

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD,
BRIAN DUBOURDIEU and CENTRE FOR EQUALITY RIGHTS IN
ACCOMMODATION**

APPLICANTS
(Appellants)

-and-

**ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF
ONTARIO**

RESPONDENTS
(Respondents)

AFFIDAVIT OF BRUCE PORTER

I, **BRUCE PORTER**, of Peninsula Lake in the District Municipality of Muskoka, **MAKE OATH AND SAY** as follows:

Charter Committee on Poverty Issues (CCPI)

1. I am the Coordinator of the Charter Committee on Poverty Issues. I make this affidavit in support of the Applicants' Application for Leave to Appeal.
2. CCPI is a national committee of prominent legal experts, advocates and people living in poverty. CCPI is dedicated to ensuring that the rights of people living in poverty are fully considered and adequately protected by Canadian courts. CCPI has intervened in thirteen cases before the Supreme Court of Canada, has provided social context education for judges across Canada on poverty issues, and is internationally recognized for its work. CCPI was granted leave to intervene in this case before the Ontario Superior Court of Justice and Court of Appeal for Ontario, as part of a coalition with several other organizations representing people living in poverty.

Impact of the Court of Appeal's Decision

3. This affidavit addresses the implications, for those whom CCPI represents, of the Court of Appeal's finding that the present claim is non-justiciable. The Court characterized the claim as relying on a freestanding right to housing which does not exist in the *Charter*, and as raising issues that are political rather than legal. The Court also held that, because the alleged rights violations linked to homelessness are caused by the interaction of multiple policies and programs rather than by a particular law, policy or government action, the claim is non-justiciable. From CCPI's perspective, the Court of Appeal's approach to justiciability would, if allowed to stand, deny those whom CCPI represents any meaningful protection of their *Charter* rights to life, security and equality in the most critical areas of their lives and interactions with governments.

4. The extraordinary rise in homelessness over the three decades since the enactment of the *Charter* has had catastrophic effects on the life, health, dignity and physical security of hundreds of thousands of individuals and families who are among the most marginalized and disadvantaged members of Canadian society. It is an incontrovertible fact that homelessness engages the fundamental interests that sections 7 and 15 of the *Charter* are meant to protect, yet this claim is the first time in the history of the *Charter* that the courts have been asked to consider whether the failure of governments to take reasonable actions to reduce and eliminate homelessness is consistent with sections 7 and 15 or justifiable under section 1 of the *Charter*.

5. In its previous interventions before this Court, CCPI has sought to ensure that poor people pursuing life, security of the person and equality rights in relation to access to housing, food or income security are not misrepresented as advancing claims to self-standing socio-economic rights that are not explicitly guaranteed in the *Charter*. Unfortunately, this is precisely how the Court of Appeal mischaracterized and then dismissed the claim in the present case.

6. In CCPI's experience, *Charter* claims of more advantaged groups have been properly distinguished from claims to self-standing socio-economic rights. For example, in *Chaoulli v Quebec (Attorney General)*,¹ the Appellants' section 7 challenge to policies affecting advantaged groups' access to adequate healthcare was understood as a right to life rather than as a right to health care claim. The claim in the present case, challenging governments' failures to adopt a coordinated strategy to protect rights to life, security of the person and equality in access to

¹ *Chaoulli v Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

housing, should similarly be distinguished from a claim that the *Charter* confers a freestanding right to adequate housing.²

7. If those whom CCPI represents are to enjoy the equal benefit of the *Charter*, policy areas linked to governments' positive obligations under international human rights law must not be immunized from judicial scrutiny for deprivations of life, security or equality that may contravene the *Charter*.³ As has been emphasized by this Court and by the government of Canada itself in submissions to the United Nations, Canada's ratification of international human rights instruments recognizing socio-economic rights, including the right to adequate housing, lend support to interpretations of sections 7 and 15 of the *Charter* that require governments to take positive action to address violations of the rights of those who are homeless.

8. The Court of Appeal also held that the claim in this case is political rather than legal and raises issues that are beyond the competence of courts. In CCPI's experience, such a distinction should be carefully considered in cases such as this. Homeless people have rarely had the capacity to access courts for judicial scrutiny of decisions affecting their *Charter* rights. By contrast, decisions affecting more advantaged groups are more frequently challenged in court. Unexamined distinctions between legal and political issues may reflect and reinforce systemic patterns of disadvantage in access to justice which CCPI has long decried. The question of whether governments' failure to implement a housing strategy violates the *Charter* is a legal question, which falls squarely within the mandate of the courts. As Justice Binnie noted in *Newfoundland (Treasury Board) v. N.A.P.E.*, if the political branches of government were to be the final arbiters of compliance with the *Charter* in social policy areas, the *Charter* would afford no real protection to those it was intended to benefit.⁴

9. Homelessness is caused by the interaction of a wide range of policies and programs. In recent years, the argument that human rights claims addressing homelessness or other types of socio-economic deprivation are non-justiciable because of the complexity of economic and social policies and programs they engage, has been widely rejected within the United Nations and by domestic courts around the world. Courts have carved out effective and manageable roles

³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998).

⁴ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para. 111.

in reviewing socio-economic policy for compliance with international or constitutional human rights, without encroaching on legislative competence.⁵

10. In the area of housing and homelessness in particular, courts have focused on ensuring that governments meet their obligations to enact reasonable strategies to reduce and eliminate homelessness. While courts have deferred to governments with respect to the choice of precise legislative and programmatic means, they have played a critical role in clarifying the scope of governments' human rights obligations and in ensuring that governments do not simply ignore the rights of the most marginalized groups in society.⁶

11. If allowed to stand, the Court of Appeal's finding that a justiciable *Charter* claim must impugn a particular law, policy or government action, would also have a serious detrimental effect on those whom CCPI represents. As Chief Justice Dickson underscored in *Irwin Toy v Québec (Attorney General)*, while advantaged groups are more likely to challenge government action or legislation that interferes with their rights, vulnerable groups are more likely to challenge governments' failures to act to protect their rights.⁷ If vulnerable groups are to enjoy the equal benefit of the *Charter*, governments must be held accountable for their failures to take action to protect rights. As this Court has clarified in previous cases dealing with government inaction,⁸ the justiciable question in cases of inaction is not generally whether particular legislation is unconstitutional. Rather the question is whether the government had the authority to act and, if so, whether its failure to act was consistent with the *Charter*. Framing the present case as a challenge to a particular piece of legislation would have been inappropriate because, as in those cases, "there are myriad options available to the government that may rectify the unconstitutionality of the current system."⁹

12. For over two decades, CCPI and other human rights and equality seeking organizations have advocated for positive government action to combat homelessness to protect rights to life,

⁵ Martha Jackman & Bruce Porter, *International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection*, Ottawa Faculty of Law Working Paper No. 2013-09.

⁶ See for example *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) October 2000; Constitutional Court of Colombia, decision T-585/06; Christian Curtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008); *FEANTSA v. France*.

⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 993.

⁸ For example: *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at paras 114-117, 157; *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 S.C.R. 46 [*G (J)*] at paras 91-93; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*] at paras 34, 97.

⁹ *Eldridge*, at para 96; *G (J)*, at para 92.

security and equality of those affected. UN human rights bodies, experts in housing and homelessness, mental health and human rights commissions and parliamentary committees have likewise expressed concern that the absence of a housing strategy in Canada has resulted in systemic violations of *Charter* and human rights. They have urged the Canadian government, in coordination with the provinces, to adopt a housing strategy. The situation is directly akin to that described by Justice Deschamps in *Chaoulli v Quebec (Attorney General)*, in that governments have “lost sight of the urgency of taking concrete action.”¹⁰

13. This Court is “the last line of defence”¹¹ for those whom CCPI represents.

AFFIRMED BEFORE ME at the
Township of Lake of Bays in the
Province of Ontario
this 26th day of January, 2015.



Commissioner for Taking Affidavits

Samantha Woods, Deputy Clerk, by virtue
of office, is a Commissioner of taking
Affidavits in the Township of Lake of
Bays, District of Muskoka



BRUCE PORTER

¹⁰*Chaoulli v Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at paras. 96-97 [*Chaoulli*].

¹¹ *Ibid* at 96-97.