

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE, and
GEORGE KUEHNBAUM on their own behalf and on behalf of all members of the
CANADIAN UNION OF POSTAL WORKERS, and
BRUCE PORTER AND SARAH SHARPE, on their own behalf and on
behalf of all members of the CHARTER COMMITTEE ON POVERTY ISSUES**

Applicants

- and -

**HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA**

Respondents

AFFIDAVIT OF BRUCE PORTER

I, Bruce Porter, of the District Municipality of Muskoka in the Province of Ontario,
MAKE OATH AND SAY:

1. I am the Co-ordinator of the Charter Committee on Poverty Issues ("CCPI") and have held this position since 1994. As such, I have knowledge of the matters to which I hereinafter depose except where stated to be on information, in which case I believe the same to be true.

The Structure and Objects of CCPI

2. CCPI is a national committee whose purpose is to bring together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international law, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), human rights legislation and other law in Canada. CCPI has a board of six members. Three members of the board are low income advocates.

3. Sarah Sharpe, a resident of Gooseberry Cove, Southwest Arm, Trinity Bay, Newfoundland, is the President of CCPI. I am advised by Sarah Sharp, and do verily believe, that she is a low income woman with multiple disabilities who grew up in poverty.

4. CCPI was founded in 1989 at a national meeting in Ottawa organized by the National Anti-Poverty Organization, the Court Challenges Program of Canada and the Public Interest Advocacy Centre. Since its inception, CCPI has been administered and co-ordinated by not-for-profit incorporations which share CCPI's purposes. From 1989 to 1994 CCPI was administered by the Public Interest Law Centre in Manitoba (PILC) and co-ordinated by Arne Peltz, the Executive Director of PILC. From 1994-2002 CCPI was administered by the Centre for Equality Rights in Accommodation (CERA) and co-ordinated by myself, as the Executive Director of CERA. Since 2002 CCPI has been administered by the Social Rights Advocacy Centre and continues to be co-ordinated by myself. I am now the Director of the Social Rights Advocacy Centre. CCPI itself is not incorporated.

5. CCPI has secured funding on a case by case or project basis to conduct research and consult with organizations and individuals across Canada, to develop informed positions on issues affecting poor people in Canada, to develop and promote appropriate test case litigation on poverty issues, to intervene in cases of importance to poor people and to make submissions before domestic and international bodies. CCPI has received funding from the Court Challenges Program of Canada to research and conduct national consultations on many issues dealing with section 15 of the *Charter* as it applies to poverty issues. CCPI has also received funding from charitable foundations, from Status of Women Canada and from the Federal Department of Justice for research, consultations and the development of submissions or papers on human rights and poverty issues, including funding for the preparation of submissions to international human rights bodies.

6. CCPI applied for and has received funding from the Court Challenges Program of

Canada for legal research and consultation with affected groups for the development of arguments in the present case with respect to s.15 of the *Charter*.

Interventions in Court

7. CCPI has been granted leave to intervene in ten cases at the Supreme Court of Canada and in a number of other cases before lower courts and tribunals raising issues of importance to poor peoples' rights under the *Charter* or other law.

8. CCPI was granted leave to intervene at the Supreme Court of Canada in *R. v. Wu* (SCC File No. 29053, Heard June 4, 2003); *Gosselin v. Québec (Attorney General)*, 2002 SCC 84; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *R. v. Prosper*, [1994] 3 S.C.R. 236; and *Symes v. Canada*, [1993] 4 S.C.R. 695.

9. In all of its interventions at the Supreme Court of Canada and at other levels of court, CCPI has promoted interpretations of the *Charter*, and in particular sections 7 and 15 of the *Charter*, which recognize the critical role of courts in protecting the interests of disadvantaged groups, recognize the relationship between the *Charter* and positive obligations under international human rights law, and are informed by the constitutional commitment of governments under s.36 of the Constitution, to provide essential public services of reasonable quality to all Canadians.

10. CCPI's role in promoting interpretations and applications of the *Charter* that address poverty issues, promote *Charter* values and are informed by the values of international human rights law have been widely recognized in published works both in Canada and internationally.

Representations in International Fora

11. CCPI has played an important role in Canada and internationally in promoting a better integration of international human rights norms in domestic law and in improving the effectiveness of review mechanisms before United Nations treaty monitoring bodies. This work has addressed a critical need in the context of globalization, to ensure the protection of constitutional rights linked with international human rights norms, particularly in the area of social and economic rights of disadvantaged groups.

12. In 1993 CCPI, along with the National Anti-Poverty Organization, was granted standing to make oral and written submissions before the United Nations Committee on Economic, Social and Cultural Rights (“CESCR”) regarding Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*. CCPI was the first domestic non-governmental organization to be granted standing to make oral submissions to a U.N. treaty monitoring body in the context of a periodic review of a State party. This procedure has since been instituted throughout the U.N. treaty monitoring system. In 1995 and again in 1998 CCPI made oral and written submissions to the CESCR. In April, 1999, CCPI made oral and written submissions to members of the United Nations Human Rights Committee with respect to Canada's fourth periodic review for compliance with the *International Covenant on Civil and Political Rights*. In its submissions, CCPI focused on the importance of the *Charter*, and particularly of sections 7 and 15, in ensuring that courts actively protect the social rights of disadvantaged Canadians in the interpretation and application of law.

13. CCPI's expertise in issues of the constitutional protection of the rights of poor people is widely recognized around the world and has been described in numerous international publications. I have been invited by many international human rights organizations and bodies to present papers describing CCPI's unique work and expertise on issues of human rights, poverty and the effects of globalization. I advised South African organizations on appropriate constitutional protections related to poverty and social rights and was invited as one of two international experts to address the South African Constitutional Assembly on the question of

constitutionally protecting social and economic rights. I emphasized the importance of such constitutional protections in the face of globalization.

14. Other invitations to address issues related to poverty, constitutional rights and the effect of globalization have been received from the United Nations High Commissioner on Human Rights, the International Commission of Jurists, the International Human Rights Internship Program, Forum Asia, the Committee for the Administration of Justice in Northern Ireland, the United Nations Centre for Human Settlements, the University of Barcelona, the Government of Norway and the Centre for Economic and Social Rights to a meeting in Quito, Ecuador of organizations in Central and South America working on social and economic rights.

Submissions to Governmental and Other Bodies in Canada

15. As Co-ordinator of CCPI, I have made frequent submissions to governmental and other bodies in Canada with respect to the protection of the rights of poor people under domestic and international law.

16. In 1992 I was invited to make a submission on preserving and improving the constitutional protection of social and economic rights in Canada to the Special Joint Committee on the Renewal of Canada (Beaudouin Committee) and to present CCPI's position on the protection of social rights. CCPI was also invited by the Canadian Human Rights Act Review Panel, chaired by retired Supreme Court of Canada Justice Gérard La Forest, to prepare submissions on improving the protection of social and economic rights and addressing the needs of poor people under the *Canadian Human Rights Act*. As CCPI's co-ordinator, I have also provided continuing legal education to lawyers on the role of courts under the *Charter* in protecting the interests of poor people, and I have been invited to speak to the Canadian Bar Association and the Ontario Bar Association on this issue.

17. CCPI has become increasingly involved in judicial education in Canada in recent years. I and another member of the board, Professor Martha Jackman, have been invited by the National Judicial Institute to provide keynote addresses to judges from Newfoundland, Nova Scotia,

Prince Edward Island, New Brunswick and Alberta. My presentations to judges have addressed the important role of the courts under the *Charter*, and particularly in the face of globalization, in interpreting and applying law so as to ensure the protection of the fundamental rights of disadvantaged individuals and groups, particularly the right to equality and to life, liberty and security of the person.

18. In 1998, I attended on behalf of CCPI and CERA a meeting in Geneva of organizations interested in trade and investment agreements and their effect on human rights. I assisted in establishing and drafting the platform for the International NGO Committee on Human Rights in Trade and Investment (INCHRITI), which emphasized that investor rights should not be adjudicated without full and proper consideration of fundamental human and constitutional rights. INCHRITI's platform was subsequently presented to various international bodies, including the United Nations Sub-Commission for the Promotion and Protection of Human Rights and the U.N. Committee on Economic, Social and Cultural Rights. Both of these bodies subsequently issued statements of concern about the potentially negative effect of trade and investment agreements on the protection of fundamental human rights.

19. When the Standing Committee on Foreign Affairs and International Trade conducted hearings concerning a proposal to establish a Multilateral Agreement on Investment in 1999, I made oral submissions to the Standing Committee, describing the work of INCHRITI and raising concerns about the effect of NAFTA and other agreements in undermining the constitutional rights of Canadians. These submissions to the Standing Committee noted that NAFTA and similar agreements:

provide corporations with standing to challenge and sue for losses arising from certain governmental legislation and action - standing which they do not enjoy under our Charter of Rights. Further, these corporate claims against government regulation are adjudicated within the hostile terrain of trade and investment law, with its strong anti-regulatory bias. There is no reference to principles of human rights jurisprudence, to our government's obligation under the Charter of Rights and under international law to protect vulnerable groups, or even to the defenses available to governments for violations of rights of citizens under the Charter of Rights which may be found to be "demonstrably justifiable in a free and

democratic society.”

20. In October, 2000 I attended a meeting hosted by Rights and Democracy in Montreal on “Globalization and Human Rights.” The meeting was attended by international and Canadian experts on trade and investment treaties as well as by experts on human rights, including representatives of U.N. human rights treaty monitoring bodies and the U.N. Independent Expert on the Right to Development. Representatives of the Department of Foreign Affairs and International Trade were also in attendance. I made submissions to the meeting with respect to the effect of NAFTA and other trade and investment agreements in creating new property rights and undermining the role of the judiciary in protecting and enforcing the constitutional rights of disadvantaged Canadians. I emphasized the importance of ensuring that investors’ rights are adjudicated within the broader framework of respect for the primacy of fundamental human rights of disadvantaged members of society, as recognized under the Canadian *Charter* and under international human rights law ratified by Canada.

21. CCPI is a member of ESCR-Net, an international network of organizations working to promote economic, social and cultural rights. As CCPI’s co-ordinator, I am a member of a working group of this network addressing the effect of trade and investment agreements on economic, social and cultural rights.

22. CCPI has recently joined with four non-governmental organizations and five universities in Canada to develop a consortium for research, advocacy and public education in the area of social rights accountability in Canada. Professor Martha Jackman of the University of Ottawa and I are Co-Directors. Funding has been provided by the Social Science and Humanities Research Council for extensive collaborative research and law reform initiatives over five years, including, as a major component, research into the effect of trade and investment agreements on the adjudication and protection of social rights in Canada, and the development of proposals to improve the integration of trade and investment treaties with human rights and Charter protections.

CCPI's Interest in these Proceedings

23. The issues before the court in these proceedings will have a profound effect on the social and economic lives of people living in poverty in Canada and on the protection of and enjoyment of their rights under sections 7 and 15 of the *Charter*.

24. As a leading advocate for almost fifteen years for the protection of poor peoples' rights under the *Charter* and for the promotion of constitutional values and principles such as equality, democracy, social inclusion and the rule of law, CCPI has a critical interest in challenging the unconstitutional delegation of judicial authority to NAFTA tribunals and the undermining of the proper role of courts in Canada in protecting and balancing constitutional rights and obligations.

25. In particular, the adjudication of investors' claims under NAFTA without a requirement, as would apply in any court or tribunal in Canada, that any interpretation and application of law be consistent with constitutional values and give appropriate consideration to the rights of disadvantaged Canadians under the *Charter*, in CCPI's view, violates the rights of poor people in Canada to life, liberty and security of the person and to the equal protection and benefit of the law.

26. Critical principles and constitutional guarantees governing adjudication, statutory interpretation and the exercise of discretion in courts and tribunals in Canada are undermined and circumvented by Chapter 11 of NAFTA. These include principles of constitutionalism, the rule of law, democracy and the requirement that courts and tribunals strive to achieve results that are consistent with the *Charter*. These are of critical importance to CCPI and to poor people.

27. Poor people in Canada and other disadvantaged groups participated actively in fashioning the constitutional deal struck in 1981 which gave unprecedented power to courts to enforce individual rights. Poor people and other disadvantaged groups lobbied against the inclusion of property rights in the *Charter* and lobbied for a guarantee of substantive equality rights that would recognize the obligations of governments to provide benefits and take positive measures

necessary to ensure equality for disadvantaged groups. Disadvantaged groups sought to ensure that corporate interests would not be able to use the new constitutional powers of courts in order to demand compensation for regulatory measures or public programs which served the needs and interests of disadvantaged members of society. The new role of the courts in adjudicating individual claims against public law and policy under the *Charter* was accepted by disadvantaged groups such as poor people, women and people with disabilities only after having won important constitutional guarantees that the rights of disadvantaged individuals and groups would be given central consideration in any challenge to public law and policy.

28. In its first consideration of a corporate challenge to legislative regulation under the *Charter*, in the *Irwin Toy* decision, the Supreme Court of Canada adopted the important distinction between the property rights of corporations, which the Court found were denied constitutional protection in Canada, and social and economic rights recognized in international law, such as the right to social security or the right to food, clothing and shelter. CCPI has consistently relied on this distinction in advocating for the rights of poor people under ss. 7 and 15 of the *Charter*. NAFTA, however, gives virtual constitutional status to certain corporate property rights while giving no status to social and economic rights of those who are disadvantaged.

29. In CCPI's view, the delegation of judicial authority to NAFTA tribunals effectively imposes constitutional change which poor people have opposed and which has been consistently rejected by Canadians. It creates justiciable property rights for corporate interests which they do not enjoy under the *Charter*.

30. Moreover, by delegating the adjudication of these new constitutional rights to NAFTA tribunals, NAFTA effectively removes from consideration the constitutional rights of disadvantaged individuals and groups. Even if the Supreme Court of Canada had permitted corporate property rights claims to proceed under s.7 of the *Charter*, investors' rights would have still been limited by a balancing of these rights with the rights of disadvantaged groups under

ss.7 and 15 of the *Charter* and under international human rights law when courts conducted their analysis of fundamental justice, and of reasonable limits under s.1 of the *Charter*. The adjudication of property rights by NAFTA tribunals, by contrast, provides no similar guarantee of balancing of rights. It thwarts the carefully designed architecture of the *Charter* and upsets the careful balancing of rights that is a critical component of constitutional adjudication by courts and tribunals in Canada and of particular interest and relevance to poor people.

31. Corporations and investors have far more resources to take legal challenges forward than do poor people. Because poor people are often not present as parties in cases in which advantaged interests bring disputes to Canadian courts and tribunals, a critical aspect of the protection of the constitutional rights of poor people is the assurance that courts and tribunals must consider *Charter* values and *Charter* rights, as well as rights contained in international human rights instruments ratified by Canada, even where these rights are not directly claimed by a party in the case at bar.

32. This guarantee of *Charter*-consistent interpretation and application of law has been a central component of CCPI's advocacy for the rights and interests of poor people. CCPI has asserted on behalf of poor people in every case in which it has been involved, and the Supreme Court of Canada has agreed, that courts and tribunals must seek to resolve disputes, to interpret statutes and to exercise discretion in a manner which is consistent with the protection of *Charter* rights and with the values contained in international human rights law. Judicial education I have conducted for CCPI has consistently emphasized this judicial responsibility. The delegation of adjudication of investor claims to NAFTA tribunals undermines this critical protection of the rights of poor people. NAFTA tribunals adjudicate claims of propertied interests with no requirement of compliance with constitutional interpretive principles, consideration of *Charter* rights and values or of the values enunciated in international human rights treaties ratified by Canada.

33. CCPI has focused its advocacy for the rights of poor people in Canada on ss. 7 and 15 of

the *Charter*, which are directly at issue in these proceedings. These two sections of the *Charter* contain the most critical protections for poor people, acting as the primary vehicles for giving legal effect to Canada's international human rights obligations and embodying the key values of dignity, equality, personal security and integrity. Poor people and other disadvantaged groups rely on courts and tribunals in Canada to protect these central rights and values in all adjudication.

34. The guarantee of equality in s. 15 is a central *Charter* value which informs the interpretation of all other rights in the *Charter*, and therefore of all law and the exercise of all discretion by Canadian courts and tribunals. Section 15 guarantees that the needs and interests of disadvantaged groups which might otherwise be ignored will be a relevant and important considerations in the adjudication of disputes by courts and tribunals in Canada. Section 7 similarly embodies key *Charter* values and ensures that issues related to the personal security and integrity of poor people and other vulnerable groups will be key factors in the resolution of disputes and the interpretation of law. CCPI and its members have a critical interest in ensuring that governments in Canada are not permitted to delegate the adjudication of legal disputes to tribunals that are not required to consider and comply with these critical *Charter* rights of poor people.

35. Poor people in Canada have a particularly compelling interest in ensuring that disputes between investors and governments of the type considered by NAFTA tribunals are adjudicated in courts that are required to adhere to constitutional principles and are guided by *Charter* rights and values. Governments' legislative or regulatory measures or public enterprises which negatively impact investors are frequently those which are designed to protect disadvantaged groups or to ensure that essential public services are provided to all Canadians. These are often disputes in which the rights of disadvantaged individuals and groups and their unique need for public services ought to be important considerations. If the adjudication of these critical disputes is delegated to tribunals operating outside of Canadian constitutional norms and values, then the rights for which CCPI and poor people in Canada have fought for under the *Charter* are rendered

illusory in precisely those cases where they may be most important. The guarantee of Charter-consistent adjudication would be meaningless if the adjudication of critical claims against law and public policy can be delegated outside the judiciary, with no accountability to constitutional norms or *Charter* rights.

36. CCPI and its members also rely on the adherence by Canadian courts and tribunals to norms of fundamental justice, procedural fairness, legal precedent, and the recognition of participatory rights of disadvantaged groups. CCPI has sought and been granted intervener status by many courts and tribunals in Canada in a broad range of cases so as to ensure that the interests of poor people are properly considered and balanced with other rights and interests and that constitutional jurisprudence evolves in a manner which recognizes the rights of poor people. CCPI's advocacy for poor people relies on effective access to courts, on the role of courts in applying consistent and evolving principles of interpretation and on the requirement that courts comply with legal precedent. Where lower courts have interpreted Charter rights narrowly so as to exclude poverty issues, CCPI and those it represents have relied on higher courts, and particularly on the Supreme Court of Canada, to articulate interpretive principles which are consistent with evolving Charter values and those of international human rights law ratified and promoted by Canada. NAFTA tribunals, by contrast, hold hearings related to public law and policy in Canada in locations that may not be accessible to poor people. They are not required to recognize public interest standing and have not tended to recognize the benefit of *amicus* interventions as have Canadian courts. They do not rely on or promote evolving constitutional norms or human rights values. There is no guarantee that an interpretation adopted in one case by a NAFTA tribunal will be applied in a subsequent case. Rules of fundamental justice and procedural fairness which apply to courts and tribunals in Canada do not apply to NAFTA tribunals. All of these limitations adversely affect poor people, whose needs and interests are more likely to be considered in courts and tribunals operating under Canadian constitutional norms and the requirements of the *Charter*.

37. This affidavit is made in support of an application and for no other purpose.

SWORN before me at the Town of
_____, in the
Province of Ontario this _____ day of
, 2003.

A COMMISSIONER, ETC.

)
)
)
)
) BRUCE PORTER
)
)