

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
ATTORNEYGENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO**

Respondents

APPLICATION UNDER Rule 14.05(3)(g.1) of the
Rules of Civil Procedure, R.R.O. 1990, O. Reg. 194
and under the *Canadian Charter of Rights and
Freedoms*

AFFIDAVIT OF MARIE-EVE SYLVESTRE

I, MARIE-EVE SYLVESTRE, of the City of Ottawa in the Province of Ontario

MAKE OATH AND SAY as follows:

A. Qualifications, Education and Experience

1. I am a lawyer and a member of the Quebec Bar (2000), an associate professor of law at the University of Ottawa and the Director of the Ph.D. Program in Law. I am also a collaborator of the International Centre for Comparative Criminology at the Université de Montréal (ICCC).

2. I received the degree of Bachelor of Law (LL.B.) from the Université de Montréal in 1999 and was awarded the Faculty Medal. I was subsequently awarded the Quebec Bar Merit Award for finishing in first position in the Province of Quebec in bar exams in 2000 and was a law clerk for Mr. Justice Charles D. Gonthier of the Supreme Court of Canada. I received the degree of Masters in Law (LL.M.) in 2002 and Doctor of Juridical Science (S.J.D.) in 2007 from Harvard Law School where I was a Frank Knox Memorial Foundation Fellow and the holder of a doctoral scholarship from the Social Sciences and Humanities Research Council of Canada (SSHRC). My further qualifications and a complete list of scholarships are contained in my resumé attached as Exhibit A.

3. My S.J.D. dissertation analysed patterns of discrimination and criminalization of homeless people in Montreal and Rio de Janeiro, developing a socio-legal analysis of the adoption and enforcement of programs against antisocial behaviour and urban disorder starting in the 1990s in both cities. My research

relied on extensive fieldwork conducted in Rio de Janeiro between 2003 and 2005 and in Montreal between 2005 and 2007. Through a request for access to information, I obtained data and internal reports from the *Service de police de la Ville de Montréal* (SPVM) with respect to the implementation and monitoring of their program against antisocial behaviour. I also followed police officers on duty in the downtown area. This part of my fieldwork was complemented by extensive observation and several meetings with community groups, street workers and shelter managers.

4. In the case of Montreal, I analyzed the consequences of the adoption of an anti-disorder program and zero-tolerance policing practices in the 1990s for homeless people and other marginalized groups who occupy public spaces. I documented the extraordinary increase in the issuance of statements of offences against homeless people since the adoption of neighbourhood policing in 1997 as well as discriminatory practices in law enforcement, incarceration for default payment of fines, displacement, harassment and violence.
5. My doctoral thesis also described five sets of beliefs or discourses conveyed about homeless people in the scientific literature, in the legal and political discourse, in popular attitudes and in the media. I demonstrated that these beliefs do not reflect the reality of homeless people and the diversity of experiences of homelessness; on the contrary, they are based on prejudices

and stereotypes about them. These beliefs have informed both punitive and charitable responses to homeless people, historically and in the present. These beliefs include: 1) homeless people are disorderly, dangerous and potentially criminals; 2) homeless people have chosen to be homeless and to commit 'disorderly' acts because they like this way of life; 3) homeless people have chosen to be homeless because they are lazy, irresponsible and do not want to work; 4) homeless people are different from other citizens in the sense that other citizens could never become homeless.

6. In 2007, my colleague Céline Bellot and I joined our efforts and put together a research project on the criminalization of homeless people in Canada, assessing the propensity to resort to the criminal justice system (in particular to regulatory criminal law) as a means of resolving conflicts related to homelessness. Céline Bellot holds an M.A. and a Ph.D. (2001) in Criminology from the Université de Montréal. She is an associate professor at the Social Work Department at the Université de Montréal, a regular researcher at the International Centre for Comparative Criminology at the Université de Montréal (ICCC) and a regular member of the Collectif de recherche sur l'itinérance, la pauvreté et l'exclusion sociale at the Université du Québec à Montréal (CRI-UQAM). Bellot's doctoral studies relied on four years of ethnographic fieldwork with Montreal street youth.

7. Our ongoing research project on the criminalization or “judicialization” of homeless people in Canada is funded by the Social Sciences and Humanities Research Council of Canada (SSHRC) and the Canadian Homelessness Partnering Strategy (HPS) from Human Resources Canada. This project aims to document the legal trajectories of homeless people who face the criminal justice system for offences to by-laws or provincial statutes related to the use and occupation of public spaces in Canada. The first component of this study consists in the collection and analysis of data on statements of offences issued against homeless people in eight Canadian cities (Halifax, Montreal, Quebec, Gatineau, Ottawa, Toronto, Winnipeg and Vancouver). The second component is based on 50 in-depth interviews with the actors involved in three different levels of the criminalization process of homeless people, in six of these eight cities. These include the representation level (defence lawyers and community workers), the judicial level (prosecutors and judges), and the administration of justice level (fine collectors and correctional officers). This project also draws on previous research of Bellot’s in which she conducted 29 interviews with homeless people in Montreal in 2004-2005.
8. Since 2005, my research results have been published in three book chapters, seven articles, three research reports and numerous other publications at the national and international levels in three languages (French, English and Portuguese). They have also been presented in the context of more than 50 conferences, community forums and workshops held nationally and

internationally. A list of my research contributions is contained in my resume in Exhibit A.

9. Starting in 2008, I acted as a special consultant for the Quebec Bar in the context of the Quebec Parliamentary Commission on Homelessness held in the fall of 2008 and the spring of 2009. I contributed to the Quebec Bar Brief and presented it before the Parliamentary Commission on November 4, 2008 with the President of the Bar. The Quebec Bar brief was entitled: « Les personnes en situation d'itinérance : détentrice de droits fondamentaux ». Since the fall of 2010, I have been a member of the Advisory Committee on Human Rights of the Quebec Bar and I ensure the follow-up of the Quebec Bar recommendations with respect to the human rights of homeless people.
10. On April 9, 2009, I was invited by the Commission of Social Affairs of the Quebec National Assembly to present a personal brief before the Quebec Parliamentary Commission on Homelessness. My brief was entitled: « La judiciarisation et la pénalisation des personnes itinérantes : des pratiques coûteuses, inefficaces et contre-productives ».
11. Starting in 2006, I acted as a special consultant for the Quebec Commission des droits de la personne et des droits de la jeunesse (CDPDJQ). In 2005, the Commission established a three-party task force to examine allegations of systemic discrimination against homeless people in Montreal. The task force

was composed of representatives from the Commission, community groups, as well as the City of Montreal, including the police. In November 2009, the Commission issued a legal opinion to the effect that the criminalization of homeless people in Montreal constituted systemic discrimination and represented a case of “social profiling” contrary to the protection from discrimination on the enumerated ground of “social condition”.¹ The Commission relied extensively on my research and that of Céline Bellot in developing its legal opinion. A copy of the Commission’s Report, along with an Executive Summary in English, is attached as Exhibit B.

12. Starting in 2009, I acted as a special consultant for the Municipal Court of the City of Montreal in an effort to examine alternatives to the criminalization of homeless people. I presented my work before judges of the Municipal Court in 2009 and I am currently working with the President of the Municipal Court to establish a working group with key actors involved in the criminal justice system including judges, prosecutors, defence lawyers, the collection department and community groups.

13. I have been a member of the Research and Planning Committee of the Alliance to End Homelessness in Ottawa from 2006 to 2009. In that capacity,

¹ Commission des droits de la personne et des droits de la jeunesse, *La judiciarisation des personnes itinérantes à Montréal: Un profilage social*, cat 2.120-8.61, Montréal, Commission des droits de la personne, novembre 2009 [Commission].

I helped organize the Community Forums which are held annually on National Housing Day.

14. Since 2009, I have been a member of the Regional Commission to Fight Homelessness (Commission régionale intersectorielle de lutte contre l'itinérance - CRILI) in Outaouais, Quebec.
15. On the basis of the experience set out in paragraphs 1 to 14 above, I have knowledge of the matters to which I depose in this affidavit.

B. Area of Expertise and Nature of Evidence

16. My area of expertise is in discrimination against and profiling of homeless people on the basis of prejudice and stereotypes, specifically as it is manifested in social control of the homeless through criminalization of those who occupy public spaces. In this affidavit, I have been asked to describe:
 - a. Prevalent patterns of discrimination, stereotypes and prejudice faced by homeless persons, both historically and in the present;
 - b. The nature and effect of legislative and regulatory responses to homelessness based on false stereotype and prejudice rather than on the actual causes of homelessness;
 - c. Evidence of the cost-effectiveness of addressing the causes of homelessness rather than regulating the homeless on the basis of stereotypes and prejudices; and

- d. Homelessness as a socially constructed personal characteristic that is difficult to change.

17. When I refer to homeless people or to those experiencing homelessness in this affidavit, I am including two general categories:

- a. People living in unstable housing arrangements, including people living on the streets or in places not meant to be living spaces (under bridges, alleys, sidewalks, building doorways, vehicles, tunnels, ravines, etc.), people living in emergency shelters (whether it is on a temporary, occasional or more permanent basis), and people who “squat” friends’, families’ or colleagues’ living spaces and who change addresses as their circumstances change (commonly referred to as “couch surfing”).
- b. Those who are improperly or vulnerably housed, occupying housing that is unsafe, unaffordable, overcrowded or inappropriate for other reasons, such as lacking in available support services necessary for persons with disabilities or mental health issues. These people will often also experience homelessness as described in the first category for short periods of time because of housing affordability, maintenance, or other issues.

18. The majority of homeless people are not chronically homeless, but are temporarily without stable housing for periods of time. The length and frequency of these periods will vary according to the person and

circumstances: according to the most recent study published by REACH³, “the division between these two groups [the vulnerably housed and the homeless] is false. The people we identified as ‘vulnerably housed’ were not just at risk of homelessness; in the past 2 years, they had spent almost as much time homeless (just under 5 months per year) as the homeless group did (6.5 months per year). Instead of two distinct groups, this is one large, severely disadvantaged group that transitions between the two housing states.”²

C. Stereotypes, Prejudices and Stigmas about Homeless People

19. Homeless people have long been subjected to negative stereotypes, prejudices and discrimination. These are based on a general pattern of ignoring the actual causes of homelessness, which are generally related to structural systemic issues. The actual causes of homelessness include economic changes, poverty, violence, land use and planning strategies, neighbourhood gentrification, and state and institutional failures to address the needs of vulnerable groups such as refugees, youth released from foster homes, ex-prisoners released from correctional facilities, people with mental or intellectual disabilities in need of supports, etc. There are a myriad of individual circumstances which combine with the systemic causes such as physical and mental health problems, displacement from land or existing

² Emily Holton, Evie Gogosis & Stephen Hwan, *Housing Vulnerability and Health: Canada’s Hidden Emergency* (Toronto: Research Alliance for Canadian Homelessness, Housing, and Health, 2010).

housing, unemployment, family breakdown, addiction and migration. Prejudice and stereotypes obscure the real causes of homelessness and thwart efforts to address the causes by blaming those who are its victims – imputing personal characteristics of moral inferiority, laziness, dishonesty and criminality which then provide an ‘explanation’ for the problem of homelessness. Those who are homeless are treated as a threat to society, considered as outsiders needing to be repressed and confined rather than being treated as equal citizens worthy of respect.

20. The discriminatory pattern of blaming homeless people for their own demise rather than understanding and addressing the actual causes of homelessness leads to two prevalent policy responses. The first response is to criminalize homeless people, attempting to regulate, punish or confine them rather than addressing the needs or structural causes that led to homelessness. The second response is charity. Rather than being seen as a social problem that can be addressed through appropriate government programs and policies, the charitable response individualizes homelessness. It also creates dependency on the generosity of donors and is based on compassion and assistance, rather than on the notion of equal entitlement or fundamental rights such as life, security and equality to which homeless people are entitled as citizens and human beings.

i) Historical Patterns

21. While homelessness in Canada in its current form dates back to policy and economic changes that began to occur in the late 1980s, patterns of discrimination toward the homeless have a much longer history. As noted by the Quebec Human Rights Commission in its recent report on discrimination against homeless people, described as “social profiling”, the historical antecedent to modern patterns of discrimination against the homeless can be traced back at least to the 13th century, when vagrants, *sans aveux* (without an agreement of loyalty and allegiance to a lord) and *gueux* (beggars) were the primary targets of repressive measures of social control in France. Still in the 18th century, the King’s agents tirelessly chased homeless people, applied red hot iron marks on their bodies and confined them in *dépôts de mendicité* (workhouses). Historical sources estimate the number of homeless individuals confined in *dépôts* to be more than 230,000 over a period of 20 years with a peak of over 50,000 mendicants arrested in the course of one year. The mortality rate among those in confinement was extremely high³. The first vagrancy ordinance was enacted in France by François 1er in 1534. Subsequently, it appeared under sections 269 and 276 of the 1810 Penal Code and was punishable by imprisonment for three to six months. These dispositions were only officially abolished in 1992.

³ D Johnston, *A general, medical and statistical history of the present condition of public charity in France* (Edinburgh: Oliver & Bond, 1829).

22. Similarly, the first vagrancy statute was passed in England in 1349, making it a crime to give alms to anyone who was unemployed while being of “sound body and mind.”⁴ A correlation has been established between the adoption of vagrancy statutes in 14th century England and the need for additional labourers at a time when the Black Death had already killed more than half of the workforce and when landowners, ruined by various wars, crusades and the price paid to free some of their tenants, were desperately looking for labourers who would work for low wages.⁵ Vagrancy statutes remained dormant at least until the 16th century, but with the breaking up of feudalism in England and the subsequent transition to a market economy, vagrancy statutes shifted their focus from labourers to criminals or anyone who was “likely” to engage in criminal activity. In 1824, the United Kingdom adopted *An Act for the Punishment of Idle and Disorderly Persons, and Rogues and Vagabonds*, providing for the commitment of any person wandering in any public place who begged while “being able wholly or in part to maintain himself or herself, or his or her Family, by Work or by other Means, and wilfully refusing or neglecting to do so.”⁶

23. A legal history of the vagrancy provisions in Canada can be found in *R. v. Munroe*⁷ and in *R. v. Heywood*.⁸ The first *Vagrancy Act* was adopted in

⁴ Cited in William Chambliss, “A Sociological Analysis of the Law of Vagrancy” (1964) 12:1 Social Problems 67 at 68.

⁵ *Ibid* at 69.

⁶ *An Act for the Punishment of Idle and Disorderly Persons, and Rogues and Vagabonds*, 1824 (UK), 5 Geo IV, c 83 s 3.

⁷ (1983), 41 OR (2d) 754, 148 DLR (3d) 166, 5 CCC (3d) 217 (Ont CA).

⁸ [1994] 3 SCR 761, 120 DLR (4th) 348, 94 CCC (3d) 481 [*Heywood*].

Canada in 1860. It was replaced by the adoption of the *Criminal Code of Canada* in 1892. Section 208 of the *Criminal Code* provided that:

208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both.⁹

The vagrancy provisions remained virtually unchanged until the 1950s.

Section 164(1) of the 1953-54 *Criminal Code* provided:

164. (1) Every one commits vagrancy who

(a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;

(b) begs from door to door or in a public place;

(c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;

(d) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or

(e) having at any time been convicted of an offence under a provision mentioned in paragraph (a) or (b) of subsection (1) of section 661, is found loitering or wandering in or near a school ground, playground, public park or bathing area.¹⁰

Section 179 of the current *Criminal Code* now reads as follows:

179. (1) Every one commits vagrancy who

(a) supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or

⁹ *Criminal Code*, SC 1892, c 29, s 208.

¹⁰ *Criminal Code*, SC 1953, c 51, s 164(1).

(b) having at any time been convicted of an offence under section 151, 152 or 153, subsection 160(3) or 173(2) or section 271, 272 or 273, or of an offence under a provision referred to in paragraph (b) of the definition “serious personal injury offence” in section 687 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read before January 4, 1983, is found loitering in or near a school ground, playground, public park or bathing area.

Punishment

(2) Everyone who commits vagrancy is guilty of an offence punishable on summary conviction.¹¹

24. Throughout the Middle Ages and into the contemporary era, homeless people were stereotyped as lazy individuals, who were unwilling to work and intentionally chose to remain in such a precarious social condition. Homelessness was explained and addressed as an individual moral failure rather than in relation to its actual structural causes, so that the victims of economic changes leading to displacement or unemployment were blamed for their predicament. As the Supreme Court of Canada acknowledged in *Heywood* legislative responses to homelessness have created “status” offences – related to personal characteristics rather than to prohibited actions.¹² Justice Cory wrote:

Historically, the essence of the offence of vagrancy was that of being a loose, idle or disorderly person or vagrant, rather than the doing of any of the specific acts referred to in the vagrancy provisions. In the 1953-54 *Criminal Code* (S.C. 1953-54, c. 51) the vagrancy provisions were restructured so that the focus shifted from being a vagrant to doing the acts prohibited by the section. However, it is significant that the acts prohibited were still primarily related to the status of the accused rather than the nature of the acts themselves.¹³

¹¹ *Criminal Code*, RSC 1985, c C-46, s 179.

¹² *Heywood*, *supra* note 8.

¹³ *Ibid.*

Vagrancy laws and their modern substitutes contained in cities bylaws and provincial statutes all have in common a tendency to sanction homeless people either for being homeless, for resorting to street survival strategies related to their status as homeless persons or for merely being in public spaces, rather than punishing them for adopting a specific behaviour, causing any particular harm or presenting any particular threat to personal integrity or security.

ii) Modern Patterns of Criminalization, Social Profiling and Discrimination Against the Homeless

25. Anti-panhandling statutes and anti-disorder by-laws adopted in Western cities and states starting in the 1980s share many similarities with vagrancy laws. Their popularity has in large part been attributed to the success and notoriety of the “broken windows” theory. This theory was first introduced in the literature by George Kelling and former Harvard University professor James Q. Wilson in a 1982 article published in *Atlantic Monthly* entitled “Broken Windows: The Police and Neighborhood Safety.”¹⁴ According to this theory, the absence of social and legal responses to petty crime and to the first signs of disorder in a neighbourhood (a broken window, for example) may signal to potential offenders that this neighbourhood is not concerned with preserving order in its public spaces and that crime will be tolerated or accepted. Moreover, according to the theory, disorder causes law-abiding residents to

¹⁴ James Q Wilson & George L Kelling, “Broken Windows: The Police and Neighbourhood Safety”, *Atlantic Monthly* 249 (March 1982) 29.

leave since they no longer feel safe in their environment. Thus, informal control mechanisms are relaxed and a spiral of urban decay and crime begins.

26. The proponents of this theory associated the homeless with signs of disorder and potential criminals and suggested that they be particularly targeted by police intervention and eliminated from public spaces to prevent subsequent disorder and more serious crime. They portrayed homeless people who are deemed responsible for disorderly acts as “disreputable or obstreperous or unpredictable people.”¹⁵ They compared “respectable people” to “street people”, “good citizens” to the homeless, and “good kids” to “criminals or wannabes.”¹⁶ In order to justify the stereotype of homelessness as a sign of moral failure or criminality, those who adopted these approaches also relied on the myth of “homelessness by choice.” They insisted that homeless people should be held responsible and repressed for their “choice to live on the streets.” They observed that “[c]learly, not all those designated as homeless in these [cases] are in this condition involuntarily. Yet, their choice to live on the streets is disruptive to others.”¹⁷

27. This theory has been largely discredited. Scholars have demonstrated the lack of conclusive evidence to support the connection between disorder and

¹⁵ *Ibid.*

¹⁶ George L Kelling & Catherine M Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities* (New York: Martin Kessler Books, 1996).

¹⁷ *Ibid.*

serious criminality or the fact that order-maintenance policing had brought about declines in crime.¹⁸ Nevertheless, my research has found that public officials and the police in Canada have relied, sometimes heavily, on the stereotypes implicit in the broken-window theory (i.e. homeless people are dangerous and potentially criminals, homeless people have chosen to live on the streets, and homeless people are different from other good citizens), in order to justify the adoption of social and legal responses to homelessness in the last two decades. As programmatic responses that addressed the causes of homelessness such as social housing, investment in health care or employment policies, have been reduced or eliminated, governments have adopted unprecedented measures based on the “stigma” of homelessness as a perceived “moral” failure and designed to make homeless people disappear from the public sphere.

28. Throughout Canada, local and provincial authorities have prohibited “antisocial behaviour” in public spaces, such as parks, subway stations and sidewalks. Ontario was the first province to adopt this type of legislation with the passage of the *Safe Streets Act*¹⁹ in 1999. British Columbia soon followed

¹⁸ Bernard E Harcourt, *Illusion of Order: The False Promises of Broken Windows Policing* (Cambridge, Mass: Harvard University Press, 2001); Bernard E Harcourt & Jens Ludwig, “Broken Windows: New Evidence from New York City and a Five-City Social Experiment” (2006) 73:1 U Chicago L Rev 271; Franklin E Zimring, *The Great American Crime Decline* (Oxford: Oxford University Press, 2007); John Eck & Edward Maguire, “Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence” in Alfred Blumstein & Joel Wallman, eds, *The Crime Drop in America* (Cambridge, UK: Cambridge University Press, 2000) 207; Jock Young, *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (London: SAGE, 1999).

¹⁹ SO 1999, c 8.

the same path and enacted its own provincial-wide *Safe Streets Act*²⁰ in 2004. The City of Montreal and the Province of Quebec did not adopt new legislation. However, local authorities and the police ranked fighting against antisocial behaviour among the highest concerns in the city and insisted that it should become a priority. The police worked with general, open-ended existing pieces of legislation, while the City of Montreal and its boroughs adopted regulatory modifications to the status of some public places, making significant architectural changes to the public domain to restrict access to public spaces for the homeless.

29. All these measures have had severe effects on homeless populations and on people who use public space for activities related to their subsistence and survival. Homeless people rely on public spaces. This is so from the moment the shelter requires them to leave in the morning to the first line-up in front of the community health clinic, food bank or soup kitchen, to the employment centre or a community organization to get social support, and then back to the final line-up in front of the shelter in the evening. Homeless people are by definition (and hence the French word “itinerant”) always on the move and always exposed. The lack of access to private space means that they will have to respond to their most fundamental needs in public spaces. They are highly dependent on being able to use public spaces, yet there they are vulnerable to discriminatory treatment.

²⁰ SBC 2004, c 75.

30. Since the adoption of the *Safe Streets Act*, there has been a consistent increase in the number of certificates of offences issued in both Toronto and Ottawa against homeless people. In Toronto, certificates of offences were nine times more frequent in 2006 (6356 certificates) than they were in 2000 (710 certificates) with an overall increase of 800% and a total number of certificates reaching 16,860 in a period of six years. In Ottawa, certificates of offences were 15 times more frequent in 2006 (1527 certificates) than in 2000 (103 certificates) with a total increase of 1400% and a total number of certificates reaching 4882 in a period of six years. In Montreal, between April 1, 1994 and March 31, 2006, the police issued 37,775 statements of offence for violations of municipal by-laws or the regulations of the Montreal Transportation Society (STM) to 6,740 homeless people. These numbers are only the tip of the iceberg as they only include individuals who, at the time of the issuance, provided as their address that of one of the organizations or shelters working with street youth or the homeless population in the city. Moreover, in Ontario, homeless individuals are also charged with infractions to provincial legislation such as the *Highway Traffic Act*,²¹ the *Liquor License Act*,²² the *Environmental Protection Act*,²³ the *Trespass to Property Act*,²⁴ and to municipal by-laws. These infractions are not included in the numbers.

²¹ RSO 1990, c H.8.

²² RSO 1990, c L.19.

²³ RSO 1990, c E.19.

²⁴ RSO 1990, c T.21.

31. In addition to the issuance of statements of offence, there have been documented instances of police harassment, violence and the displacement of homeless people. For instance, in Montreal, some people reported being displaced up to five times every night, putting their life, security and health at risk.

32. Our studies have found that these repressive measures have had an impact on homeless individuals of all ages, with the greatest impact on the young and old: in Montreal, between 1994 and 2004, 31% of the statements of offence were issued against individuals below the age of 30; 36% against homeless people between 30 and 44 years of age and 33% against individuals above 45 years old. Women received approximately 8% of all statements issued during that period while 92% of them were issued to men.

33. Generally speaking, the more unstable and visible homeless people are, the more they will receive statements of offence. Nonetheless, whether individuals are younger or older, men or women, whether they are chronically, episodically or transitionally homeless and whether they live on the streets, in shelters or are transiting from friends or family housing units, they receive statements of offences simply because they occupy public spaces on a daily basis to satisfy their most basic needs.

34. In response to these patterns of discrimination and stereotyping of homeless people, the Quebec Human Rights Commission established a three-party taskforce in 2005 to examine the potentially discriminatory effect of by-laws on the homeless. In November 2009, the Commission produced a legal opinion describing the criminalization of homeless people in Montreal as “systemic discrimination” and representing a case of “social profiling.” The Commission estimated that homeless people had received between 30% and 50% of all statements of offences issued on the territory served by the Montreal police in 2004 and 2005. For instance, in 2004, at least 3,281 statements of offences out of 10,397 were issued to homeless people (31.6%).

35. According to the Commission, social profiling is a form of discrimination pursuant to s. 10 of the Quebec *Charter of Human Rights and Freedoms*,²⁵ which prohibits discrimination on a number of grounds, including “social condition.” Social condition has been a prohibited ground of discrimination under the Quebec *Charter* since its adoption in 1975. In a 1994 policy statement on social condition, the Quebec Human Rights Commission describes it as referring to a rank, a social position or class attributed to someone principally because of his or her level of income, occupation and education, having regard to the objective and subjective components of

²⁵ RSQ c C-12, s 10.

each.²⁶ Homelessness has been accepted by human rights tribunals, courts and the Quebec Human Rights Commission as a form of “social condition.”²⁷

Like racial profiling:

Social profiling refers to any action taken by one or several persons in a position of authority with respect to a person or a group of persons, for the purposes of safety, security or public protection, that relies on social condition, whether it is real or presumed, without any reason or reasonable suspicion, with the effect of subjecting that person to differential treatment. This includes any action taken by persons in a position of authority applying a specific measure in a disproportionate manner on one segment of the population because of their social condition, real or presumed.²⁸

36. According to the Commission, social profiling is triggered by an action taken against a person based on the fact that this person apparently belongs to an identified group of people. In the case of homelessness, profiling may be based on a person’s “sloppy or neglected appearance,” “bad bodily odour or personal hygiene” and “used and ill-assorted clothing.”²⁹ Social profiling can be exercised in different ways. It can be the result of a broad interpretation of by-laws in order to criminalize homeless people. For instance, the Montreal police used the general prohibition to use “street furniture for a purpose other than the one for which it is intended”³⁰ to ticket homeless people who were lying down on a park bench instead of sitting straight on it. It can also be the result of issuing a statement of offence for an offence that goes otherwise unchecked for the rest of the population such as jaywalking or throwing a

²⁶ Commission des droits de la personne et des droits de la jeunesse, *Lignes Directrices sur la Condition Sociale*, cat 2.120.8.4, Montréal, Commission des droits de la personne, 31 mars 1994.

²⁷ Commission, *supra* note 1 à la p 45.

²⁸ *Ibid* [translated by author].

²⁹ *Ibid* [translated by author].

³⁰ City of Montreal, revised by-law C P-12.2, *By-law Concerning Cleanliness and Protection of Public Property and Street Furniture*, s 20.

cigarette butt on the sidewalk. Our studies found that authorities frequently adopted abusive, harassing behaviour towards this population, such as issuing a statement of offence to someone who is sleeping or issuing multiple statements of offence for the same behaviour in a very short period of time. The Commission generally concluded that several by-laws of the City of Montreal had a discriminatory impact on homeless people and that they infringed their right to life, security, integrity, dignity, liberty and equal access to public spaces. The Commission recommended that the by-laws be revised in order to make sure that the sanctioned behaviour represents a real public nuisance. In November 2009, the Commission of Social Affairs of the Quebec National Assembly released the report of the Parliamentary Commission on Homelessness. The Commission recommended the eradication of the judicial records of homeless people who had been convicted of violating municipal by-laws and provincial statutes related to the occupation of public spaces. In doing so, the Parliamentary Commission recognized the ineffectiveness of strategies aiming at criminalizing the homeless in Quebec. The Commission's position relied on our work (Bellot's and mine) as well as on the suggestions made by the Quebec Bar.

37. Depending on their personal circumstances, homeless people and vulnerably housed people are a relatively powerless group of individuals in Canadian society. Their voices are largely unheard and their interests tend to be overlooked in the political process. For instance, they are not considered

interested parties when cities put forward development or revitalization projects which will have significant impact on homeless communities and on the vulnerably housed by displacing them, by raising the prices of housing or property, or by increasing demands for repression and containment of homeless populations. In the words of a Montreal City Councillor, “they [homeless people] are not welcome anywhere.”

38. Similarly, community organizations and shelters which provide homeless services are not welcome in most neighbourhoods. Operations informally called “Not in my Backyard” (NIMBY) have been formed in several cities, essentially stating that while social and community groups working with the homeless should be allowed to exist and continue their activities, they should not be allowed to do so in their neighbourhood. These movements have prevented the operation, centralization and expansion of community shelters. For instance, there was a lot of resistance in the community when the *Refuge des jeunes de Montreal*, a drop-in center and a shelter for homeless youth had to move to the Montreal Gay Village in 2010. Businesses and resident associations expressed their opposition to the move, arguing that there were already too many community organizations serving the homeless in the area and that it would attract further criminal activity.

39. Attitudes toward the homeless are informed by prejudices and stereotypes that are applied to poor people more generally. A recent Angus Reid survey

commissioned by the Salvation Army found that despite widespread concern about poverty as one of the most serious problems facing Canada, a disturbingly high number of respondents viewed people living in poverty as morally inferior, lazy and responsible for their own circumstances. The survey found that:

- Nearly half of all respondents agreed with the notion that, if poor people really want to work, they can always find a job.
- 43 percent agreed that “a good work ethic is all you need to escape poverty.”
- 41 percent believe that the poor would “take advantage” of any assistance given and “do nothing.”
- 28 percent believe the poor have lower moral values than average.
- Nearly a quarter believe that “people are poor because they are lazy.”

A copy of the 2011 report of the survey, entitled “Debunking myths about Poverty in Canada” is attached as Exhibit C to this affidavit.

40. The results of this survey conform with the patterns of discrimination and prejudice described in expert evidence considered by Ferrier J. in *R. v. Clarke*, in which it was found that “there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight.”³¹

³¹ [2003] OJ No 3883, 61 WCB (2d) 134 (Ont Sup Ct).

41. The case of the city of Ottawa further illustrates the kinds of stigma and exclusion faced by homeless people and community shelters. In 2005, an Ottawa city councillor called for and obtained a moratorium on downtown homeless services. His rationale was that the concentration of social supports in the downtown area had created a ghettoizing effect and had also attracted homeless people to the city of Ottawa. This was a point of view shared by former Mayor O'Brien who, in 2007, stated that Ottawa was attracting the homeless "like seagulls at the dump" by offering so many services. On another occasion, Mayor O'Brien compared homeless people to pigeons, saying that if we would stop feeding them, they would stop coming.³² These beliefs reflect general stereotypes about homeless people as inferior, irresponsible, and undesirable inhabitants who will bring about urban decay and disorder. They are, however, not grounded in empirical evidence: shelters and community organizations choose to locate near the population they wish to serve. Moreover, if social support for the homeless were stopped, homeless people would not disappear. Their own situation would simply become even more critical and precarious.

42. The prevalence of discriminatory attitudes toward those who are poor or homeless has led all provinces and territories to include in their human rights legislation some form of protection from discrimination on the ground of "social condition," receipt of social assistance, or source of income. The only

³² "'Pigeons' squawk over mayor's comments on homeless", *CBC News* (25 April 2007), online: CBC.ca <<http://www.cbc.ca/news/canada/ottawa/story/2007/04/25/pigeon-070425.html>>.

human rights legislation not to include a ground of discrimination linked to social condition is the *Canadian Human Rights Act*.³³ In 2000, the *Act* was reviewed by a special panel chaired by former Supreme Court Justice Gérard Laforest at the request of the Minister of Justice. The panel was requested to consider, among other things, whether the ground of "social condition" should be added to the *Act*. Relying on extensive research and consultations held across Canada, the panel stated that:

Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination...

We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function.

A copy of the relevant sections, part one and chapter 17(e), of the Canadian Human Rights Act Review Panel's Report, *Promoting Equality* is attached and marked as Exhibit D.

43. Discriminatory prejudice and stereotypes that are prevalent among the public also affect government policy. Such stereotypes encourage government policy and expenditure to focus on regulating homeless people, addressing perceived "moral failures," and relying increasingly on charities to supplement

³³ RSC 1985, c H-6.

inadequate social programs to meet basic survival and service needs of homeless people. Governments' failure to adopt a coherent and effective strategy to address the causes of homelessness and to rely instead on continued expenditure on social regulation and criminalization is therefore consistent with prevalent stereotypes and prejudices about homeless people. The more the homeless people are considered to be "outsiders," unworthy citizens, causes of social deterioration and urban decay, the less likely governments are to address the actual needs of this group. By neglecting to address the causes of homelessness through policies and programs that create and sustain affordable housing and offer necessary support services, homelessness is exacerbated, which in turn, engenders more discriminatory attitudes toward this group.

D. The Costs of Discriminatory Responses to Homelessness

44. Repressive measures related to their occupation of public spaces have no dissuasive effect on homeless people. Such measures rely on the false belief that homeless people chose to live on the streets, to occupy public spaces and to engage in antisocial behaviour and criminal activity and therefore can be discouraged from being in such a social condition through the issuance of statements of offences or criminal charges. The documented effect, however, is simply to punish those who are homeless, without providing them with any alternative to homelessness.

45. Homeless people are rarely able to pay fines, and because of this, they frequently end up being incarcerated. In Ontario, 0.3% of all certificates of offences issued against homeless people (e.g. 51 out of 16,860 in Toronto and 14 out of 4,880 in Ottawa) have been paid between 2000 and 2006. In Montreal, of the 7650 statements of offence which reached a complete resolution during the period of the Bellot study, 72.3% were closed after the offender was incarcerated for default of payment of the amount due. Bellot found that offenders spent, in total, more than 70,000 days in prison for the non-payment of statements of offence between 1994 and 2004. She further predicted that pending cases would result in an additional 200,000 prison days. According to Statistics Canada, the average daily cost per inmate held in provincial custody is \$143.03.³⁴

46. The connections between homelessness and costly incarceration in Canada are now well-documented. The likelihood of being incarcerated is very high among homeless people and the number of people who are homeless or vulnerably housed when they are arrested, jailed or released from jail in Canada is steadily increasing. In a 2009-2010 study conducted by the John Howard Society of Toronto with 363 inmates in four provincial correctional facilities in the Toronto area, 69% of the respondents experienced residential instability in the two years prior to their incarceration, 24% of them had used a

³⁴ Statistics Canada, *Adult Correctional Services in Canada 2005-2006* by Laura Landry & Maire Sinha (Ottawa: StatCan, 2008) at 24. Note: amount referenced does not include capital costs.

shelter during that period, and 23% were homeless (living on the street, in places unfit for habitation, in a shelter or couch-surfing).³⁵ Contrary to popular belief, this is not because homeless people are more dangerous and more likely to be criminals than other citizens. In the same study, researchers found that homeless people were significantly less likely to have been incarcerated for a violent offence than other individuals.

47. High incarceration rates among homeless and vulnerably housed individuals are largely explained by three structural factors: first, homeless people are more visible and often targeted by law enforcement because of their occupation of public spaces and may end up incarcerated for these reasons; second, criminalization has been one of the dominant state responses to homelessness in the last decades and accordingly, the number of adults with no fixed address admitted to correctional facilities has increased; and third, the number of ex-prisoners released onto the streets is very high. Thus, homelessness leads to incarceration, and incarceration, in turn, produces homelessness.

48. In the same study conducted by the John Howard Society of Toronto, researchers found that 32.2% of the respondents expected to be homeless at discharge from prison. The rate of homelessness among respondents on being discharged was 22.9%. That rate had increased to 32.3% within days of

³⁵ Amber Kellen et al, *Homeless and Jailed: Jailed and Homeless* (Toronto: John Howard Society of Toronto, 2010).

discharge. Moreover, homeless respondents were more likely to need a full range of services upon discharge. They anticipated their service needs within the next six months to include transportation (92%), finding affordable housing (90%), getting low-cost or free furniture (87%), finding low cost or free clothing (82%), replacing identification documents (76%), finding low-cost or free food (74%), and assistance to find a job (62%). Lack of availability of these services is directly related to rates of homelessness among those discharged from prisons.

49. Incarceration and criminalization also have long-lasting effects on homeless people which impede their street exit process and community reintegration. In several studies, including our own (that of Bellot and myself), people report losing housing as well as their job while in jail, increasing the proportion relying on income support programs upon discharge. While there is no incarceration for default payment of fines in Ontario, when a fine has been in default for at least 90 days, the Ministry of the Attorney General may disclose to a consumer reporting agency the name of the defaulter, the amount of the fine and the date the fine went into default (section 69.1 *Provincial Offences Act*). The fact that a fine remains unpaid will thus affect the person's credit rating. And so, if a homeless person were to try to get a handle back on his or her life, he or she would be confronted with poor credit and would not be able to get basic services, like heat, water, phone, etc. In the words of an officer

for the Collection Services in Ottawa: “Unless they sort out their unpaid fines, they won’t be able to get the rest of their lives in order.”

50. A study conducted by researchers at the University of Toronto in 2006 showed that correctional facilities for adults and young offenders, respectively, cost \$3,720 and \$7,917 on a monthly basis.³⁶ The costs of homeless support services provided by the police, health care system and other social supports were estimated at \$4,583 per capita on a monthly basis. The cost of ensuring access to adequate housing and community-based support services for the homeless is relatively small compared to this. The Emergency Homelessness Pilot Project (EHPP) initiated by the City of Toronto in 2002 provided rent supplements to former homeless persons - occupants of Tent City - and assisted them in finding and maintaining housing. The estimated total monthly cost of housing, including the housing component of social assistance, rent supplement, and community worker support, was less than \$1,000 per month.³⁷ The cost of a new social housing unit has been estimated at \$1,080 monthly by the 2006 University of Toronto Study.³⁸ Another study commissioned by the John Howard Society of Toronto in 2011, analyzed the cost savings associated with the intervention of transitional housing and supports for “homeless ex-offenders” as opposed to

³⁶ Sylvia Novak et al, *Justice and Injustice: Homelessness, Crime, Victimization and the Criminal Justice System* (Toronto: Centre for Urban & Community Studies, University of Toronto, 2006) at 23.

³⁷ Gloria Gallant, Joyce Brown & Jacques Tremblay, *From Tent City to Housing: An Evaluation of The City of Toronto’s Emergency Homelessness Pilot Project* (Toronto: City of Toronto, 2004).

³⁸ Novak, *supra* note 37 at 23.

their absence. The analysis demonstrated that better outcomes can be achieved at lower costs with transitional housing and supports in place for individuals when they are released from prison. The likelihood of re-offending decreases and the public funding spent on prisoners is far less than the alternative of continued reincarceration. The per-person estimated savings was \$350,000. A copy of the 2011 report *Making Toronto Safer: A Cost-Benefit Analysis of Transitional Housing Supports for Men Leaving Incarceration* is attached as Exhibit E.

E. Homelessness as a personal characteristic that is difficult to change

51. Because of the prevalence of stereotypes and stigma applied to homeless people, the lived experience of homelessness involves far more than economic deprivation and absence of housing. It becomes an all-encompassing social identity or social label for individuals. It defines one's personhood in a way that is socially constructed and difficult to change. Virtually every part of society perceives and treats a person differently once they become homeless. Law enforcement officials treat them as potentially dangerous and disorderly and in need of severe regulation: they apply measures in a discriminatory fashion, on the basis of visible signs of poverty. Politicians tend to treat them as a "problem" to be kept out of a neighbourhood by denying basic sustenance or other services, rather than equal citizens entitled to programs and services to meet their unique needs.

52. The broader category of homelessness defines a disadvantage that is very difficult for an individual to overcome. Street exit is a long and difficult process which involves considerable movement back and forth from being homeless and being “vulnerably housed.” When applying for a job, it is hard to justify the period of time that the individual remained unemployed because he or she was homeless. When applying for an apartment, the homeless person often has difficulties providing references to future landlords and is seen as an undesirable tenant. As mentioned before, homeless people will carry several thousands of dollars in unpaid fines as a result of their criminalization. This has a major impact on their ability to exit the street and change their position. In Ontario, the fact that a fine remains unpaid affects the person’s credit rating. As noted above, landlords routinely check prospective tenants’ credit before renting an apartment, and debt collection on unpaid fines may compromise a tenant’s ability to pay rent.

53. Choices and options are extremely limited when one experiences homelessness. While the assumption behind criminalization and regulation of the homeless is that governments have an interest in punishing the homeless and in thus “encouraging” them to change their characteristics, evidence shows the contrary. Programs based on the assumption that they can easily change are ineffective and costly largely because they do not address the structural causes of homelessness.

F. Conclusion

54. On the basis of my own research and my knowledge of the research of others, it is clear that homeless people in Canada are subject to widespread prejudice, stereotype, stigma and discrimination based on their social condition of homelessness. False stereotypes and prejudices have informed government policy and programs, both federally and provincially in relation to this group.

55. Based on my research, I have concluded that the pattern that is evident in governmental response to homelessness has been marked by a prevailing tendency to neglect programs addressing the actual causes of homelessness and to instead criminalize and regulate homelessness. In this sense, government policies in recent years have been informed by the false stereotype that homelessness is caused by moral failures and characteristics that can be changed by regulating the homeless and their use of public space. Policies should instead be informed by the fact that homelessness results from income inequality, lack of affordable housing, lack of community support and other structural causes that need to be addressed in a comprehensive and strategic fashion. The neglect of the actual needs of homeless people for income support, affordable housing and support services in recent years has led to increasing patterns of criminalization and regulation

and is therefore a key aspect of prejudice and stereotype affecting homeless people.

56. Those who are forced to rely on public spaces to survive are the most vulnerable to criminalization, but all homeless people, including those who are vulnerably or precariously housed, or living in inadequate or inappropriate housing, are subject to similar stigma and prejudicial attitudes based on the idea that they are morally inferior and undesirable tenants or neighbours.

57. The absence of a coherent strategy to address the actual needs of homeless people has had immensely harmful effects on this vulnerable population. Moreover, it has cost governments significant amounts of money that could have been saved by addressing and solving the problem of homelessness through more reasonable and cost effective means. The adoption of a housing strategy as has been recommended by United Nations human rights bodies is critical to address the stigmatization and exclusion of homeless people and the growing problem of widespread homelessness.

58. My acknowledgement of my duty to the Court on Form 53 is attached as Exhibit F to this affidavit.

59. I affirm this affidavit in order to provide evidence on the application herein and
for no other or improper purpose.

AFFIRMED BEFORE ME)
at the City of Ottawa in the)
Province of Ontario)
this day of 2011.)

MARIE-EVE SYLVESTRE

A Commissioner, etc.

List of Exhibits

Exhibit A: Marie-Eve Sylvestre, *Curriculum vitae*.

Exhibit B: Commission des droits de la personne et des droits de la jeunesse, *La judiciarisation des personnes itinérantes à Montréal: Un profilage social*, cat 2.120-8.61, Montréal, Commission des droits de la personne, novembre 2009

Exhibit C: Salvation Army, *Debunking Myths about Poverty in Canada* (Toronto: Salvation Army, 2011).

Exhibit D: Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000), part one and chapter 17(e).

Exhibit E: John Stapleton, Brendon Pooran & René Doucet, *Making Toronto Safer: A Cost-Benefit Analysis of Transitional Housing Supports for Men Leaving Incarceration* (Toronto: John Howard Society of Toronto, 2011).

Exhibit F: Form 53.