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The Costs of Charter Litigation

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Introduction

The enactment of the *Charter of Rights and Freedoms* in 1982 fundamentally altered both the substance and form of constitutional review. In the first decade of *Charter* litigation, many novel claims were advanced and resolved, yet there still remained a great deal of confusion with respect to the scope of the substantive principles and the procedural mechanisms for raising and applying them. After 35 years, most of the relevant constitutional principles have been solidified and clarified, as have the guidelines on the procedures for mounting a constitutional challenge. However, despite the great achievements of the past three and a half decades, there remains a legitimate concern that most Canadians do not have the financial resources to mount such challenges. Many believe that there still remain serious problems regarding access to justice for ordinary Canadians.

In fact, a brief review of academic scholarship and popular journalism demonstrates that a consensus has emerged that most people cannot afford to mount constitutional challenges in order to vindicate their rights-claims. The conventional wisdom that most challenges are cost prohibitive for Canadians is repeated endlessly like a well-worn mantra. Within academic literature, we find the following statements:

- Individuals with legitimate *Charter* claims in the non-criminal context must bear the enormous costs of their actions or find counsel who will be prepared to work *pro bono*. … Thus, the great promise of *Charter* jurisprudence is dependent upon a litigant clearing the practical hurdle of costs. [1]

- While our system of justice delivers quality results, it often does so at a cost that shuts the courtroom door to all but the well-to-do.[2]

- It is a rare client with a *Canadian Charter of Rights and Freedoms* issue who has deep pockets, and deep pockets are required for almost any *Charter* challenge. … While not every *Charter* case is of transcendent importance, many of those that we have to turn away for want of funding had the potential to advance some very important values in Canadian society and, if successful, would make Canada a better place for minorities and those for whom the *Charter* was enacted in the first place.[3]

[1] Benjamin L. Berger, "Putting a Price on Dignity: The Problem of Costs in Charter Litigation" (2002) 26 Advocates' Q. at 235.
[2] Robert J. Sharpe, "Access to Charter Justice" (2013) 63 SCLR (2d) at 3.
[3] Joseph J. Arvay & Alison Latimer, "Cost Strategies for Litigants: The Significance of *R. v. Caron*" (2011) 54 SCLR (2d) at 427, 448-449.

- Unfortunately, as litigation is both timely and expensive, only the richest in society can afford to utilize this final resort without a litigation-support program such as the CCP (Court Challenges Program). Indeed, without the program, Canada's most vulnerable groups will continue to be left out in the cold.[4]

- One of the main impediments to obtaining effective and meaningful *Charter* remedies is the costs and delay of litigation.[5]

- It will come as no surprise to those familiar with the process of litigation to discover that the cost of mounting a *Charter* challenge is extremely high. … Costs like these represent a formidable obstacle to disadvantaged and even middle-income Canadians who wish to pursue their *Charter* rights in the courts.[6]

One finds similar sentiments expressed within popular journalism:

- While there may be much to celebrate, the process of using [the *Charter*] to establish rights is time-consuming and expensive, almost entirely dependent on government subsidies and the benevolence of lawyers to bankroll cases, sometimes costing millions of dollars. … Like fine champagne, the *Charter* is in danger of becoming a luxury many never taste. … It's like the Dom Pérignon that's locked behind the door at the LCBO. It may taste great, but if you can't get at it, what does it matter? … It doesn't seem right that the government enacts the *Charter* and commits itself to having individuals protected through our justice system, and yet makes it economically impossible for that to happen.[7]

- In addition, the costs of litigation have sent the price of a *Charter* challenge soaring out of reach for ordinary litigants and many public-interest groups. … We are stuck with this *Charter* that looks wonderful on paper, but it's just that – paper – unless people have the ability to enforce their rights. … Only those who drive a Cadillac get to use the *Charter* highway.[8]

In this brief report, I will address the issue of whether *Charter* challenges are, in fact, beyond the means of ordinary Canadians by looking at the costs incurred both in challenges I have advanced and in other challenges for which there is some information regarding the costs of the challenge. In a nutshell, it is clear that in cases in which there is extensive legislative fact evidence, it is possible for the costs of a challenge to exceed $1,000,000, whereas in cases in which the challenge is advanced and supported

[4] Larissa Kloegman, "A Democratic Defence of the Court Challenges Program" (2007) 16:3 Constitutional Forum at 107.
[5] Kent Roach, "Enforcement of the Charter – Subsections 24(1) and 52(1)" (2013) 62 SCLR (2d) at 486.
[6] Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, Scholarly Publishing Division, 2010) at 104-105.
[7] Tracey Tyler, "The Charter's challenges", *Toronto Star* (7 April 2007), online: <www.thestar.com>.
[8] Kirk Makin, "Charting a course in the age of judicial review", *The Globe and Mail* (11 April 2007), online: <www.theglobeandmail.com>.

largely by legal argument, and not evidence, the costs of the challenge will entirely depend upon legal fees. In many of these cases, the costs will be considerably less and will rarely exceed $50,000.

The Author's Experience in Mounting Constitutional Challenges

Since the early 1990s, I have had carriage of numerous constitutional challenges, most often seeking invalidation of *Criminal Code* offences. I have brought challenges to various offences— including those pertaining to obscenity,[9] drug literature,[10] gaming houses,[11] marijuana possession[12]— and to our sex trade laws.[13] In addition, I have employed the *Charter* to secure a right to consume marijuana as medicine[14] and to create rules facilitating post-conviction disclosure and preservation of evidence.[15] Further, I have also had many occasions to employ the *Charter* in the course of ongoing criminal trials seeking remedies for procedural violations such as unreasonable search and seizure or denial of right to counsel. All of these cases were fundamentally different in terms of the time spent preparing and advancing the claim and in terms of the costs incurred in raising the claim.

Ironically, I have been asked to prepare this report on the costs of constitutional litigation despite the fact that I completed most of this work on a *pro bono* basis. It is likely that the high costs of constitutional litigation can be attributed to exorbitant legal fees; however, even when lawyers complete work *pro bono*, or on a highly-discounted, basis, for many cases there will still be serious cost issues relating to disbursements, and, in particular, expert evidence. Nonetheless, in my experience, there are many ways to reduce the costs of disbursements, and I have found that constitutional challenges can be brought in a way which is affordable to many Canadians—as long as legal fees are not excessive.

To advance the constitutional challenges I have brought in the past 30 years, I have relied upon three methods of funding (for disbursements). The challenge to the marijuana possession offence (which ended up in the Supreme Court of Canada) was funded entirely by donations from interested parties. In many constitutional claims, there is an ongoing political debate and there are often activists and supporters who are willing to donate small amounts of money for the "cause". In the marijuana

[9] *R v Emery*, 8 OR (3d) 60.
[10] *Iorfida v MacIntyre*, 21 OR (3d) 186.
[11] *R v Andriopoulos*, [1994] OJ No 2314.
[12] *R v Clay*, [1997] OJ No 3333 (Gen Div), 49 OR (3d) 577 (OCA), 2003 SCC 75.
[13] *R v Bedford*, 2013 SCC 72.
[14] *Wakeford v Canada*, 166 DLR (4th) 131 (Gen Div), [1999] OJ No 1574 (SCt J), [2000] OJ No 1479 (SCt J), 58 OR (3d) 65 (OCA) [Wakeford].
[15] *Chaudhary v Ontario (Attorney General),* 2013 ONCA 615; Winmill v Canada (Ministry of Justice), 2015 FC 710.

challenge, the applicant/accused was able to raise $25,000, which was used primarily for expert witnesses. Most of these witnesses were willing to come to court and testify on a *pro bono* basis, and the funds were used for transportation and accommodation. Some witnesses were paid a $1000 honorarium, but most were willing to work without pay. In subsequent cases dealing with the right to use marijuana as medicine, modest funding (approximately $20,000) was obtained from American benefactors (George Soros' Drug Policy Foundation and Peter Lewis' Marijuana Policy Project). Although I was never able to find Canadian benefactors to provide disbursement funding, it must be remembered that many challenges involve issues which are currently a matter of political debate and activism. Therefore, there will always be supporters willing to donate funds, and in the digital era it has become easy to target these potential small-scale benefactors. In fact, for the recent Federal Court invalidation of the *Marihuana for Medical Purposes Regulations*,[16] the case was entirely funded by donations from patients and pro-cannabis supporters.

Due to the unpredictable nature of fundraising, I did not rely upon this method of disbursement funding in many cases. For other cases, I did rely upon two other sources of funding: the defunct Court Challenges Program and the Test Case Program at Legal Aid Ontario. Between 1999 and 2002, I received approximately $50,000 for two cases dealing with the right to consume marijuana as medicine.[17] Both cases were brought by an activist, James Wakeford, and both cases involved extensive legislative fact evidence, multiple hearings and appeals. I no longer have complete records of these files, but I do recall that the funding secured from the Court Challenges Program was largely needed to fund the extensive array of expert witnesses. As in most of my cases, I was able to obtain this expert evidence without having to pay fees for service (other than the occasional $1000 honorarium). At the end of the day, we did not incur high costs for transportation and accommodation (as the Crown chose not to bring these witnesses to Toronto for cross-examination) and there were some funds remaining to pay my fees and the fees of co-counsel. (I believe these fees did not exceed $10,000 for both cases.)

Being able to secure expert witnesses on a *pro bono* basis is partly a product of the fact that, as an academic, I am better able than a practising lawyer to persuade other professors to volunteer their time for free. More importantly, by working with a team of students, I am able to minimize the amount of work which is required of the expert, as my students will always take responsibility for drafting the expert's affidavit so that the expert need only review the draft. Although the experts will spend a fair

[16] *Allard v Canada*, 2016 FC 236.
[17] *Wakeford*, *supra* note 14.

amount of time being interviewed by a student, they do not have to devote much time to the completion of the affidavit.

Most recently, I applied for Test Case funding from Legal Aid Ontario (LAO) to bring the *Bedford* challenge to our sex trade laws. I should note that the Court Challenges Program (in 2002) and the Test Case program (in 2006) both denied funding for this challenge in the belief that it was unlikely to succeed; however, I was able to finally persuade the Test Case Program to provide $30,880 in disbursement funding in 2007 (with another $14,389 provided in 2008). Before turning to some of the details of the *Bedford* funding, it should be noted that many provincial legal aid plans do have programs for test case funding based upon criteria similar in nature to the defunct Court Challenges Program. In Ontario, funding can be secured for "public interest" cases as defined by the following criteria:

> A public interest matter is one that demonstrably, based on specific factors established by LAO:
> - advances important public interests, in alignment with LAO's access to justice mandate and strategic goals
> - transcends individual interests
> - addresses a serious issue that fundamentally affects low-income Ontarians or disadvantaged communities whose perspective would be unlikely to come before the courts but for the involvement of LAO
> - is a an effective and efficient use of resources – a practical and realistic means of bringing an issue before the court[18]

Despite the existence of these programs, I cannot speak to their efficacy as I have no information on the scope and nature of funding they provide. With respect to the *Bedford* challenge, it can been seen that the funding was indeed modest: $45,269 was awarded for a case involving over 60 witnesses (most of whom were cross-examined), 27,000 pages of documentary evidence, 7 days to hear the application and 5 days of argument on appeal in the Court of Appeal. (There was a different funding arrangement for the Supreme Court of Canada, as will be discussed.) As with my other cases, there were no counsel fees paid, and all of the experts waived any fees for service. The funding was primarily requested to allow for the transportation and accommodation of witnesses for the purpose of cross-examination on their affidavits; however, the proposed budget was created prior to the Crown responding to our record, and when the Crown tendered affidavits from approximately 30 witnesses, it turned out that our greatest expense ($11,720) was incurred for the transcription of the cross-examinations of the witnesses I had not anticipated being required to cross-examine. Another costly expense incurred related to the

[18] Legal Aid Ontario, *Support for Test Cases*, online: Legal Aid Ontario <http://www.legalaid.on.ca/en/info/test_cases.asp>.

photocopying of an application record of 88 volumes of documentary evidence ($5749 – the total cost of approximately $16,000 for the reproduction of the record was split evenly between the applicants and the federal and provincial government). Appended to this report as Appendix A is a chart of all expenses incurred for the application – the chart shows that approximately $10,000 remained in our budget to use for the appeal to the Ontario Court of Appeal.

If expert witnesses are willing to waive fees (or if the challenge does not require extensive expert evidence), it becomes clear that the belief that *Charter* claims are cost-prohibitive will relate primarily to the issue of counsel fees. In *Bedford*, I was not willing to conduct the appeal in the Supreme Court of Canada without the assistance of other counsel, and I asked senior counsel Marlys Edwardh to assist me. A new application was then presented to the Test Case Program seeking disbursement funding and funding for the services of Ms. Edwardh.

With respect to funding for counsel, the Legal Aid plan will provide a funding of $109.13 per hour for Tier I counsel, with funding of $136.43 per hour for senior counsel. Clearly, these hourly rates for counsel are not exorbitant; however, for cases of some complexity, the hours of preparation can become unwieldy. In this case, for the appeal to the Supreme Court of Canada, it was estimated that 80 hours of preparation would be required for the leave-to-appeal application, and 490 hours of preparation would be allowed for the actual hearing in the Supreme Court. In addition, the Test Case Program provided $6,500 for disbursements for the leave application and $20,000 for disbursements for the hearing in the Supreme Court. In total, funding for taking the challenge to the Supreme Court of Canada amounted to $14,000 for the leave application and $71,876 for the appeal itself.

It is somewhat incongruous that the initial hearing and appeal cost $45,000, whereas the appeal to the Supreme Court of Canada amounted to $85,876. It must be remembered that by the time a case reaches the Supreme Court of Canada, all the “heavy lifting” has been done in terms of interviewing witnesses, drafting affidavits and attending and conducting cross-examinations. One would expect costs to be reduced as one ascends the levels of the court hierarchy. This reality underscores the significant cost to be incurred if legal fees are charged (even at the discounted legal aid rate).

To get a better sense of the potential costs that can be incurred with complex litigation and counsel fees, I did make some effort before the appeal to the Court of Appeal of Ontario to estimate the costs of preparing and arguing this case. Upon success in the Superior Court, the application judge unexpectedly awarded costs against the government, and I then made an attempt to estimate my fees in preparing to

apply for costs. (Ultimately this application was never brought.) Putting aside disbursements (already paid for by LAO), I estimated that my counsel fees would be $200,520 based upon the following breakdown:

- 528.5 hours of preparation at $300/hr ($158,550)
- 23.5 days of cross-examinations at $1000/day ($23,500)
- 7.5 days of court hearing at $2,500/day ($18,750)

Although the hourly rates charged in this estimate are higher than the rates allowed under the Legal Aid plan, these are still discounted rates for senior counsel. Nonetheless, once counsel fees are introduced the cost of the *Bedford* application rises to $286,401 from $45,000 (Note that this does not include any fees associated with the appeal to the Court of Appeal, as no estimate has been done of the time spent on this appeal). Most significantly, it must also be recognized that most of my litigation work, including the *Bedford* case, is done with extensive participation of law students who either volunteer or who are paid the standard rate of $15/hr for research assistance. I estimated that I spent approximately 500 hours preparing this application and I believe that if I had not had extensive student assistance, my hours of preparation would have been closer to 1500 hours ($450,000 at $300/hr).

Variables and Elusive Cost Estimates

Beyond the potential high costs associated with counsel fees, it appears that the largest variable which affects the predictability of costs will be the necessity of calling legislative fact evidence. *Bedford* was not a complex case in terms of legal argument, but it is one of the constitutional challenges known for the extensive array of legislative fact evidence tendered upon the application. Later on I will return to provide a more complete discussion of this important variable, but for now it is important to also understand that even if legal fees had been charged in *Bedford*, the costs of mounting this challenge may not be representative of the costs to be incurred for challenges of similar factual complexity. For reasons mentioned below, in *Bedford,* there were many ways, not available in other cases, in which costs could be reduced.

I am not aware of any study that quantifies the costs of various challenges brought in the past 30 years and it may be worthwhile to obtain information from the various Legal Aid programs about funding provided for test cases. However, some sense of the range of cost can be found when one examines cases in which applications have been made for advanced costs. With respect to advanced costs, courts

have the jurisdiction to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of case and in any event of cause, where:

1) the party seeking interim costs genuinely cannot afford to pay for litigation,

2) the claim adjudicated is prima facie meritorious,

3) the issues raised are of **public importance** (and have not been resolved in previous cases).[19]

Advanced costs are only awarded in exceptional circumstances, and from 2000 this award has mostly been made in cases dealing with issues of Aboriginal rights[20] and one dealing with the issue of whether traffic tickets need to be issued in French.[21] In the *Okanagan* case, the quantum of advanced costs were not pre-determined and the applicants were allowed periodically to request payment of costs in accordance with a procedure agreed to by the parties; however, it does appear that a maximum award of $814,000 was contemplated.[22] However, in the *Tsilhqot'in* case, we can see that the quantum can be very high as advanced costs exceeding $10,000,000 were incurred.[23] Of course, no two cases are alike and other advanced costs show that some challenges can be completed for considerably less than these two Aboriginal rights cases. In the *Fournier* case, an award of $17,500 was originally made to pay for the mounting of a defence to a charge of fraudulently selling native status cards.[24] In the *Caron* case, an award of $91,000 was made for a language rights challenge to unilingual traffic tickets.[25] In the *Fontaine* case, an award of $70,000 was made to support a class action being brought by an Aboriginal woman against a residential school.[26]

In *Carter v Canada*[27], dealing with the constitutionality of the assisted suicide prohibition is a case very analogous to the *Bedford* case in terms of the *Charter* arguments made and the scope of legislative fact evidence. This case did not receive an award of advanced costs; however, the application hearing judge

[19] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*]; *Little Sisters Book and Art Emporium v Canada*, 2007 SCC 2 [*Little Sisters*].
[20] *Ibid*; *Tsilhqot'in Nation v Canada (AG*), 2004 BCSC 610; *Keewatin v Ontario*, [2006] OJ No 3418; *Hagwilget Indian Band v Canada*, 2008 FC 574; *Fontaine v Canada (Attorney General),* 2015 ONSC 7007 [*Fontaine*].
[21] *R v Caron*, 2011 SCC 5, 2011 CSC 5 [*Caron*].
[22] *Okanagan*, *supra* note 19 at para 5.
[23] *Tsilhqot'in Nation v Canada (AG),* 2006 BCCA 2 at para 18.
[24] *R v Fournier,* [2004] OJ No 1136.
[25] *R v Caron*, 2009 ABCA 34 at para 4.
[26] *Fontaine, supra* note 20 at para 9.
[27] *Carter v Canada (Attorney General),* 2015 SCC 5

decided to award "special costs" to the applicants in light of the public importance of the successful challenge. This award of "special costs" exceeded $1,000,000[28] and it is likely that the *Bedford* challenge would have also incurred costs of this magnitude had it not been for the willingness of counsel and experts to work free of charge.

The issue of costs also introduces another layer of unpredictability for the funding of constitutional challenges. In calculating the costs of litigation, one often assumes that the challenge will be successful; however, one must also account for the contingency of losing and having costs awarded against the applicant. Fortunately, the awarding of costs against applicants who have brought constitutional challenges is not a significant concern as there is a well-established doctrinal approach to costs in which costs are rarely awarded against test case applicants.[29] In fact, I have never had costs awarded against my clients in cases in which the constitutional challenge had been dismissed.

Predicting the costs of a constitutional challenge is also confounded by three other important variables. First, it must be remembered that constitutional challenges are brought within the context of an adversarial process, despite the challenge resembling a public inquiry. In *Bedford*, there was a high level of co-operation between the applicants and the federal and provincial governments, and the government often agreed to pay for some expenses incurred by the applicant (in Appendix A, it can been seen that the federal government agreed to pay for the transportation and accommodation of a witness from Australia – our costliest flight). Nevertheless, in many other cases I have been involved with there was a more adversarial and antagonistic relationship with government, and often the challenges become bogged down in interlocutory motions such as motions to strike the claim, judicial review of undertakings given in cross-examination to produce documents and the raising of numerous preliminary objections to standing, jurisdiction of the court and admissibility of evidence. In some cases, the government is willing to facilitate a speedy hearing on the merits, and in other cases the government will do whatever it can to delay addressing the merits of the claim. Obviously, if the government hotly contests all aspects of the challenge, costs will increase in a significant manner.

The second variable affecting costs relates to the choice of procedure. In all of my challenges I was able to reduce costs by initiating the process by way of application for declaratory relief and not by way of an action. Despite the fact that hearing *viva voce* evidence at a trial of an action is more dramatic, it is far

[28] *Ibid* at para 134.
[29] *Joanisse v Barker*, [2003] OTC 733 at para 14; *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General)*, 2004 SCC 4 at para 69; *Vennell v Barnardos*, [2004] 73 OR (3d) 13 at para 51.

more cumbersome and inefficient as compared to the application process in which affidavits are tendered with cross-examination of the affidavits taking place outside of court before the hearing of argument. Even with effective case management trials are notoriously unpredictable and often require a great deal of last-minute adjustments in scheduling. Having the witnesses attend for cross-examination in front of a special examiner outside of court allows for precise scheduling and reduces the burden on the witness. As can be seen from the chart of expenses in Appendix A, the costs incurred for testing affidavit evidence in the *Bedford* was very manageable and predictable.

The third variable, alluded to above, is the need for calling legislative fact evidence. If experts need to be paid, and counsel wishes to call a wide array of experts, then costs will exponentially increase. Not all cases require an in-depth analysis of legislative fact evidence; however, in recent years it does appear that this practice of calling numerous experts from various disciplines has become the norm and not the exception. As this variable is the one which most dramatically affects the quantum of costs, I wish to now briefly address the issue of how, when and why the practice of introducing an extensive record of legislative fact evidence has evolved in Canadian law.

Legislative Fact Evidence – Some Thoughts on this Critical Variable[30]

The Supreme Court of Canada may not have provided much guidance as to when and how legislative fact evidence should be introduced, but it has provided a clear definition of what legislative fact evidence entails:

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, Administrative Law Treatise (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., Charter Litigation (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context**.** Such facts are of a more general nature, and are subject to less stringent admissibility requirements….[31]

[30] Most of the discussion in this section is taken from an article I completed in 2014: A. Young, "Proving a Violation: Rhetoric, Research and Remedy" (2014) 67 S.C.L.R. (3d) 617.
[31] *Danson v Ontario (Attorney General),* [1990] 2 SCR 1086, 74 OR 763 at para 27.

Recent practice in constitutional adjudication under s. 7 suggests that the litigants believe a meritorious challenge must be accompanied by an extensive sampling of legislative fact evidence. As Da Silva has noted:

> Recent constitutional jurisprudence has seen an increasing role for expert evidence and social science research in the determination of contentious cases. Trial level constitutional arguments in *Bedford v Canada* (concerning the constitutionality of criminal prohibitions against prostitution- related activities), *Canada (Attorney General) v PHS Community Services Society* (concerning constitutional exemptions from criminal drug trafficking offences for a safe injection site), and *Carter v Canada (Attorney General)* (concerning the constitutionality of criminal prohibitions on physician-assisted dying) relied heavily on expert submissions and social science data; in *Insite,* trial level weighing of this information provided a factual basis for the Supreme Court of Canada (SCC)'s ultimate determination. Contemporaneous with these cases was the first use of British Columbia's trial level constitutional reference power: *Reference re: Section 293 of the Criminal Code of Canada,* also known as *The Polygamy Reference.*[32]

This movement towards extensive application records replete with a variety of expert evidence was propelled by a clear admonishment in the earlier *Charter*-era from the Supreme Court of Canada to the effect that constitutional challenges should not be brought in a factual vacuum. The Supreme Court of Canada clearly expressed a preference for challenges to be accompanied by legislative facts of a contextual nature. The Court stated in 1989:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[33]

The Court may have been expressing a disdain for constitutional arguments which proceed solely on the basis of the rhetoric of "enthusiastic counsel"; however, one has to wonder whether the Court was inviting counsel to convert a court hearing into a commission of inquiry. The recent flurry of s. 7 challenges were not simply accompanied by a modest selection of contextual studies and research, but rather were cases in which dozens of expert and

[32] Michael Da Silva, "Trial Level References: In Defence of a New Presumption" (2002) 2 WJ Legal Stud. 1 at 1.
[33] *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385 at 361-62 [cited to SCR]. See also, *Danson v Ontario (Attorney General),* [1990] 2 SCR 1086.

experiential witnesses testified, and countless studies were tendered without the requirement of calling the authors of the studies as witnesses.[34]

For example, in the recent polygamy reference, Bauman C.J. noted the importance of a full evidentiary record in *Charter* litigation and stated "I have taken a liberal approach to admissibility in this proceeding, admitting all the evidence tendered."[35] Thus Bauman C.J.'s disposition regarding the constitutionality of s. 293 of the *Criminal Code* rested "on the most comprehensive judicial record on the subject ever produced".[36] Bauman C.J. summarized the evidence as being comprised of over 90 affidavits and expert reports. Approximately 22 of the affiants and experts were examined who represented "a broad range of disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology."[37] Many lay witnesses also presented evidence of personal experiences within polygamous relationships.[38]

The conversion of constitutional challenges into wide-ranging inquiries of social and political facts and values extends beyond the well-known controversies involving drug injection sites, polygamous relationships, assisted suicide and sex work. For example, in a recent s. 7 and s. 15 challenge to the BC Corrections Branch's decision to cancel the Mother and Baby Program, which allowed inmates to remain with their babies after giving birth while they served their sentences, the Court heard and considered a wealth of contested evidence concerning child-rearing practices and the bond between mother and

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[34] See e.g. ***Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 84, 102 OR (3d) 321 [*Bedford* ONSC]** (88 volumes containing over 25,000 pages of evidence were presented to the court, in addition over 60 lay and expert witnesses); ***R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 at paras 26, 89-91, 121, 143-47, 200** (the Court, having been presented with numerous articles, reports, and studies, relied heavily on the 1977 Badgley Report and the 1987 Powell Report, and heard from such witnesses as therapeutic abortion physicians); ***Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 60, 79-82, 3 SCR 134** (the claimants and the government each tendered affidavits from medical practitioners assessing the efficacy of Insite) [*PHS*]; ***Carter v Canada (Attorney General)*, 2012 BCSC 886 at paras 114, 160, 278-79, 287, 299, 262-63, 287 CCC (3d) 1** (the evidentiary record included some 36 binders, 116 affidavits, and 18 witnesses who were cross-examined on their affidavits, including 11 witnesses who were cross-examined in court); ***Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (1996), 18 BCLR (3d) 241, 131 DLR (4th) at paras 1, 110 (available on QL) (BC Sup Ct) [*Little Sisters* BCSC]** (the court heard testimony from many expert or experiential witnesses, including artists, sociologists, psychologists, book distributors, librarians, and police officers); ***Victoria (City) v Adams*, 2008 BCSC 1363 at paras 38, 45, 88 BCLR (4th) 116 [*Adams*]** (the trial judge referred to two reports related to homelessness, the Report of the Gap Analysis Team and The Mayor's Task Force Report); ***Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 40, 42, 56, 62, 70-84, 114, 1 SCR 791 [*Chaoulli*]** (the Court was presented with at least 5 studies regarding wait times in Canada as well as further reports on the status of health care in other Canadian provinces and other countries, in addition to the testimony of at least 7 doctors).

[35] *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588, 28 BCLR (5th) 96 at para 46.

[36] *Ibid* at para 6.

[37] *Ibid* at paras 28-29.

[38] *Ibid* at paras 26-51, 59-62, 104-105.

child. In finding the cancelled policy to be violative of rights, Ross J. summarized evidence from 10 expert witnesses[39] and 7 experiential witnesses[40] in addition to the two applicants. These witnesses included a nurse, a sociologist, a psychologist, a physician, a law professor, a professor of psychiatry, a clinical and forensic psychologist, a clinical social worker, a correctional supervisor and some of the mothers in the program. The director of Research, Planning and Offender Programming at Corrections also provided a report regarding the "characteristics of the population of sentenced women in the province, criminogenic risk factors and factors relating to recidivism."[41]

It may not always be necessary to call legislative fact evidence. Sometimes the proof of a constitutionally adverse effect of law can be a matter of reasoned argument and simple common sense. Scientific and empirical inquiry will usually play a critical role, but, in some circumstances, common sense should come into play if science has yet to provide a conclusive resolution. For example, in *RJR-McDonald*[42], the Court needed to reach a factual finding as to whether advertising increased consumption of a product (in this case, cigarettes). The scientific studies presented to the Court were not resolute or determinative of the issue and the Court relied upon the "powerful common sense observation" that companies would not spend millions on advertising if they did not believe that it would increase consumption of their products.[43] The Court recognized that the exercise of proving the effects of law cannot be seen as a pure scientific inquiry as "predictions respecting the ramifications of legal rules upon the social and economic order are not matters of precise measurement, and are often 'the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components.'"[44]

In addition, legislative fact evidence is often available within government reports, and on a consistent and routine basis, the litigants and the courts have relied upon government reports without supporting witnesses for the purpose of elucidating legislative objectives and to provide evidence of the effects of legislation. Even a cursory review of Supreme Court jurisprudence in the *Charter* era reveals extensive reliance on government reports to establish a wide array of legislative facts.[45] Government reports may

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[39] *Inglis v British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309 at paras 255-322 (available on WL Can).
[40] *Ibid* at paras 84-134.
[41] *Ibid* at para 227.
[42] *RJR-McDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR*].
[43] *Ibid* at paras 84, 184; *Chaoulli*, *supra* note 34 at paras 136-37.
[44] *Ibid* at para 67.
[45] Consider the following diverse examples: In ***R v Butler*, [1992] 1 SCR 452 at 484, 493, 513-14 [cited to SCR],** the Court relied on the *Fraser Report* and the *MacGuigan Report* to elucidate legislative purpose and the effects of

not always be "generally accepted" and beyond debate; however, evidence-based studies of law are few and far between, and a focused inquiry by lawmakers and their agents into the effects of law may be only evidence readily available to supplement common sense and reasonable hypotheticals.

If relevant government reports or government-commissioned studies do not exist, simple reliance upon common sense and reasonable hypotheticals may not be sufficiently powerful to provide the court with the impetus to invalidate a challenged law. In *Bedford*, the factual questions underlying the constitutional argument could have been answered with common sense and reasonable hypothetical argument. Although the policy issues surrounding many aspects of the sex trade are controversial, divisive and the subject matter of endless debate, it must be remembered that the factual issue raised in the case was far more simple: can safety be enhanced by moving indoors, recruiting assistance and communicating with clients? It seems that this question could be answered easily based upon common sense; nonetheless, it is hard to imagine the Court invalidating the sex trade provisions without the accompanying record of empirical study, experiential opinion and government-commissioned reports, which all spoke to the increased risk of violence faced by sex workers operating in the current legal regime.

Concluding Thoughts on Reducing the Costs of Constitutional Litigation

I do not think it is natural or inevitable that constitutional challenges should always be million-dollar ventures. There is no question that some claims are intertwined with complex social science or natural science data, and often this data is a matter of academic and scientific debate. In these cases one would expect that high costs will be incurred for collecting, presenting and analyzing the data; however, even in cases of complexity there are ways in which costs can be reduced.

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viewing pornography. See ***R v Caine*, [2003] SCJ No 79 at paras 3, 21, 44, 55-56, 58, 195-96**: the Court relied on the *Le Dain Report* and reports of the Senate Special Committee on Illegal Drugs and the House of Commons Special Committee on Non-Medical Use of Drugs for discerning legislative purpose, demographics of marijuana users, and the effects of marijuana use. In ***Moge v Moge*, [1992] 3 SCR 813 at 854-56, 863-64 [cited to SCR],** the court relied on three Statistics Canada reports, the 1990 Department of Justice *Evaluation of the Divorce Act*, and the 1990 *Women and Poverty Revisited* report with respect to the demographics of single mothers and the economic impact of divorce. In ***R v Gladue*, [1999] 1 SCR 688 at paras 55-59** (the court relied upon the 1967 report *Indians and the Law*, the 1987 Canadian Sentencing Commission report, a report of the House of Commons Standing Committee on Justice and Solicitor General, a 1997 Federal/Provincial/Territorial report on population growth in prisons, and the five-year review of the *Corrections and Conditional Release Act* in evaluating the disproportionate impact of the criminal justice system on Aboriginal persons. In ***Reference re: Unemployment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 SCR 669 at paras 19-20, 31, 64, 72**, the court relied on the *Rowell-Siros Report*, the *Gill Report*, the *Cosineau Report*, the *Boyer Report* and the *Forget Report* to reach conclusions about the systemic discrimination of women under the Unemployment Insurance regime.

First, as mentioned earlier, whenever possible the claim should be brought as an application for declaratory relief and not as a civil action. The latter process is time-consuming, unpredictable and presumptively more expensive than a process in which most of the work is done outside of court in a more informal setting. Frankly, I am not a civil litigator and I cannot speak to available procedural mechanisms for expediting civil trials in a cost-efficient manner, but I can say that I have been able to utilize the application process in an efficient manner such that I have been able to conduct numerous challenges for a fraction of the costs associated with a lengthy court battle.

Of more importance than the choice of procedure is the question of lawyers' fees, and it can be argued that *Bedford*, and other challenges I have brought, were inexpensive ventures due to the fact that lawyers' fees were not charged. Nonetheless, even when counsel is not willing or able to do the case on a *pro bono* basis, there is a simple way to reduce costs significantly. In general, I do believe that many lawyers are content to undertake public interest litigation at the reduced Legal Aid rate. The rising cost of constitutional litigation is not a product of the rate of pay (which is low) but the hours of preparation required for completion of the challenge. It is virtually impossible to predict the amount of time needed to prepare and present the claim and capping hours often works unfairly for those who work countless hours on the file.

In my experience, I have seen the real benefit of having a team of volunteer, or low-paid, students doing the bulk of the preparatory work. Some law schools have test case programs (in which students volunteer to assist lawyers conducting public interest litigation) and *Pro Bono* Students Canada is available for matching students with lawyers in need of research assistance. Accordingly, I believe that one of the only ways a new funding program can manage the potentially high costs of lawyers' fees is by developing a process and program in which law schools play a role in providing volunteer research assistance.

Finally, a great deal of thought needs to be directed to the issue of how to manage costs associated with the tendering of voluminous legislative fact evidence through numerous expert witnesses. Earlier, I mentioned that in my cases experts were willing to work for free partly because they did not have to draft their own affidavits, but rather just reviewed drafts completed by student research assistants. Beyond this facilitation of work, experts were often willing to assist for free because they believed in the "cause" and were happy to become involved, in what they perceived to be an "activist" role. Despite the savings in costs, recruiting experts who could be considered activists is a problem for maintaining the credibility and objectivity of the expert. Not only does one have to weigh the benefits of free evidence

against the potential negative assessment of credibility, one has difficult choices to make in terms of the type of expert to be called. The best evidence always emanates from the original researcher who authored the study to be relied upon, but often this expert is not available and, even if available, there are often many other experts who have done similar studies in an effort to replicate results. Therefore, it may be more efficient not to call all of the original researchers, but rather call an expert who can provide a literature review, and methodological assessment, of available studies.

If there is any hope of managing costs with respect to legislative fact evidence, it is important to be pragmatic and prudent with respect to both the type of experts to recruit and the number of experts required in order to adequately prove the legislative facts being relied upon. Accordingly, funding programs should exercise some degree of supervisory control over the choices made and strategies adopted regarding the tendering of legislative fact evidence. Even though there are principled reasons why funding programs should not routinely exercise control and direction over choices made by counsel, it is important to ensure good choices are being made with respect to the collection and presentation of legislative fact evidence as it is this task which is primarily responsible for the belief, and the reality, that *Charter* litigation has become cost-prohibitive.

APPENDIX A
Financials for *Bedford* Constitutional Challenge

Expense	**Debit**	**Credit**	**Balance**
Original Legal Aid Ontario grant		30,880.00	30,880.00
Legal Aid Ontario funding increase		14,389.00	45,269.00
General Expenses			
Binding, copying	79.50		45,189.50
Courier	476.69		44,712.81
Courier	36.05		44,676.76
Court fees	458.00		44,218.76
Fax charges	2.50		44,216.26
Out-of-office photocopies	1,645.96		42,570.30
Photocopying	7.50		42,562.80
Photocopying	3.50		42,559.30
Postage	2.60		42,556.70
Process Server	371.00		42,185.70
GST @ 5% for authorized disbursements	293.69		41,892.01
Process Server	126.00		41,766.01
Photocopies, binding – compendium	328.04		41,437.97
Tabs and supplies	77.00		41,360.97
Tabs	45.13		41,315.84
Canada Post – correspondence to clients	57.00		41,258.84
Canada Post/FedEx – docs to newspaper	37.98		41,220.86

Witness Travel Costs			
Frances Shaver - Air fare	276.21		40,944.65
Frances Shaver - Air fare	82.36		40.862.29
Eleanor Maticka-Tyndale - Air fare	130.00		40,732.29
Gayle MacDonald - Air fare	682.30		40,049.99
Wendy Harris - Air fare	287.65		39,762.34
Dan Gardner - Train fare	154.00		39,608.34
Cecilia Benoit - Air fare	644.76		38,963.58
Expense	**Debit**	**Credit**	**Balance**
John Lowman - Air fare	1,044.34		37,919.24
Ronald Weitzer - Air fare	940.18		36,979.06
Lauren Casey - Air fare	111.87		36,867.19
Barbara Sullivan - Air fare	2,853.67		34,013.52
Witness Hotel Costs			
Frances Shaver	106.54		33,906.98
Cecilia Benoit	128.07		33,778.91
Gayle MacDonald	127.84		33,651.07
Dan Gardner	128.07		33,523.00
Elliot Leyton	123.17		33,399.83
Ronald Weitzer	111.87		33,287.96
Lauren Casey	89.27		33,198.69
Barbara Sullivan	492.68		32,706.01
Counsel Travel Costs			
Alan Young - Edmonton & Vancouver Air Fare			

	1,455.68		31,250.33
Sabrina Pingitore - Edmonton Air Fare	564.34		30,685.99
AY and SP Edmonton Hotel	878.84		29,807.15
Alan Young - Vancouver Hotel	550.00		29,257.15
Costs Covered by Crown			
Ronald Weitzer - Air fare		940.18	30,197.33
Ronald Weitzer - Hotel		111.87	30,309.20
Lauren Casey - Air Fare		732.20	31,041.40
Lauren Casey - Hotel		89.27	31,130.67
Barbara Sullivan - Air Fare		2,853.67	33,984.34
Barbara Sullivan - Hotel		492.68	34,477.02
Expense	**Debit**	**Credit**	**Balance**
Transcription Costs			
Alexis Kennedy cross-examination	581.25		33,895.77
Mary Sullivan cross-examination	1,362.50		32,533.27
Melissa Farley cross-examination	1,806.25		30,727.02
Janice Raymond cross-examination	975.00		29,752.02
Eduardo Dizon cross-examination	787.50		28,964.52
Natasha Falle cross-examination	725.00		28,239.52
Oscar Ramos cross-examination	437.50		27,802.02
Oscar Ramos transcript copy	256.25		27,545.77
Edmonton cross-examinations (Quinn, Joyal, Morrissey)	1,924.12		25,621.65

Ronald Melchers and Richard Poulin			
cross-examinations	3,092.25		22,529.40
Delivery, handling & tax for court reporter			
invoice Nov 14 2008	164.75		22,364.65
Delivery, handling & tax for court reporter			
invoice Jan 12 2009	189.13		22,175.52
Other Costs			
IKON - Joint Application Record	4,149.50		18,026.02
Students on factum - Sheetal, Shoshana, Dan	7,500.00		10,526.02
Research assistance – Sabrina	500.00		10,026.02