What's the future of the Court Challenges Program?

At the CBA meetings in St. John's this summer, Justice Minister Vic Toews took questions on a variety of topics, including those seeking assurance as to the stability of the Court Challenges Program.

The CCP is a national, non-profit organization mandated to support test cases of national significance relating to language and equality rights. It receives about $3 million annually from the federal government. The Mulroney government closed the CCP down in 1992. The Liberals reinstated it after the 1993 election, in which both the Liberal and Conservative parties supported reinstatement.

Conservative commentators, lawyers, and political scientists oppose public funding for test case litigation. Ian Brodie, now chief of staff to Prime Minister Stephen Harper, wrote in 2001 that it "raises questions about the traditional view of judicial review and interest group litigation." It is the Charter, not the CCP, however, that displaces this traditional view. All branches and levels of government must operate under the Charter's strictures. The federal government can avoid Charter litigation by changing its policies; otherwise, it must defend its policies in the courts. Either way, it acts in the public interest, and at public expense.

It is not appropriate in our constitutional democracy for the Minister of Justice, the Cabinet or even Parliament to have the final word on Charter compliance. That responsibility lies with courts of law. The legal supremacy of the Charter — in combination with the extraordinary strictures laid down in s. 33 for statutory override of some Charter rights — makes this clear.

Charter litigation is a serious and expensive business. The courts are its gatekeepers, through the established rules of standing and justiciability. While the courts can shift the financial burden through cost orders, these orders cannot finance the initiation or carriage of litigation.

The CCP supports test case litigation of sufficient merit and significance. Its application processes likely improve the quality of the litigation. So too its support of interventions adds expertise and social context otherwise unavailable to the parties on both sides of the courtroom.

Charter challenges are in the public interest: we are all right holders now, even those who cling to traditional values and institutional roles. These proceedings merit public support. Otherwise only the rich, powerful or well-connected will be able to litigate to vindicate their rights.

Toews began his ruminations on the CCP by noting its governmental tie to the Ministry of Canadian Heritage and Status of Women, which is now reviewing all its programs. He made clear that he had no involvement in or knowledge of the review process. So far, so good.

Toews went on to register his disapproval of the CCP. While he surmised that CCP funding goes to good causes, he expressed astonishment at the secrecy of its recipient list on legal and political grounds. It was an astounding expansion of [solicitor-client] privilege to withhold this information from public scrutiny. Non-disclosure undermined political accountability, because legislators cannot assess the program's effectiveness.

These comments seem overheated. The Federal Court has opined that solicitor-client privilege covers information as to the identity of recipients of CCP funding, on analogy to legal aid. This privilege protects the integrity of the litigation process generally.

Disclosure to the Minister of Justice would be particularly inappropriate. He is, ex officio, the Attorney General of Canada. His department is often the primary respondent in these cases and its lawyers do legal work for all ministries.

Governments sometimes litigate simply to delay the inevitable. They may prefer to respond to a court ruling rather than engage in pre-emptive law reform that might antagonize their electoral base. The Supreme Court looks with disfavour on government concessions within Charter cases. These factors increase the complexity and duration of Charter litigation, and thus its expense.

The CCP has become a political football for those who resist the Charter's displacement of traditional values and its reconstruction of institutional roles.

Any structural changes in the future should flow from full deliberation in a public forum of all arguments relating to the Court Challenges Program, on their merits.

Lorraine E. Weinrib is a professor at the Faculty of Law, University of Toronto.