

S.C.C. File No. \_\_\_\_\_

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

NELL TOUSSAINT

Applicant

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Respondent

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**AFFIDAVIT OF BONNIE MORTON**  
(Sworn \_\_\_\_\_)

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I, Bonnie Morton of the City of Regina in the Province of Saskatchewan, MAKE  
OATH AND SAY:

1. I am the Chairperson of the Charter Committee on Poverty Issues ("CCPI"). As such, I have knowledge of the matters to which I hereinafter depose.

**A. The Charter Committee on Poverty Issues (CCPI)**

2. CCPI is a national committee founded in 1989 which brings together low-income representatives and experts in human rights, constitutional law and poverty law for the purpose of assisting poor people in Canada to secure and assert their rights under international human rights law, the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), human rights legislation and other laws in Canada. The membership of CCPI includes people who live in or have lived in poverty as well as experts in relevant human rights and constitutional law.

3. CCPI has intervened in 12 important cases at the Supreme Court of Canada as well as others at lower courts and tribunals, raising issues of concern to people living in poverty. CCPI's interventions before the Supreme Court of Canada have included the following:

- *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, in which CCPI argued that the right to healthcare under section 7 of the *Charter* should be interpreted in a manner which ensures access to healthcare for those who lack the means to access private healthcare;

- *R. v. Wu*, 2003 SCC 73, in which CCPI argued that poor people are systemically disadvantaged in the justice system and that poverty should not be allowed to result in any form of incarceration because of inability to pay a fine;
- *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, in which CCPI argued, *inter alia*, that the right to security of the person in section 7 of the *Charter* ought to be interpreted as including positive obligations on governments to ensure that disadvantaged members of society have access to adequate food, clothing and housing;
- *Lovelace et al. v. Ontario et al.*, 2000 SCC 37, in which CCPI argued jointly with other interveners that section 15(2) of the *Charter* ought to be interpreted so as to ensure that poor people enjoy the full protection of section 15 from discrimination in ameliorative programs;
- *J.G. v. Minister of Health and Community Services (New Brunswick) et al.*, [1999] 3 SCR 46, in which CCPI argued that governments are required by section 7 of the *Charter* to take positive measures to ensure the provision of legal aid in custody cases in which liberty and security issues of parents and children are at stake;
- *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, in which CCPI argued that administrative decision-makers, when

making discretionary decisions, must take human rights considerations into account, including systemic disadvantages such as poverty;

- *Eldridge v. A.G.B.C.*, [1997] 3 SCR 624, in which CCPI argued that governments are required by section 15 to act affirmatively to ensure that persons who are deaf enjoy the same benefit of public health services as the hearing population;
- *R. v. Prosper*, [1994] 3 SCR 236, in which CCPI argued that in light of the requirements of fundamental justice and the principles of equality underlying sections 7 and 15 of the *Charter*, circumstances of poverty and disadvantage should not be a barrier which would deny access to fundamental rights and fairness in our justice system, including the right to effective representation by counsel; and
- *Symes v. Canada*, [1993] 4 SCR 695, in which CCPI argued that the *Charter* ought to be applied with equal rigor in the social and economic domain as in other areas of government activity and that deference to the role of parliament and legislatures should be exercised at the remedial stage rather than invoked as a shield to effective *Charter* scrutiny.

4. Through these interventions, CCPI has become well known for bringing to courts' attention relevant and important concerns, which are not raised by other parties. CCPI's facts have not only been relied upon extensively by courts, but

are frequently cited and used by researchers and advocates across Canada and internationally.

## **B. CCPI's Potential Role in this Appeal**

5. The present case raises critically important public interest issues for CCPI's constituency. CCPI has significant interest and relevant expertise with respect to the impact of a requirement to pay fees to process Humanitarian and Compassionate (H & C) Applications without a waiver for persons living in poverty. Moreover, CCPI has been working for many years on the legal issues at stake in this case, particularly whether the rule of law and access to justice for those living in poverty applies to administrative justice and whether the social condition of poverty constitutes an analogous ground of discrimination.

6. CCPI was granted intervener status at both the Federal Court and at the Federal Court of Appeal in the present case to address the constitutional issues that are the subject of the present Application for Leave to Appeal. In granting intervener status before the Federal Court, Prothonotary Aalto stated that "this is one of those unique cases that raise issues of public policy, access to justice and discrimination and inequality such that the Court will benefit from the participation of CCPI..."

7. In the decision of the Federal Court of Appeal, the Honourable Madam Justice Sharlow found the constitutional issues were "moot" but still offered a

decision on them because they had been “dealt with thoroughly” by the Honourable Madam Justice Snider and “were the subject of full argument” in the appeal.<sup>1</sup> CCPI played a key role in ensuring that the constitutional issues were fully argued before both courts.

8. Should this Court grant the Applicant leave to appeal, CCPI intends to seek leave to be added as an intervener, or alternatively as a party with public interest standing, to ensure that the issues of significant public interest at stake in the Federal Court of Appeal’s ruling are fully argued before this Court.

### **C. The Importance of Addressing the Public Interest Issues in the Present Case**

9. If allowed to stand, the decision of the Court below on the constitutional issues in this case will have a significantly detrimental effect on the rights of CCPI’s constituency.

10. The Court’s finding that the rule of law and access to justice does not apply to discretionary administrative decision-making procedures, such as H & C consideration under the *Immigration and Refugee Protection Act*,<sup>2</sup> sends direction to governments across Canada and to officials exercising decision-

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<sup>1</sup> *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2011 FCA 146 at para 56 [Toussaint].

<sup>2</sup> SC 2001, c 27.

making authority under a wide range of statutes as to their constitutional obligations. It tells them that they need not exercise discretion or administer justice in a manner consistent with the goal of ensuring access to justice for persons living in poverty. This has devastating implications for the integrity of the Canadian justice system which increasingly relies on administrative bodies to protect fundamental rights. Denying poor people access to administrative bodies that are charged with overseeing a range of programs that determine their access to food, housing, income security, shelter, support services and healthcare, solely on the basis of an inability to pay fees, renders *Charter* rights illusory in many of the areas poor people rely on most for their protection.

11. The issues that were decided by the Federal Court of Appeal under section 15 of the *Charter* are also of immense significance and importance for CCPI's constituency. The Court below placed an insurmountable evidentiary burden on poor people alleging the discriminatory impact of fees. The Applicant was found on the evidence to have been excluded from the fees because of her poverty, yet her allegation that fees have an adverse effect on poor people was rejected because she was unable to provide any specific numbers of potential applicants for H & C who had been unable to file applications because of

poverty.<sup>3</sup> Such data would be impossible to obtain in this case, and in most other cases alleging the discriminatory impact of fees.

12. The Court below also found that section 15 had not been breached because the Applicant was denied a “discretionary and exceptional benefit” rather than a “legal right.”<sup>4</sup> If protections under section 15 were to be limited to “legal rights” and denied in areas of discretionary benefits, the protections from discrimination that are afforded to poor people (and presumably all other disadvantaged groups) would be dramatically limited in scope and effect.

13. Moreover, the Court below found that poverty and receipt of social assistance are not analogous grounds of discrimination under section 15 because “[a] person’s financial condition is not an immutable personal characteristic.”<sup>5</sup> For more than 25 years, CCPI and poor people in Canada have been advocating for legal remedies to widespread discrimination and prejudice on the basis of the social condition of poverty and receipt of social assistance. During that time, human rights legislation in Canada has been improved so that all provincial human rights legislation now includes protection from this kind of discrimination. In 2000, CCPI made submissions to the Canadian Human Rights Review Task Force, chaired by Justice LaForest, which found “ample evidence of widespread discrimination based on characteristics related to social conditions,

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<sup>3</sup> *Toussaint*, *supra* note 1.

<sup>4</sup> *Ibid* at para 59.

<sup>5</sup> *Ibid*.

such as poverty, low education, homelessness and illiteracy” and recommended the inclusion of “social condition” as a prohibited ground of discrimination in the *Canadian Human Rights Act*.<sup>6</sup> Provincial and federal appellate courts have reached contradictory conclusions about whether these grounds are analogous under section 15. It is of critical importance to CCPI’s constituency that the issue be considered and determined by this Court.

14. This Court has recognized that the determination of whether a characteristic is an analogous ground under section 15 of the *Charter* is to be made based on a complete analysis of the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society’s treatment of the group.

15. Abundant expert evidence was filed by the Applicant on the nature of discriminatory prejudice and stereotype applied to poor people and the social construction of poverty as a suspect ground of decision-making which meets this Court’s test for analogous grounds. In CCPI’s view, this case provides an excellent opportunity for this Court to conduct the kind of purposive and contextual analysis of the legal and historical situation of poor people in Canadian society and of the patterns of discrimination in society’s treatment of the group.

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<sup>6</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) at 107, 110.

**D. Lack of Clear Direction from this Court on Governments' Obligations  
with respect to Poor People.**

16. CCPI has confronted significant difficulties in bringing poverty issues before this Court. In the twenty-six years since section 15 of the *Charter* came into effect, this Court has considered, to my knowledge, only one case dealing with an allegation of discrimination by a recipient of social assistance under s.15 of the *Charter*. In that case, *Gosselin v. Quebec*, the ground of discrimination pleaded was age, and not receipt of social assistance.<sup>7</sup> This Court has heard no appeal, to my knowledge, dealing with the issue of discrimination on the ground of social condition, poverty or receipt of social assistance. Similarly, it has heard no case, to my knowledge, dealing with access to justice for poor people outside of the context of the right to state-funded counsel.<sup>8</sup> The discriminatory or prejudicial effect of fines on impoverished offenders was considered indirectly in *R. v. Wu*,<sup>9</sup> in which CCPI intervened, but the constitutionality of a refusal to waive fees for accessing judicial or administrative processes for those living in poverty has not been considered in a broader context by this Court.

17. CCPI is concerned that the scarcity of cases to be heard by this Court dealing with the most significant public interest issues confronting the millions of Canadians living in poverty leaves governments with scant direction from this

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<sup>7</sup> *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para 35, [2002] 4 SCR 429.

<sup>8</sup> *J.G. v. Minister of Health and Community Services (New Brunswick) et al.*, [1999] 3 SCR 46; *R. v. Prosper*, [1994] 3 SCR 236.

<sup>9</sup> 2003 SCC 73.

Court as to its constitutional obligations with respect to poor people. There is little jurisprudence to guide the exercise of discretion, the drafting of regulations or the development of new legislation. With disparate and conflicting opinions among appellate courts as to whether discrimination on the ground of social condition, poverty or receipt of social assistance is prohibited under the *Charter*, poor people are left without an important tool in their attempt to seek fairer treatment by governments. In this case, the Federal Court of Appeal's ruling on the constitutional issues leaves the government unclear as to its obligations under the amended *Immigration and Refugee Protection Act*, and applicants for H & C uncertain as to their rights. While media coverage has suggested that the decision of the Federal Court of Appeal represents a victory for "justice with compassion" and "an affirmation that everyone, regardless of income, is entitled to the protection of the law", government officials were reported to have expressed doubt that the decision would have any wider impact beyond the two appellants. Attached as Exhibits A and B are two articles from the *National Post* and *Toronto Star*, respectively, on the Federal Court of Appeal's decision.

**E. Barriers to Bringing the Public Interest Issues Dealt with by the Court Below before This Court in a Future Case**

18. The limited number of cases dealing with issues of discrimination and access to justice for poor people is no accident. There are numerous obstacles and barriers to bringing cases like the present one to reach this Court.

19. First, there is a significant emotional and psychological risk to poor people who bring forward these types of rights claims. Impoverished applicants are almost invariably subjected to negative comments and stereotypes when they seek justice through the courts and they are often in a position of vulnerability in relation to the government they are challenging. The Applicant in the present case experienced this kind of vulnerability as an undocumented migrant vulnerable to the initiation of deportation proceedings at any time.

20. Second, there is significant expense involved in effectively litigating public interest cases. When this case commenced, funding was available to the Applicant and to CCPI as an Intervener through the Federal Court Challenges Program. However, all funding for new cases under the Court Challenges Program was cancelled by the federal government on September 25, 2006. The Applicant, as well as CCPI as an Intervener, have continued to remain eligible for funding through the Program through the appeals process. If this Honourable Court were to grant leave in the present case, the Applicant and CCPI would be eligible for Court Challenges funding for the appeal. However, subject to a change of government policy, no such funding is available to future applicants attempting to bring these issues before this Court.

21. Third, issues of mootness, such as those that arise in the present case, are likely to occur again if similar litigation is initiated anew. Poor people often live in unstable situations. Changes in their lives may render some components

of their claims moot. Public interest litigation takes a long time and often involves legislation that is subject to periodic amendment. Mootness may also be created by actions of the Respondent. The present Applicant was originally joined with two families in similar circumstances. One family was deported prior to the hearing of their case. Their application was determined by Madam Justice Snider of the Federal Court to be moot. Another applicant managed to borrow money to pay the H & C fee and her application was similarly dismissed as moot. These challenges are typical of public interest cases of this sort.

22. Attempting to bring forward a future case in which the public interest issues can be placed before this Court with no mootness concerns or legislative amendments to contend with, would require significant expenditure of public resources with no guarantee that similar problems of mootness would not arise. Such cases may not even be possible to initiate if alternative financial resources, such as those which were available in the present case through the Court Challenges Program, cannot be found. It is unclear whether CCPI could play the same role in a future case that it has played in the present one. CCPI has no operational funding, no staff and no independent resources. It's capacity to represent the interests of poor people in this kind of litigation has been dramatically undermined by the cancellation of the Court Challenges Program.

23. CCPI is of the view that consideration of the public interest issues in the context of the present appeal would represent a responsible use of scarce public

and other resources. The constitutional issues decided by the Federal Court of Appeal are immensely significant to poor people; they were decided on the basis of a full evidentiary record; and they have had the benefit of full argument at all levels of court in this case.

24. CCPI is willing to participate in an appeal in any capacity deemed appropriate and helpful to this Court in order to encourage the efficient use of public and judicial resources and facilitate the determination by this Court of public interest issues that have been left unresolved for too long.

25. This affidavit is made in support of a motion by Nell Toussaint for leave to appeal to this Court in the above case, and for no improper purpose.

|                                       |   |                      |
|---------------------------------------|---|----------------------|
| SWORN BEFORE ME in the City of Regina | ) |                      |
| in the Province of Saskatchewan this  | ) |                      |
| this ____ day of June, 2011           | ) | <u>Bonnie Morton</u> |

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A Commissioner of Oaths

## **List of Exhibits**

**Exhibit A:** Adrian Humphreys, “Waive immigrant fees, court rules”, *National Post* (12 May 2011).

**Exhibit B:** Carol Goar, “Justice tempered with compassion”, *Toronto Star* (17 May 2011).