COURT OF APPEAL FOR ONTARIO

CITATION: Tanudjaja v. Canada (Attorney General), 2014 ONCA 852
DATE: 20141201
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Feldman, Strathy and Pardu JJ.A.

BETWEEN

Jennifer Tanudjaja, Janice Arsenault, Ansat Mahmood, Brian DuBourdieu, Centre for Equality Rights in Accommodation

Appellants

and

The Attorney General of Canada and the Attorney General of Ontario

Respondents

Tracy Heffernan, Fay Faraday and Peter Rosenthal, for the appellants

Janet E. Minor and Shannon Chace, for the respondent the Attorney General of Ontario

Michael H. Morris and Gail Sinclair, for the respondent the Attorney General of Canada

Anthony D. Griffin, for the intervener the Ontario Human Rights Commission

Avvy Go and Mary Eberts, for the intervener the Colour of Poverty/Colour of Change Network

Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights

Marie Chen and Jackie Esmonde, for the intervener the coalition of the Income Security and Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance

Vasuda Sinha, Rahool Agarwal and Lauren Posloski, for the intervener the Women's Legal Education and Action Fund

Molly Reynolds and Ryan Lax, for the intervener the coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights

Laurie Letheren and Renée Lang, for the intervener the coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario

Martha Jackman and Benjamin Ries, for the intervener the coalition of the Charter Committee on Poverty, Pivot Legal Society and Justice for Girls

Heard: May 26, 27 and 29, 2014

On appeal from the judgment of Justice Thomas R. Lederer of the Superior Court of Justice dated September 6, 2013, with reasons reported at 2013 ONSC 5410, 116 O.R. (3d) 574.

Pardu J.A.:

[1] The appellants ask this Court to overturn a decision of a motion judge dismissing their application for relief pursuant to the *Charter of Rights and Freedoms*. The motion judge concluded it was plain and obvious the application did not disclose a viable cause of action and the application had no reasonable prospect of success. The motion judge also found the appellant's claim was not justiciable.

The Applicants

[2] The application was brought by four individuals and an organization devoted to human rights and equality rights in housing.

[3] The individual applicants suffer from homelessness and inadequate housing.

[4] Brian DuBourdieu was diagnosed with cancer. As a result of his illness he was unable to work, unable to pay his rent and lost his apartment. He has been living on the streets and in shelters and has been on the waiting list for subsidized housing for four years.

[5] Jennifer Tanudjaja is a young single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, Ms. Tanudjaja has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years.

[6] Ansar Mahmood was severely disabled in an industrial accident. Two of his children are also disabled, including one son who uses a wheelchair. Mr. Mahmood lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a

fixed income and has been on the waiting list for subsidized accessible housing for four years.

[7] Janice Arsenault and her two young sons became homeless after her spouse died suddenly. For several years she lived in shelters and on the streets. She was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in danger of becoming homeless again.

[8] The Centre for Equality Rights in Accommodation (CERA) is an Ontario-based non-profit organization which provides direct services to low income tenants and the homeless on human rights and housing issues. CERA is membership-based. Many of CERA's members have experienced inadequate housing and homelessness.

The Application

[9] The appellants allege that actions and inaction on the part of Canada and Ontario have resulted in homelessness and inadequate housing. They argue that the governments have taken an approach that violates their s. 7 and s. 15 rights under the *Charter*. The core of their application is captured in para. 14 of the Amended Notice of Application, which provides:

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures,

> and/or have taken inadequate measures, to address the impact of these changes on groups most vulnerable to, and at risk of, becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness. As a result, they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.

[10] The appellants expressly disavow any challenge to any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)"[1]. They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person. Rather, they submit that the social conditions created by the overall approach of the federal and provincial governments violate their rights to adequate housing.

[11] They submit that Canada has eroded access to affordable housing by:

> (a) cancelling funding for the construction of new social housing;
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> (b) withdrawing from administration of affordable rental housing;
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> (c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces; and

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[1] *Withler v. Canada* (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 35.

(d) failing to institute a rent supplement program comparable to those in other countries.

[12] They submit that Ontario has also diminished access to affordable housing by:

(a) terminating the provincial program for constructing new social housing;

(b) eliminating protection against converting affordable rental housing to non-rental uses and eliminating rent regulation;

(c) downloading the cost and administration of existing social housing to municipalities;

(d) failing to implement a rent supplement program comparable to those in other countries;

(e) downloading responsibility for funding development of new social housing to municipalities which lack the tax base to support such construction; and

(f) heightening insecurity of tenancy by creating administrative procedures that facilitate evictions.

[13] The appellants also argue that Canada and Ontario have diminished income support programs, and that this has increased the risk of homelessness and inadequate housing. In 1996, federal transfer payments were no longer tied to a minimum standard for social assistance. Amendments to the *Employment Insurance Act* S.C. 1996, c. 23, resulted in fewer people being entitled to benefits and Ontario has reduced welfare rates.

[14] Finally, the appellants submit that deinstitutionalization of persons afflicted with disabilities without adequate community support has resulted in widespread homelessness amongst those persons.

[15] The appellants claim wide-ranging remedies in their application:

> a) A declaration that decisions, programs, actions and failures to act by the government of Canada ("Canada") and the government of Ontario ("Ontario") have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing. Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing.
>
> b) A declaration that Canada and Ontario have obligations pursuant to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.
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> c) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' rights to life, liberty and security of the person contrary to s.7 of the *Charter*. These violations are not in accordance with the principles of fundamental justice and are not demonstrably justifiable under section 1 of the *Charter*.
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> d) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' right to equality contrary to s. 15(1) of the *Charter*. These violations are not demonstrably justifiable under section 1 of the *Charter*.

e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:

    i. must be developed and implemented in consultation with affected groups; and

    ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;

f) An order that [the Superior Court of Justice] shall remain seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e).

The motion judge's decision

[16] The motion judge struck the appellants' application, without leave to amend, on the basis that it was plain and obvious that the application could not succeed. He found that the application disclosed no reasonable cause of action and was not justiciable.

[17] With respect to s. 7 of the *Charter,* the motion judge concluded that there was no positive *Charter* obligation which required Canada and Ontario to provide for "affordable, adequate, accessible housing" and that in any event, the appellants had not identified any breach of the principles of fundamental justice. With respect to s. 15 of the *Charter*, he found that "the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no

breach of s. 15 of the *Charter*." In any event he concluded that homelessness and inadequate housing were not analogous grounds under s. 15 of the *Charter*. The free standing claim that homelessness might disproportionately affect persons such as "women, single mothers, persons with mental and physical disabilities, aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance" did not engage s. 15 of the *Charter*, in the absence of discriminatory laws, or discriminatory application of those laws. Finally he concluded that in any event, the issues raised by the application were not justiciable, that the implementation of the relief sought would "cross institutional boundaries and enter into the area reserved for the Legislature."

The Interveners

[18] The following eight organizations, or groups of organizations, were granted leave to intervene in this appeal under Rule 13.02 of the *Rules of Civil Procedure*: (1) a coalition of the *Charter* Committee on Poverty, Pivot Legal Society and Justice for Girls (the *Charter* Committee Coalition); (2) a coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights (the Amnesty Coalition); (3) the David Asper Centre for Constitutional Rights (the Asper Centre); (4) a coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario (the ARCH Coalition); (5) a coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering

Committee on Social Assistance (the Income Security Coalition); (6) the Colour of Poverty/Colour of Change Network (COPC); (7) the Ontario Human Rights Commission (OHRC); and (8) the Women's Legal Education Action Fund Inc. (LEAF). Each filed a factum and made brief oral submissions, generally in support of the appellants.

Analysis

[19] I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.

[20] As indicated in *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 90-91, "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity."

[21] Having analysed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution

> through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
>
> …
>
> [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

[22] A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Re Canada Assistance Plan,* [1991] 2 S.C.R. 525, at p. 545:

> In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[23] The Supreme Court discussed the difference between a political issue and a legal issue in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 2 S.C.R. 134, and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791. In both cases, the Attorneys General argued

that the subject matter of the *Charter* challenge was immune from scrutiny, and the Supreme Court disagreed. Both cases are distinguishable.

[24] In *Canada (Attorney General) v. PHS Community Services Society*, the Court observed, at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated *into law or state action,* those *laws and actions* are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, per Deschamps J., at para. 107, per McLachlin C.J. and Major J., and at para. 183, per Binnie and LeBel JJ.; *Rodriguez,* at pp. 589-90, per Sopinka J. The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*. [Emphasis added]

[25] In *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 S.C.R. 791, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J. and Major J. said:

> While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like *all laws*, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. [Emphasis added]

[26] Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982,* which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" (emphasis in original).

[27] In this case, unlike in *PHS Community Services* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged) there is no sufficient legal component to engage the decision-making capacity of the courts.

[28] In *Chaoulli*, the Supreme Court found that the legislative prohibition against private insurance contained in the *Hospital Insurance Act,* R.S.Q. c. A-29, engaged the appellants' rights to security of the person and was arbitrary in that no link was established to tie the need for the prohibition to the goal of maintaining quality public health care. That kind of analysis, a comparison between the legislative means and purpose, is impossible in this case.

[29] This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

[30] There are several aspects of this application, however, that make it unsuitable for *Charter* scrutiny. Here the appellants assert that s. 7 confers a general freestanding right to adequate housing. This is a doubtful proposition in light of *Chaoulli*, where McLachlin C.J. and Major J. made the following unequivocal statement, at para. 104:

> The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

[31] Further, as this Court noted in *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, leave to appeal denied, [2006] S.C.C.A. No. 441, at para. 225:

> [I]n *Gosselin, supra*, the Supreme Court of Canada rejected an argument that s. 7 of the *Charter* requires the provision of a minimum level of social assistance adequate to meet basic needs.

[32] Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right, and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law there is no basis to make that comparison.

[33] Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

[34] Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions, and urban centres are all different, across the country.

[35] I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that

legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.

[36] The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.

[37] Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v. Quebec*, 2002 SCC 84, [2002] 4 S.C.R. 429. Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.

[38] The appellants also argue that the motion judge ought to have refused to hear the respondents' motions to dismiss because the governments did not move to dismiss the application until two years after the application was issued on May 26, 2010, and after the appellants had compiled a voluminous record which was served on the respondents on November 22, 2012. Six months later the respondents advised the appellants that they had reviewed the record, sought instructions, and consulted each other and would respond with motions to strike.

The motion judge found that it was not reasonable to require that the motion to strike be brought before the record was served, and that only then would the respondents have an appreciation of the case to meet. Given the size of the record and the significance of the issues raised, the motion judge did not consider that six months was so long as to justify refusal to hear the motions to strike. I see no reason to interfere with this discretionary decision.

[39] I would add that although to issue of leave to amend was raised during argument, the appellants did not propose any specific amendment and I cannot conceive of any amendment that would cure the absence of a justiciable issue. None of the parties or interveners thought it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions. The appeal is therefore dismissed, without costs by agreement of the parties.

"G. Pardu J.A."
"I agree G. R. Strathy J.A."

Feldman J.A. (Dissenting):

Overview

[40] I have had the benefit of reading the reasons of Pardu J.A., but I do not agree with her conclusion that the appeal should be dismissed.

[41] The appellants seek constitutional remedies under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* against the governments of Ontario and Canada for the myriad of problems related to homelessness and inadequate housing in this province and this country. The application does not attack any specific piece or pieces of legislation. Rather, the appellants seek remedies for what they say is the unconstitutional effect of the governments' withdrawal of programs and failure to legislate.

[42] The application for constitutional relief was struck out at the pleadings stage before the court had the opportunity to consider the 16-volume evidentiary record filed by the appellants.

[43] In my view, it was an error of law to strike this application at the pleadings stage. The application raises significant issues of public importance. The appellants' approach to *Charter* claims is admittedly novel. But given the jurisprudential journey of the *Charter*'s development to date, it is neither plain nor obvious that the appellants' claims are doomed to fail.

[44] I would allow the appeal, and allow the application to proceed.

Analysis

(1) The Rule in *Hunt v. Carey Canada Inc*.

[45] The respondents moved to strike the appellants' application under rule 14.09 and rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the ground that the application disclosed no reasonable cause of action. The leading case on the test for striking a claim as disclosing no reasonable cause of action is the Supreme Court of Canada's decision in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.

[46] Justice Wilson summarized her holding in *Hunt*, at p. 980:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect…should the relevant portions of a plaintiff's statement of claim be struck out….

[47] Justice Wilson emphasized that novelty alone is not a reason to strike a claim. Rather, the claim must be "certain to fail" because, as pleaded, it contains a "radical defect". Chief Justice McLachlin recently discussed these principles in

R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45. On the issue of the proper approach to novel claims, she stated, at para. 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[48] In this passage, the Chief Justice reminds us that some very significant innovations in the law have developed from motions to strike or similar preliminary motions, including the general duty of care owed to one's neighbour, which came from the House of Lords' decision on such a motion in *Donoghue v. Stevenson*.

[49] To summarize, a claim should not be struck out at the pleadings stage unless it has no reasonable prospect of success, taking the facts pleaded to be

true. The novelty of the claim alone is not a reason to strike the claim. Rather, there must be a radical defect in the claim that will be fatal to its success. The purpose of a motion to strike is to weed out, at an early stage, claims that have no reasonable chance of success, either because the legal issue raised has been conclusively decided against the claim or because the facts, taken at their highest, cannot support the claim. The motion to strike should not be used, however, as a tool to frustrate potential developments in the law.

(2) The appellants' *Charter* claims

[50] In the amended notice of application, the appellants set out the basis for their *Charter* claims, at paras. 34-38:

> 34. The harm caused by Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing deprives the applicants and others similarly affected of life, liberty and security of the person in violation of section 7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice. The deprivation is arbitrary, disproportionate to any government interest, fundamentally unfair to the applicants, and contrary to international human rights norms. Further, Canada's and Ontario's failure to effectively address homelessness and inadequate housing violate s. 15 of the *Charter* by creating and sustaining conditions of inequality.
>
> 35. Those who are homeless and inadequately housed are subject to widespread discriminatory prejudice and stereotype and have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by governments. People who are homeless and

> inadequately housed are perhaps the most marginalized, disempowered, precarious and vulnerable group in Canadian society.
>
> 36. Canada's and Ontario's failure to adopt effective strategies to address homelessness and inadequate housing, result in the further marginalization, exclusion and deprivation of this group. Canada and Ontario have failed to take into account the circumstances of people who are homeless and have created additional burdens, disadvantage, prejudice and stereotypes, in violation of section 15 of the *Charter*.
>
> 37. Furthermore the persons affected by homelessness and the lack of adequate housing are disproportionately members of other groups protected from discrimination under s. 15(1) including: women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance. Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing therefore constitutes adverse effects discrimination against these groups under s. 15(1).
>
> 38. There is no pressing and substantial objective served by these violations and the violations are not demonstrably justifiable under s. 1 of the *Charter*.

(3) The appellants' s. 7 claim should not be struck

[51] In a lengthy discussion, the motion judge defines the parameters of s. 7 of the *Charter*, as if those parameters were settled law. He concludes that the appellants' claim does not fit within those settled parameters, and as a result, it is plain and obvious that their claim cannot succeed.

[52] In my view, there are four problems with the motion judge's approach: 1) he misunderstood the appellants' s. 7 claim and stated it in an overly broad

manner; 2) he erred in stating that the s. 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled; 3) he erred in purporting to define the law in a critical area of Canadian jurisprudence on a motion to strike; and 4) most importantly, he erred in concluding that the issue of whether the appellants had a potential claim under s. 7 could be decided without considering the full evidentiary record.

[53] The motion judge first erred in misconstruing the appellants' claim. At para. 34, the motion judge articulated the claim as follows:

> The position taken by the applicants asserts that the *Charter* includes a positive obligation, placed on Canada and Ontario, to see that the rights included in the *Charter* are provided for. In such circumstances, the question of whether there is an accompanying breach of fundamental justice would not arise. In this approach, the only issue would be whether the rights to "life, liberty and security of the person" are being breached. If they are, the state would be obliged to act. There is a broad array of cases which say that this is not so.

[54] The motion judge understood the appellants to be making two assertions. The first was that the governments have positive obligations under s. 7. The second was that in order to succeed, the appellants need not prove a breach of a principle of fundamental justice. The appellants did make the first assertion, based on the Supreme Court of Canada's decision in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, and based on the record they sought to put before a trial court. However, they did not make the second

assertion, as can be seen clearly from para. 34 of the amended notice of application, quoted above.[2]

[55] Following a lengthy discussion of some case law which both preceded and followed *Gosselin*, the motion judge concluded that the governments have no positive obligation under s. 7 to sustain life, liberty or security of the person and therefore there can be no deprivation under the first step of the s. 7 analysis. He then discussed the appellants' assertion that the majority judgment in *Gosselin* left open the possibility that, in appropriate circumstances in a future case, a court could recognize such an obligation, referring to the following significant passages from the majority decision at paras. 82 and 83:

> [82] *One day s. 7 may be interpreted to include positive obligations*. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe* [*v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307]…at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the

[2] Later on in his reasons, at para. 62, the motion judge recognized that the appellants had pleaded a breach of the principles of fundamental justice.

> *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> *The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.*
>
> [83] I conclude that they do not. With due respect for the views of my colleague Arbour J., *I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.* However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support. [Emphasis added.]

[56] While recognizing that the majority in *Gosselin* did not foreclose the possibility that, in "special circumstances" in a future case, a court could find that s. 7 imposes positive obligations on government, the motion judge nevertheless concluded the opposite, at para. 59:

> The law is established. As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s. 7 of the *Charter*.

[57] He also stated that the appellants had not pled any "special circumstances", as the majority in *Gosselin* referred to. He then, at para. 67, addressed and distinguished each of the cases that the appellants or the interveners submitted did recognize "positive obligations on the state to act to protect rights [the *Charter*] provides for."

[58] For example, the motion judge quoted *Vriend v. Alberta*, [1998] 1 S.C.R. 493, in which the Supreme Court stated at para. 64:

> It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney* [*v. University of Guelph*, [1990] 3 S.C.R. 229], Wilson J. made a comment in *obiter* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left

> open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

[59] The motion judge then responded, at para. 71:

> *Vriend* and each of the cases referred to [in the quotation from *Vriend* reproduced above] … pre-date *Gosselin.* Each of them did what it did. They acknowledged that it may be that special or unforeseen circumstances may cause the application of s. 15(1) or, by analogy, s. 7 of the *Charter* to evolve. That possibility does not change the law as it is. What is suggested here has been dealt with before. There is no positive obligation raised by the *Charter* that requires Canada and Ontario to provide for affordable, adequate, accessible housing.

[60] The motion judge determined that other Supreme Court and appellate cases, including *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, and *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29, where the court considered how the *Charter* may include positive obligations to act, nevertheless have no application to this proceeding.

[61] Finally, under his discussion of s. 7, the motion judge rejected the submission of the intervener, the David Asper Centre for Constitutional Rights, that the pleaded *Charter* remedies were available in this case, including the possible application of the court's supervisory jurisdiction, as discussed in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3

S.C.R. 3. He rejected that submission on the basis of his conclusion that the application necessarily requires a complex review of housing policy issues that the court is not equipped to supervise.

[62] In my view, the motion judge erred by concluding that it is settled law that the government can have no positive obligation under s. 7 to address homelessness. To the contrary, *Gosselin* specifically leaves the issue of positive obligations under s. 7 open for another day.

[63] Further, because a claim can only be struck where the law is clear that the claim cannot succeed, the court should not conduct a lengthy analysis of the case law as it does when making decisions after a trial, a summary judgment hearing, or an appeal, and then draw conclusions that state the law in a new way: see *Spasic Estate v. Imperial Tobacco Ltd*. (2000), 49 O.R. (3d) 699 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 547, at paras. 22-23.

[64] However, in my view, the motion judge's larger error was to strike the claim without allowing a court to review the evidentiary record assembled by the appellants. In *Gosselin*, the Supreme Court stated that a positive obligation on the part of government to sustain life, liberty or security of the person may be established in "special circumstances". The motion judge stated that no "special circumstances" were pleaded or alleged.

[65] Whether a party characterizes the circumstances as “special” is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments. For example, in *Gosselin* (see para. 83 quoted above), the court stated that there was not enough evidence to support the proposed interpretation of s. 7.

[66] In this case, the appellants assembled a 16-volume record, totalling nearly 10,000 pages, which contains 19 affidavits, 13 of which were from experts. It is premature and not within the intent of *Gosselin* to decide there are no “special circumstances” in such a serious case, at the pleadings stage.

[67] One of the concerns raised by the motion judge was that, if *Gosselin* is always read as leaving the door open for the imposition of positive obligations on governments under s. 7 in the future, then no case pleading positive obligations could ever be struck out at the pleadings stage. In my view, that concern is misplaced. There may well be cases where the facts pleaded raise an issue that has been clearly decided in another case, or where the facts as pleaded do not raise a *Charter* issue, although *Charter* relief is requested.

[68] But this is not one of those cases. This application is a serious attempt made on behalf of a broad range of disadvantaged individuals and groups. It seeks to have the court address whether government action and inaction that

results in homelessness and inadequate housing is subject to *Charter* scrutiny and justifies a *Charter* remedy. I will discuss this issue further at the conclusion of these reasons.

(4) The appellants' s. 15 claim should not be struck

[69] The appellants' s. 15 claim, while perhaps somewhat weaker than their s. 7 claim, should not have been struck at this early stage either. Importantly, the values underlying s. 15 can inform the s. 7 analysis. In their amended notice of application, at para. 37, the appellants observe that those affected by homelessness and inadequate housing are often disproportionately members of other groups protected from discrimination under s. 15, such as women, persons with disabilities, Aboriginal persons, and seniors. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 115, L'Heureux-Dubé J. (with whom Gonthier and McLachlin JJ. agreed), concurring in the result, stated:

> [I]n considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

[70] In his discussion of whether the claim under s. 15 should be struck as disclosing no reasonable cause of action, the motion judge again conducted a lengthy and detailed discussion of the merits of the claim, concluding in a number of places, that it is not the impugned government conduct that causes homelessness or the problems faced by the homeless. The motion judge stated at para. 107 that "the 'burden' of being without adequate housing is not caused by these programs. It arises from other wider characteristics of our society and approach to economic issues."

[71] This is the very issue that is intended to be addressed by an application judge on a full record, including the responses by the respondent governments. It is only based on such a record that reliable conclusions regarding causation can be drawn. With evidence, it may be that, even if the motion judge's statement is partly true, the governments' conduct is a contributing factor to the burden of being without adequate housing. It is not the role of a motion judge on a motion to strike to make factual findings that are not in the pleadings.

[72] The fact that the motion judge found it necessary to make such factual findings in order to determine the motion further demonstrates that the motion to strike is ill-conceived. Such findings are appropriate only where a full record is placed before the court.

[73] Finally, in the s. 15 context, the motion judge made a number of significant "observations", the most important of which was that homelessness and being without adequate housing are not analogous grounds of discrimination under s. 15 of the *Charter*. He stated that the lack of adequate housing is not a shared quality, characteristic or trait.

[74] A court could very well decide this issue after considering the full evidentiary record and argument. It is an important issue. But it is not open for decision when the application is not allowed to proceed.

(5) Justiciability

[75] The motion judge also added that the issues raised in the application are not justiciable. It is for this reason that my colleague would dismiss the appeal.

[76] I would not strike this application at the pleadings stage on the basis that the claims raised are not justiciable.

[77] In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), at pp. 242-44, Dean Lorne Sossin addresses the justiciability issue in the context of disputes involving social and economic rights. Citing the Supreme Court of Canada's decision in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, he states at p. 242:

> Canadian Courts have shown marked reluctance to invest rights and guarantees protected under the *Charter* with social and economic content. However,

> they have shown equal hesitation in foreclosing this possibility. The Supreme Court of Canada, for example, has expressly refrained from stating whether section 7 of the *Charter*, guaranteeing a right to security of the person, protects "economic rights fundamental to human life or survival." [Footnote omitted.]

[78] Dean Sossin outlines opposing views on whether, if claims for social and economic rights under the *Charter* were justiciable, courts would be deciding "political" or "policy" matters that should be left to the legislature. In response, he points out that courts may be accused of doing that very thing when they conduct the required analysis under s. 1 of the *Charter*.

[79] He then concludes that the justiciability of social and economic rights under the *Charter* is an open question:

> It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment, the justiciability of social and economic rights under the *Charter* remains an open question. [Footnote omitted.]

[80] In his chapter "Taking Competence Seriously" in Margot Young et al., eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007), at p. 273, Professor David Wiseman argues that courts are competent to adjudicate "poverty-related standards", and points to a number of cases outside

the *Charter* context where courts have been prepared to do just that.[3] He also refers to the dissenting reasons of Arbour J. and L'Heureux-Dubé J. in *Gosselin*, at paras. 141-42 and paras. 330-35, where they acknowledged that, while the court may not be able to determine the level of assistance that government should provide, that does not mean it cannot determine whether there is a constitutional obligation on government to provide some level of assistance.

[81] In *Gosselin*, the Supreme Court did not hold that claims for social and economic rights under the *Charter* were non-justiciable. As a result, courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate.

[82] My colleague points to a number of concerns with the format of this application: in particular, unlike in many other *Charter* cases, the appellants have attacked no particular law. Therefore, there is no direct way to apply the s. 1 analysis from *R. v. Oakes*, [1986] 1 S.C.R. 103.

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[3] For example, in *Marshall v. Canada*, [1999] 3 S.C.R. 456, at paras. 58-59, the Supreme Court interpreted a treaty as providing the right to trade for "necessaries" or a "moderate livelihood", which "includes such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth…. It addresses day-to-day needs" (citation omitted). In *Stouffville Assessment Commissioner v. Mennonite Home Assn*., [1973] S.C.R. 189, the Supreme Court applied a statute that extended a benefit to "an incorporated charitable institution organized for the relief of the poor", and in so doing, considered what constitutes "relief of the poor." See *Assessment Act*, R.S.O. 1990, c. A.31, s. 3(1)(12)(iii). See also *Criminal Code*, R.S.C. 1985, c. C-46, s. 215, which creates the offence of failing to provide the "necessaries of life". In applying this section, courts have to decide what constitutes the "necessaries of life." See Young, at p. 273.

[83] I agree that the broad approach taken in this application is novel and a number of procedural as well as conceptual difficulties could arise when the court addresses whether the *Charter* has been infringed, and if appropriate, determines and applies a reasonable and workable remedy.

[84] However, there are two answers to these concerns. First, as Wilson J. observed in *Hunt*, at p. 980, and McLachlin C.J. observed in *Imperial Tobacco*, at para. 21, the novelty of a claim is not a bar to allowing it to proceed. Although the development of *Charter* jurisprudence has to date followed a fairly consistent procedural path, and has involved challenges to particular laws, we are still in the early stages of that development. There is no reason to believe that that procedural approach is fixed in stone. This application asks the court to view *Charter* claims through a different procedural lens. That novelty is not a reason to strike it out.

[85] Second, this court had cogent and helpful submissions from the intervener, the David Asper Center for Constitutional Rights, on the ability and authority of the court to grant one or more of the remedies requested in the application. Although the amended notice of application seeks, as one remedy, an order requiring the governments to implement strategies to reduce homelessness and inadequate housing and to consult with affected groups, under court supervision, the court need not make such a wide-ranging order if it finds a breach of the *Charter*. It may limit itself to granting declaratory relief only, as was done in

Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44. Four such declarations are requested in the amended notice of application.

Conclusion

[86] In my view, it was an error of law to strike this claim at the pleadings stage. The claim does not meet the test under rule 21.01(1)(b): while the claim is novel, both conceptually and substantively, it cannot be said, based on the state of the relevant jurisprudence to date, that the claim has no reasonable prospect of success. In *Gosselin*, the Supreme Court of Canada left open the issue of both the existence and the extent of positive obligations under the *Charter* to give effect to social and economic rights. It is therefore premature to decide at the pleadings stage that the issues are not justiciable.

[87] Chief Justice McLachlin described the purpose of motions to strike as follows in *Imperial Tobacco*, at para. 19:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[88] This application is simply not the type of “hopeless” claim for which Rule 21 was intended. It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice. It raises issues that are basic to their life and well-being. It is

supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and analysis. The appellants put together a significant record to support their application. That record should be put before the court.

[89] I would allow the appeal.

Released: (KF) DEC 1, 2014

"K. Feldman J.A."