

# CAVALLUZZO

## Litigating Constitutional Cases: A Beginner's Guide Representing the Applicant

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"It is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means."

*Re Lavigne and OPSEU (1987), 60 O.R. (2d 486 (H.C.J), reproduced in B.C. (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71*

# Getting Started

A. *Who is your applicant?*

- individual whose rights have been violated
- public interest organization

## Test for Public Interest Standing:

- whether there is a serious justiciable issue as to the law's invalidity
- whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise
- whether there is another reasonable and effective means of bringing the issues before the court

## Per Cromwell J. (on the third factor):

It would be better, in my respectful view, to refer to this factor as requiring consideration of whether the proposed suit is, in all of the circumstances and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court.

*Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para 44

## B. How will your client pay for it?

- reduced fees
- pro bono
- fundraising
- class proceeding

# Preliminary Issues

- motions to strike
- not unexpected if issues are novel
- eggs: *Barbra Schlifer Commemorative Clinic v. AG (Canada)* (challenge to repeal of long gun registry), *Tanudjaja et al v. Canada (AG) and Ontario (AG)* (challenge to the failure to provide adequate housing)
- pros and cons

# Evidence

- individual affiants and experts
- what the expert needs to address
- the expert as advocate
- standard of proof



## Standard of Proof Examples:

- Proving that prohibitions affecting safe injection facilities engage security of the person (*Canada (AG) v. PHS Community Services Society*, [2011] 3 S.C.R.134)
- Proving that the criminalization of conduct related to prostitution (living off the avails of prostitution, common-law bawdy houses and communication for the purpose of prostitution) violates security of the person:

An added risk of physical harm compromises personal integrity and autonomy and strikes at the core of the right to security of the person. On the facts as found, the added risk to prostitutes takes the form of an increased risk of serious physical harm or perhaps even worse. Any real increase in that kind of risk must impair the security of the person.

*Bedford v. Canada (AG)*, 2012 ONCA 186, at para 111

# Conclusion

Charter litigation on behalf of applicants is very challenging but rewarding.