

IN THE SUPREME COURT OF CANADA

(Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

TOM DUNMORE, SALAME ABDULHAMID

and WALTER LUMSDEN AND MICHAEL DOYLE,

on their own behalf and on behalf of the

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

Applicants

(Applicants)

- and -

ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO,

HIGHLINE PRODUCE LIMITED, KINGSVILLE

MUSHROOM FARM INC., and FLEMING CHICKS

Respondents

(Respondents)

AFFIDAVIT OF VINCE CALDERHEAD

I, Vincent Calderhead, of the City of Halifax and Regional Municipality of Halifax, Province of Nova Scotia, **MAKE OATH AND SAY:**

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

2. CCPI

3. CCPI is a national coalition founded in 1989 which brings together low-income activists and poverty law advocates 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. CCPI has initiated and intervened in a significant number of cases in order to ensure that poverty issues are presented in a manner that is directed by and accountable to low-income people themselves and are properly considered by courts and tribunals.

4. CCPI consults with a large number of organizations and individuals across Canada in developing its positions on particular issues. It has received funding from the Court Challenges Program of Canada to research many issues dealing with the application of section 15 of the Charter to poor people. It has also received funding from charitable foundations, from Status of Women Canada and from the Federal Department of Justice to research the application of international human rights law to the Charter and to participate in reviews of Canada before the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Human Rights Committee.

CCPI's Knowledge and Expertise

1. The activities of CCPI include: legal research and consultation on subjects of concern to poor people; test case litigation to challenge alleged violations of the rights of poor people; interventions on behalf of poor people in important cases which may affect the application of the Charter or other law to poverty issues; public education about the sources of human rights protections for poor people; appearances before United Nations Committees monitoring compliance with international human rights norms of importance to poor people and collaboration with Non-Governmental Organizations in other countries in the promotion of effective domestic remedies to violations of the human rights of poor people.
1. CCPI has engaged in legal research on a wide variety of subjects of concern to poor people, including:
 - a. the relationship between Charter rights and the human rights recognized in international law;
 - a. poverty, "social condition" and "receipt of public assistance" as forms of discrimination which should be prohibited under s.15 of the Charter;
 - a. access to justice by poor people and Aboriginal people and the impact of sections 7 and 15 of the Charter on the availability of state-funded counsel;
 - a. the constitutionality of a "special programs" defence in human rights and the implications of section 15(2) for poor people;
 - a. the extent of Federal responsibilities under international law, section 15 of the Charter and section 36 of the *Constitution Act, 1982* to ensure the provision of adequate financial assistance to persons in need;
 - a. the constitutionality of the clawback of the National Child Benefit Supplement from families on social assistance;
 - a. homelessness in Canada as a violation of the right to life and security of the person under the International Covenant on Civil and Political Rights and under the Canadian Charter of Rights and Freedoms;
 - a. the relationship between social and economic rights recognized under international human rights law and women's equality rights under the Charter and human rights legislation;
 - a. the role of financial costs when raised as a section 1 argument under the Charter.
1. CCPI has intervened in a number of important cases at the Supreme Court of Canada and 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:

Lovelace et al. v. Ontario et al., (S.C.C. File No..26165) in which CCPI argued 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, and so as to recognize the positive obligations on governments to ameliorate the inequitable socio-economic conditions of Aboriginal Communities in Canada consistent with the findings of international human rights treaty monitoring bodies;

J.G. v. Minister of Health And Community Services (New Brunswick) et al., [1999] 3 S.C.R. 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 S.C.R. 817, in which CCPI argued that administrative discretion must be exercised, wherever possible, in conformity with international human rights law and that sections 7 and 15 of the Charter are primary vehicles through which international human rights law can be given domestic effect;

Eldridge v. A.G.B.C., [1997] 3 S.C.R. 624, in which CCPI argued that section 15 applies to social and historical disadvantage whether or not it exists independently of government action, and 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;

Thibaudeau v. Canada, [1995] 2 S.C.R. 627, in which CCPI was granted intervener status jointly with the Women's Legal Education and Action Fund, the Federated Anti-Poverty Groups of British Columbia and the National Action Committee on the Status of Women, and made submissions respecting the interpretation of Charter rights in a substantive and purposive fashion recognizing the positive obligations on governments to address unacceptable levels of poverty among single mothers in Canada;

Walker v. Prince Edward Island, [1995] 2 S.C.R. 407, in which CCPI argued that the Court should not confuse the economic rights of advantaged groups with those which are protected as fundamental human rights under international human rights law, such as the right to food and housing contained in international covenants ratified by Canada;

R. v. Prosper, [1994] 3 S.C.R. 236, in which CCPI argued that in light of the requirements of fundamental justice and the principles of equality underlying ss. 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;

Symes v. Canada, [1993] 4 S.C.R. 695, in which CCPI argued that the Charter ought to be applied with equal rigour 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.

1. CCPI believes that in all of the above cases, our submissions were of importance to the Court as reflected in the Courts' written decisions. CCPI is well known for bringing to courts' attention relevant and important concerns which are not raised by other parties.
2. In 1993, 1995 and again in 1998, CCPI was granted permission to make oral and written submissions before the U.N. Committee on Economic, Social and Cultural Rights regarding Canada's compliance with the International Covenant on Economic, Social and Cultural Rights. In 1999, CCPI made oral and written submissions to the United Nations Human Rights Committee regarding Canada's compliance with the International Covenant on Civil and Political Rights. On all occasions, CCPI focused its submissions on areas of non-compliance with the obligation to provide effective legal remedies to violations of rights recognized in the Covenants, particularly by interpreting domestic legislation in a manner which is consistent with the protection of Covenant rights.

CCPI's Interests in this Appeal

1. This appeal raises important questions about the application of the Charter to the repeal of or exclusion from legislative protections of collective bargaining rights of one of the most impoverished and marginalized groups of workers in Canadian society. In assessing these questions, the courts below found it necessary to consider all of the fundamental issues of Charter interpretation which have been of concern to CCPI since its formation. These include:
 - i. Whether in some circumstances "fundamental freedoms" such as the freedom of association, read in conjunction with section 15, impose positive obligations on governments to ensure that these rights are not rendered illusory for poor people and other groups by systemic patterns of social and economic disadvantage;
 - ii. Whether the repeal of legislation on which vulnerable groups may rely is subject to Charter scrutiny;
 - iii. Whether poverty is a ground of social and historical disadvantage analogous to those enumerated under section 15;

- iv. Whether certain classes of workers experiencing social and economic disadvantage ought to be protected, in some circumstances, from discrimination under section 15 or whether their disadvantage must be shown to be the result of discrimination on the basis of other personal characteristics in order to attract the protection of section 15;
 - v. Whether the characteristics of those who are members of a group but not subject to the impugned law or provision ought to be considered when the court assesses if a group such as agricultural workers is analogous under section 15; and
 - vi. Whether social and economic disadvantage that results from the imbalance of power within the private market is beyond the scope of the Charter or whether, alternatively, such disadvantage may sometimes require government action or legislation to protect fundamental dignity and security interests.
1. The Court's determination of the issues raised in this appeal will likely have a critical impact on the rights of poor people under the Charter. The Court's decision will have broad implications for the application of section 15 to groups which are socially, historically and politically disadvantaged by poverty and economic circumstance and are subject to stereotype and discrimination on the basis of their marginal economic status.
 2. In recent years, a consensus has emerged among human rights treaty monitoring bodies that poverty among vulnerable groups in Canada is a violation of fundamental human rights and requires concerted action by all levels of government. While CCPI has previously urged this Court to recognize the positive obligations of governments to address the needs of those living in poverty through social programs and income assistance, this is the first case to deal with governments' obligations to address historical patterns of social and economic inequity affecting the working poor.
 3. Under international human rights law, the obligation to legislate protections of vulnerable groups in the area of employment include, but extend well beyond, the obligation to provide necessary protections from discrimination as recognized by this court in *Vriend v. Alberta*. Obligations under international human rights law encompass a broad array of legislative measures necessary to remedy social and economic disadvantage among groups subject to systemic patterns of disadvantage in employment. In CCPI's view, it is of fundamental importance for this Court to interpret Charter rights, and particularly equality rights, within this broader framework of government obligations under international human rights law. The present case provides the opportunity for this Court to apply the notion of substantive equality that has been developed in other contexts to the problem of the growing poverty among workers whose position in the workforce and in the labour movement itself is marginal, whose bargaining power is limited and whose ability to affect political processes is severely limited.
 4. In the present case, CCPI intends to make the following arguments which may not be advanced by any of the parties to the appeal:
 - i. Poverty or "social condition" is not simply a symptom of discrimination on the basis of other characteristics, but is itself a personal characteristic which attracts widespread prejudice, discrimination and stereotype and which defines a group which is particularly vulnerable to political exclusion and legislative neglect. As such, it is a characteristic analogous to those which are enumerated under section 15 and ought to be protected as an analogous ground in the context of the present case;
 - ii. Human rights legislation in most provinces recognizes those who rely on public assistance as requiring protection from discrimination. Lower courts have recognized that poor people in general, including those who are commonly referred to as the "working poor", face discrimination based on poverty or "social condition" analogous to grounds enumerated under section 15. Overlap and movement between the two sub-groups of the poor is common. CCPI will urge the Court to adopt a consistent, contextual approach to obligations of governments under section 15 to address the discrimination, prejudice and systemic exclusion faced by those living in poverty in diverse circumstances, including both those who rely on government assistance and those who are socially and economically disadvantaged in employment;
 - iii. In assessing whether agricultural workers constitute an analogous group under section 15, CCPI will argue that the Court should not exclude consideration of the migrant workers simply because they were not subject to the repealed legislative provisions. This Court has recognized that the nature of the group

and the prejudices, stereotypes and disadvantages faced by its members ought to be considered in the broader social and historical context and not confined to those members of the group who happen to be subject to the impugned legislative scheme. CCPI will urge that divided jurisdiction which is often a barrier to appropriate government response to the needs of disadvantaged groups should not affect the assessment of whether a group ought to enjoy the protection of section 15;

- iv. This Court recognized in *Vriend v. Alberta* that governments have an obligation to implement Charter rights by legislating protections necessary to the enjoyment of substantive equality, even if the protections are made necessary by the actions of private actors. CCPI will argue that whether the violation of Charter rights is the result of omission or failure to act, as in *Vriend*, or of the repeal of previously enacted legislation, as in the present case, the effects of government action or inaction must be assessed within the broader social and historical context. CCPI will argue that the social and historical context in which the effect of government action or inaction is assessed should include those systemic power imbalances within private sector economic relations which engage dignity and security interests of vulnerable groups;
- v. In considering whether the repeal of legislation may violate Charter rights, CCPI will draw the attention of the Court to the prohibition of "deliberately retrogressive measures" under international human rights law. International human rights treaty monitoring bodies routinely assess legislative amendment or repeal within the context of broad obligations to implement fundamental human rights. CCPI will argue that sections 2 and 15 of the Charter may be applied to issues such as the repeal of legislative protections at issue in the present case in a manner that is consistent with international human rights law without "constitutionalizing" particular legislative regimes or unduly interfering with the legislature's role of choosing the appropriate means through which to respect, protect and fulfill fundamental human rights;
- vi. Finally, CCPI will address the issue, raised by the Court below, of the extent to which the Charter protects social and economic rights recognized in international law. CCPI will argue that it would be inconsistent with international human rights law, with previous jurisprudence from this Court and with Canada's assurances to international human rights treaty monitoring bodies to draw any demarcation between civil and political rights on the one hand and social and economic rights on the other in determining the scope of the Charter's protections. International human rights treaty monitoring bodies have recommended that Canadian courts adopt a purposive approach to Charter rights recognizing many social and economic rights as components of Charter guarantees. CCPI will argue that these recommendations from international human rights treaty monitoring bodies are entirely consistent with this Court's jurisprudence and ought to be applied in the present case.

5. This affidavit is made in support of a motion by the Charter Committee on Poverty Issues for leave to intervene in this appeal, to file a factum and to present oral argument through CCPI's legal counsel.

SWORN BEFORE ME at the City/Town)

of , in the Province)

Vincent Calderhead)

of Nova Scotia, this 24th day of)

May, 2000) VINCENT CALDERHEAD

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A Commissioner of Oaths