCP), an excellent program that Egale used frequently
- CCP made a significant contribution cases helping to reduce discrimination based on sexual orientation
- It is no coincidence that the termination of the CCP coincides with a stagnation in the jurisprudence; there have not been landmark rulings on gender identity and expression equivalent to those made on sexual orientation
- A renewed CCP is a matter of fairness; it will help level the playing field between marginalized groups and governments
- CCP is a powerful investment, allowing Canada to effectively leverage the resources of the private Bar
- CCP will enhance equality, and improved equality enhances the quality of life for all Canadians
- CCP administration should be independent and cost effective
- Funding of consultations should be included in CCP again
- Caps on funding should be set at higher levels than before
- Funding should be based on merit, and not restricted based on jurisdiction, the forum of the proceeding or the *Charter* sections engaged

About Egale

Egale Canada Human Rights Trust (Egale) is Canada's only national charity promoting lesbian, gay, bisexual, and trans (LGBT) human rights through research, education and community engagement. Egale's vision is a Canada, and ultimately a world, without homophobia, biphobia, transphobia and all other forms of oppression so that every person can achieve their full potential free from hatred and bias.

Founded in 1995, Egale was one of the top consumers of the Court Challenges Program (CCP) during its former existence under the skilled leadership of then executive Director John Fisher.[1] No other group has achieved greater success in advancing equality rights through the Courts.

[1] The first of many cases in which CCP funded Egale was Rosenberg et al. v. Canada, (5 September 1995) Ottawa 79885-94, (Gen. Div.). Mr. Fisher has gone on to a distinguished career in International Human Rights and currently works for Human Rights Watch in Geneva.

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Douglas Elliott is a lawyer, a Certified Specialist and a partner in the Ontario law firm Cambridge LLP. Mr. Elliott is a leading expert on *Charter* rights, with numerous appearances in the Supreme Court of Canada to his credit including the last successful s. 15 case, *Hislop* v. *Canada*.[2] Mr. Elliott was the co-founder of the Canadian Bar Association's Sexual Orientation and Gender Identity Conference. He was the first openly gay lawyer to win the Ontario legal profession's highest honour, the Law Society Medal. Mr. Elliott frequently dealt with the CCP in his practice. He has assisted Egale in court proceedings and in law reform activities, and has been a member of Egale's Honourary Advisory Board since its inception.

Discussion

Introduction

Egale welcomes plans to reinstate the CCP and the opportunity to assist this Committee in its important work. Reinstatement provides an opportunity to critically assess the positive features and limitations of the former program, while also imagining what a more effective version might look like.

Canada is a global leader in ensuring protection from discrimination on the grounds of sexual orientation. Canada was one of the first countries in the world to legalize equal marriage. That progress is due in no small part to the impact of the CCP. However, in the years since the CCP was cancelled, Canada has "rested on its laurels."

Canada has fallen behind other countries in advancing the rights of sexual minorities, particularly in recognizing the rights of transgender, trans-sexual, two-spirit and intersex persons. Since the CCP was cancelled in 2006, not a single case has reached the Supreme Court of Canada that considers gender identity as an analogous ground. This is no coincidence.

It is to be remembered that when s. 15 of the *Charter* was approved in 1982, legislators declined to expressly include sexual orientation (let alone gender identity) in its language. However, the door was left open for the inclusion of sexual orientation as an "analogous ground." This was recognized in the Boyer Report on compliance with s. 15.[3]

Regrettably none of that Report's recommendations on law reform respecting sexual orientation were taken up by Parliament. It was clear there was a lack of political will to

[2] *Hislop* v. *Canada* [2007] 1 SCR 429.
[3] Patrick Boyer, Chairperson, *Equality For All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Minister of Supply and Services, 1985), p. 133.

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do the right thing. Our community would have to fight to establish their rights in the Courts. We did so, and mostly won, with the help of the CCP.

Perfect equality is a goal for which we should always strive as a society. Canada has come far on that journey, but still has a long way to go. A revived CCP will assist our country to advance. In the following short discussion, Egale sets out some of the reasons a revived CCP is desirable and some of the aspects of a renewed CCP that we consider necessary or appropriate.

CCP Should Be Renewed

David and Goliath: Renewal is a matter of fairness

It is perverse that a country committed to *Charter* rights would supply virtually unlimited public resources to defend *Charter* violations, and nothing at all to fund the defence of *Charter* rights.[4]

The cost of achieving equality has been modest compared to the cost of defending inequality. It is difficult to overestimate the tens of millions of tax dollars spent defending discrimination. In the case of sexual orientation, those defences almost entirely failed.

A good illustration of the lack of a level playing field is the case of equal marriage. Our community was forced to litigate against the Attorney General of Canada (AGC) in no less than nine jurisdictions, and to intervene in a reference to the Supreme Court of Canada. Egale was awarded the tiny sum of $135,000 by CCP for this entire critical campaign across Canada. In contrast, the AGC acknowledged spending $400,000 on expert fees at the trial level *in Ontario alone.*[5]

Since the cancellation of the CCP, no private sector response has emerged that has come close to matching the impact of the CCP. The Courts have failed to use their power to award advance costs[6], or any costs for that matter, in a manner that would overcome the imbalance of power between marginalized communities and the AGC. In short, there has been no private sector or public sector alternative to the CCP that has emerged to fill the vacuum.

Leveraging the Private Sector

The CCP effectively provided seed money. All cases were necessarily subsidized by the private sector, especially small and medium sized law firms. Expert witnesses often worked without charge or for modest fees. The CCP developed an experienced and

[4] Currently the notable exception is the Language Rights Support Program (LRSP).
[5] The information was disclosed pursuant to an Access to Information Request.
[6] *Little Sisters Book and Art Emporium* v. *Canada (Commissioner of Customs and Revenue)* [2007] 1 S.C.R. 38

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effective private equality Bar, and helped build strong relationships between community groups and that private Bar.

In an age when impact for money invested is a key metric in assessing the merit of any government program, it is difficult to imagine a program that has had greater positive impact for such a relatively modest investment by the Federal Government.

Equality Benefits Canada and Canadians

During the period from CCP inception to cancellation, Egale and others leveraged the CCP to transform the lives of the communities they serve. We began from a position of deliberate exclusion from the language of s. 15 in 1982. Through a process of litigation and legislative response that has been dubbed a constitutional "dialogue,"[7] we arrived at full equal marriage on a Canada wide basis by 2005.The improvement in the lives of sexual minorities has been dramatic.

However, our communities have not been the only beneficiaries. The tangible economic benefits of equality have been demonstrated by authors such as Richard Florida.[8] The price of inequality can be witnessed today in the harsh reaction of other governments and businesses to North Carolina's misguided laws.[9]

There are intangible benefits of equality as well. Our commitment to equality enhances Canada's stature among the world's democracies. Canadians can and do take justifiable pride in our commitment to human rights as part of our shared values.

[7] The theory was advanced by Professor Peter Hogg, and cited with approval by the Supreme Court of Canada in *Vriend* v.*Alberta* [1998] 1 S.C.R. 493.

[8] See Richard Florida, "The Rise of the Creative Class", Washington Monthly, May 2002, http://www.washingtonmonthly.com/features/2001/0205.florida.html

[9] A number of private sector companies have cancelled investments in the wake of North Carolina's so-called religious liberty law. The Williams Institute estimates the loss of federal government support alone at $4.5 billion. See Christy Mallory & Brad Sears, "The Fiscal Impact of North Carolina's HB2," (The Williams Institute, UCLA School of Law), May 2016 at p. 1: http://williamsinstitute.law.ucla.edu/wp-content/uploads/The-Fiscal-Impact-of-North-Carolina%E2%80%99s-HB2.pdf. Also note that there is a federal anti-religious bill "Religious Freedom Restoration Act of 1993 H.R. 1308 (103rd). The North Carolina Bill is the "Bathroom Bill" (HB 2). Public Facilities Privacy & Security Act (N.C. House Bill 2 / S.L. 2016-3). A lot of businesses, like PayPal, are protesting this law and not establishing themselves in North Carolina. See "Weinsteins Among CEOs Calling For Repeal of North Carolina's Anti-Gay Law-Update" http://deadline.com/2016/04/north-carolina-anti-gay-law-ceo-letter-mark-zuckerberg-weinsteins-1201728209/. Georgia vetoed a religious liberty bill that lets businesses and individuals not provide services to LGBT persons. This is House Bill 757 (HB 757). And see Lauren Box, "It's Not Just Personal, It's Just Business: The Economic Impact of LGBT Legislation," 48(3) *Indiana Law Review* (2015) 995.

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A Renewed CCP: Lessons from the Past, a Vision for the Future

An Independent, Cost-Effective Administration

It is essential that a renewed CCP be run independently of the Government. Egale's past experience was that the program was well managed. Future administrative costs must be kept to a minimum. There is a need to cap funds for various activities. Resources must be allocated based on maximizing impact and addressing critical needs. There must be a selection process overseen by independent experts that applies fair and transparent criteria to award scarce resources to litigation cases or other activities.

Renew Funding of Consultations

As an experienced user of the CCP, Egale found that consultations were a good use of the limited funds available. An Egale consultation on equal marriage strategy was critical. An Egale consultation on trans rights and strategy was very well received. An unexpected benefit of consultations was the opportunity to work with other marginalized groups, to identify points of intersection and to share ideas.

Higher caps

Litigation costs have increased substantially since the program was cancelled. While caps are necessary, it is better to have fewer cases with reasonable resources rather than more cases funded with inadequate resources.

Egale's experience was that the old ceiling for trials was far too low. We recommend a limit of $225,000.

Egale's experience was that the limit for interventions was reasonable, and interventions were often extremely impactful considering their modest cost. We recommend a new limit of $50,000.

Expand to Tribunals and to Matters within Provincial Jurisdiction.

The current Language Right Support Program (LRSP) provides funding based on the *Charter* rights engaged, without regard to whether the issue is a matter under federal jurisdiction or not, and regardless of whether the matter is before a tribunal or a Court. Funding is allocated based on the importance of the case, not based on the forum concerned or the level of government involved.

Egale believes that this is also the correct approach to a renewed CCP.

The exclusion of tribunals under the old CCP may have been imposed out of concern that such proceedings were too individualized to merit funding. This concern is best addressed through a careful screening process to identify cases that have broader public impact, something Egale does regularly in its own work.

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Given the proliferation of tribunals, the exclusion of tribunals from a renewed CCP would be illogical. A good illustration of the danger is provided by the history leading up the *Hislop*[10] case. The exclusion of same sex couples from Canada Pension Plan (CPP) survivor's pensions was repeatedly challenged in individual CPP tribunal proceedings. When it appeared that any successful case was about to set a precedent, that "test case" was deliberately settled by the AGC in order to avoid setting a binding precedent. The next claimant would be denied. This constitutional abuse of the tribunal system was only circumvented with the certification of a class action.[11] If CCP funding had been available, a claimant might have been willing to pursue their tribunal challenge through to a binding precedent.

Under the old CCP, cases involving provincial jurisdiction were ineligible. However, some of the key cases of importance to Egale such as *Vriend*[12] and *M.* v*. H.*[13] involved challenges to provincial laws. These rulings advanced equality and sometimes had significant impact on federal laws and policies.

The Courts recognize that the federal Government always has an interest in the *Charter* by automatically granting the AGC standing in *Charter* cases, even those involving purely provincial matters. Fairness dictates that if Canada has a legitimate interest in defending all *Charter* **violations** by provincial governments, the federal government has an equally legitimate interest in defending all *Charter* **rights** in matters under provincial jurisdiction. This is well illustrated by the *Vriend*[14] case, where the AGC intervened in support of the rights claimant against Alberta.

The artificial nature of the distinction made in the former CCP between provincial and federal laws is best illustrated by the case of *M.* v. *H.*[15] This case found that an Ontario law that denied legal recognition to same sex common law spouses violated s. 15. Although the ruling itself technically was limited to one law in one province, its impact was profound. Parliament enacted the *Modernization of Benefits and Obligations Act*[16] (MBOA) in direct response to that ruling. The MBOA is an omnibus law that amended scores of federal laws in order to include same sex couples. A ruling that supposedly affected only a provincial law triggered the MBOA, a federal Act that enhanced equality for same sex couples more than any other Act of Parliament ever.

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[10] Supra, footnote 2.
[11] *Brogaard* v. *Canada (Attorney General)*, 2002 BCSC 1149 (this was the BC companion case to Hislop)
[12] Supra, footnote 7.
[13] *M*. v. *H*. [1999] 2 S.C.R. 3.
[14] Supra, footnote 7.
[15] Supra footnote 13.
[16] Modernization of Benefits and Obligations Act (S.C. 2000, c. 12).

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Broaden the CCP beyond s. 15[17]

In its previous iteration, the CCP limited funding for equality challenges to federal laws, legislation, and policies or practices that were based on s. 15 of the *Charter*, or, invoked s. 2 (fundamental freedoms) or s. 27 (multiculturalism) in support of s. 15 of the *Charter*. Under the prior version of the CCP, claims seeking protection of ss. 7-14 legal rights under the *Charter* were not eligible for funding — even when brought in connection with s. 15.

The exclusion of ss. 7-14 legal rights may have been based on two main assumptions: first, that legal rights are too individualized to serve the collective goals of the program; and second, that individuals facing ss. 7-14 rights deprivations would already benefit from state-funded legal aid, particularly in criminal cases.

These assumptions have not been borne out by recent *Charter* jurisprudence. There has not been a successful s. 15 claim before the Supreme Court of Canada since the 2007 decision in *Canada (Attorney General) v Hislop*.[18] In recent years, arguably other *Charter* provisions have been more effective at protecting the rights of marginalized and vulnerable groups than s. 15 itself.

In *Carter* v. *Canada (Attorney General)*, for example, the Court struck down the criminal prohibition of physician-assisted dying.[19] The Court held that the prohibition violated the s. 7 rights of competent adults seeking such assistance as a result of a grievous and irremediable medical condition causing enduring and intolerable suffering, and that this violation was not justified under s. 1. While the claimants invoked s. 15, the Court found it was unnecessary to consider that aspect of the claim. The claimants did not bring their challenge in the context of defending a criminal prosecution, but as an application for a declaration that provisions of the *Criminal Code* were unconstitutional. Their claim was therefore not funded by legal aid.

Similarly, in *Canadian Doctors for Refugee Care* v. *Canada (Attorney General)*[20] the Federal Court found that the government's cuts to Interim Federal Health funding for refugee claimants and other persons seeking protection from Canada amounted to cruel and unusual treatment under s. 12 of the *Charter*, and was not justified by s. 1. At the

[17] The author is indebted for this section to an article in the online magazine *Slaw* by Egale's Legal Issues Committee Chair, Jennifer Klinck, and member, Kyle Kirkup, "Courting Controversy: Substantive Equality and the New Court Challenges Program," *Slaw*, April 25th 2016 http://www.slaw.ca/2016/04/25/courting-controversy-substantive-equality-and-the-new-court-challenges-program/

[18] *Canada (Attorney General)* v. *Hislop* 2007 [2007] 1 SCR 429. Mr. Elliott was senior counsel in this case, Canada's first successful constitutional class action. The ruling had the effect of awarding millions of dollars in survivors' pensions that had been unconstitutionally denied to gays and lesbians whose partners had died.

[19] *Carter* v. *Canada (Attorney General)* [2015] 1 SCR 331.

[20] *Refugee Care* v. *Canada (Attorney General)* 2014 FC 651.

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same time, the Court rejected the challenge based on s. 7 of the *Charter* and all but a narrow aspect of the s. 15 argument. Indeed, s. 15 only protected one class of claimants (refugee claimants who were excluded based on their country of origin). The broad basis for the ruling was s. 12 and, despite the most fundamental human rights interest it protects, the application was not covered by legal aid. Nor would the s. 12 aspect have been eligible for funding under the old CCP.

The reluctance of courts to extend s. 15 to protect the economically marginalized is another reason why funding for litigation that raises substantive equality issues should be decoupled from the need to make a s. 15 claim. In *Dunmore* v*. Ontario (Attorney General)*, the Supreme Court considered the constitutionality of legislation that excluded agricultural workers from the standard labour relations regime.[21] The majority of the Court found the legislation unconstitutional because it violated s. 2(d) freedom of association, but found it unnecessary to decide whether it violated s. 15(1).

Ten years later, in *Ontario (Attorney General)* v*. Fraser*, the Court considered the constitutionality of labour relations legislation specifically targeted at agricultural workers.[22] The majority in that case found the legislation constitutional, notably finding that the agricultural labour relations regime did not violate s. 15 because there was no evidence that it utilized stereotypes or perpetuated existing prejudice or disadvantage. Although agreeing in the result, Justice Deschamps' reasons argued that "[t]o redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as L'Heureux-Dubé J. proposed in *Dunmore*." To get to such an approach, however, "would entail a sea change in the interpretation of s. 15 of the *Charter.*"[23] It therefore seems likely that, at least for now, *Charter* litigation to advance substantive equality for the economically marginalized will often depend on provisions other than s. 15.

In January 2015, the British Columbia Civil Liberties Association, along with the John Howard Society of Canada, launched a constitutional challenge to the use of solitary confinement in Canada's federal prisons. The groups argue that sections 31, 32, and 33 of the *Corrections and Conditional Release Act*[24] violate ss. 7, 9, 10, 12, and 15 of the *Charter*. While some prison law issues are covered by legal aid in British Columbia, fear of reprisals among inmates led two institutional plaintiffs to launch this systemic challenge, rather than individuals. The case obviously raises important substantive equality issues, including the overrepresentation of those with mental health issues in solitary confinement. It is unfortunate that the legal rights aspect of their case would not be eligible for funding under the old CCP, and that funding could be denied altogether if

[21] *Dunmore* v*. Ontario (Attorney General)* [2001] 3 SCR 1016.
[22] *Ontario (Attorney General) v Fraser* [2011] 2 SCR 3.
[23] Ibid., para. 319.
[24] Corrections and Conditional Release Act (S.C. 1992, c. 20)

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the panel viewed the s. 15 argument as unmeritorious — regardless of the strength of the other *Charter* claims.

In addition to this recent example, it is easy to envision other *Charter* claims to protect the collective rights of prisoners — a marginalized group — that may not be eligible for legal aid and would not fall neatly into s. 15. These could include challenges to prison policies leading to overcrowding (ss. 7 and 12), restrictions on access to reading materials (ss. 7 and 2(b)), and limitations on religious practices (ss. 7 and 2(a)), to name just a few. A CCP focused on promoting substantive equality should not exclude such claims from the outset.

Ultimately, forcing marginalized groups with meritorious *Charter* claims to frame their arguments in terms of s. 15 is both unfair and wasteful. The practical effect of requiring a connection to s. 15 will be to encourage applicants for funding to simply add on a s. 15 claim to the list of arguments they propose to raise. If ss. 7-14 legal rights remain excluded from funding, litigants may be encouraged to abandon or place less emphasis on the strongest arguments in support of their case.

The panel reviewing a claim for litigation funding will have to make a preliminary assessment of whether the claim is meritorious. If funding depends on a s. 15 connection, it is likely that applications with a strong s. 7 claim and a merely tacked on (and unpersuasive) s. 15 claim will be denied.

The need to make a s. 15 argument will also unnecessarily complicate funding applications and the review process. Rather than encouraging claimants to present the strongest *Charter* case for the panel's consideration, one that best redresses substantive equality issues, the panel will be burdened with sifting through claims awkwardly shoe-horned into s. 15.

Finally, bringing a s. 15 *Charter* claim is costly because of the heavy evidentiary burden in establishing comparator groups and adverse effect discrimination. It is imprudent to incentivize plaintiffs to bring s. 15 claims as a condition for receiving funding, when the claims may be better and more efficiently advanced under other provisions of the *Charter*.

Instead of formalistically excluding certain claims for failing to invoke s. 15 of the *Charter*, Egale proposes a more substantive approach. *Charter* claims by marginalized groups that raise issues of national importance and are aimed at improving substantive equality should be seriously considered, including s. 15 claims, but regardless of the specific *Charter* provisions they raise. While we welcome the reintroduction of the program, the pursuit of substantive equality requires more.

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Conclusion

The project of equality for sexual minorities in Canada has made great progress, with much credit owed to the old CCP. The CCP was a very good program, but a revived CCP can be even better. Egale looks forward to the opportunity to continue its work for justice with the assistance of a reinvigorated CCP. Egale stands ready to assist Parliament and the Government in designing a 21st century program that will meet the needs of marginalized communities and help make Canada an even better country.

Thank you for your consideration of our submissions, and please do not hesitate to contact us if we can assist further.

For Egale Canada Human Rights Trust

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