
Volume 24

*A Road to Home: The Right to Housing in Canada and
Around the World*

Article 2

2015

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Citation Information

Heffernan, Tracy; Faraday, Fay; and Rosenthal, Peter. "Fighting for the Right to Housing in Canada." *Journal of Law and Social Policy* 24. (2015): 10-45.

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol24/iss1/2>

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Fighting for the Right to Housing in Canada

TRACY HEFFERNAN, FAY FARADAY & PETER ROSENTHAL*

“Lawyers going it alone is nonsensical.”

Justice Zakeria Yacoob,
Former Justice of the Constitutional Court of South
Africa¹

Cet article se penche sur la décision *Tanudjaja c Procureur général* qui porte sur le « droit au logement ». Les auteurs, tous trois avocats ayant été impliqués dans l’affaire, traitent du contexte de celle-ci, de la nature de la demande et des questions juridiques relatives aux réclamations fondées sur les articles 7 et 15 de la *Charte canadienne des droits et libertés*. Ces questions comprennent les obligations positives en vertu de la *Charte* et du droit international, les procédures innovatrices adoptant une approche systémique et remettant en question des lois opprimantes, et les ordonnances de surveillance innovantes. Les auteurs examinent les implications procédurales et de fond, de la démarche des gouvernements provinciaux et fédéraux de faire une requête en radiation. Ils étudient les décisions de la Cour supérieure de justice de l’Ontario et de la Cour d’appel de l’Ontario de radier la demande. Ils analysent l’impact de ces décisions pour les plaideurs futures en matière de *Charte*. Ils traitent également de la relation entre l’organisation communautaire et le droit d’ester en justice des communautés marginalisées.

This paper examines *Tanudjaja v Attorney General*—the “Right to Housing” case. The authors, co-counsel on the case, discuss the context of the case, the nature of the application, and the legal underpinnings of the section 7 and 15 *Canadian Charter of Rights and Freedoms* claims, including positive obligations under the *Charter* and international law, innovative procedure taking a systemic approach to challenging oppressive legislation, and innovative supervisory orders. The authors examine the procedural and substantive implications of the provincial and federal governments’ move to strike the case, parse the Ontario Superior Court of Justice and Ontario Court of Appeal decisions striking the application, and analyze the impact these decisions may have for future *Charter* litigants. They also address the relationship between community organizing and litigating rights of marginalized communities.

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¹ Zakeria Yacoob, former justice of the Constitutional Court of South Africa, in a talk at the Wellesley Institute, Toronto, Canada, 15 February 2013.

I. OVERVIEW

ADEQUATE HOUSING IS FUNDAMENTAL to ensuring physical and mental health, social inclusion, and participation in society. It safeguards the capacity to exercise and experience other fundamental rights. It is necessary for human life and essential to survival.

So how is it that across Canada we have at minimum 235,000 people who are homeless and close to one in five who experience extreme housing affordability problems?² A crisis in homelessness and affordable housing does not “just happen.” It is not a “normal” or “inevitable” part of modern society. Instead, the systemic mass homelessness that currently exists in Canada is a very recent phenomenon that emerged in the mid-1990s as a direct result of government funding cuts.³ It is a manufactured social problem that is the entirely predictable outcome of a series of active legislative and policy choices made by the federal and provincial governments.⁴ Homelessness and inadequate housing continue to be produced and sustained by that interlocking system of laws and policies.

Frustrated with the lack of action to rectify this social crisis, a group of individuals with lived experience of homelessness, community activists, academics, and lawyers in Ontario launched an innovative legal challenge in 2010. The *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* challenge asserts that in taking the active decisions to implement these laws and policies that produce and perpetuate homelessness and inadequate housing, the federal and provincial governments have violated the constitutional rights of the most marginalized members of our communities.⁵

The authors are co-counsel representing the applicants in the *Right to Housing* challenge. This paper provides an in-depth analysis of the legal foundations for that claim. It analyzes the foundations for recognizing that the *Canadian Charter of Rights and Freedoms* imposes positive obligations on government to safeguard social and economic rights that are fundamental to human survival such as the right to housing. It provides an analysis of how Canada’s international human rights obligations to protect social and economic rights like the right to adequate housing inform government obligations under section 7 and section 15 of the *Charter*. The *Right to Housing* challenge presents an innovative approach to *Charter* litigation. It deliberately defines the nature of constitutional obligations and the scope of *Charter* rights from the perspective of those who are most marginalized. It also directly challenges the *systemic* roots of marginalization, aiming to hold government accountable for building an identifiable network of interconnected laws and policies that predictably facilitate and exacerbate oppression and

² Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in Canada: 2014* (Toronto: The Homeless Hub Press, 2014), online: <<http://www.homelesshub.ca/SOHC2014>> [Gaetz, Gulliver & Richter, *State of Homelessness: 2014*]. See Michael Shapcott’s “Precarious Housing Iceberg” chart at p 9 of his affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>> [Shapcott, “Affidavit”].

³ Gaetz, Gulliver & Richter, *State of Homelessness: 2014*, *supra* note 2 at 4–5.

⁴ As Jack Layton wrote, “Homelessness is not some mysterious affliction visited upon us by unseen forces. It is the tragic, but inevitable, outcome of a series of policy decisions. And just as homelessness can be created, so too can it be ended.” Jack Layton, *Homelessness: How to End the National Crisis (Revised and Updated)* (Penguin Books: 2008) at xxv [Layton, *Homelessness*].

⁵ *Tanudjaja et al v Attorney General of Canada and Attorney General of Ontario* (2012), ON SC File No. CV-10-403688.

marginalization. The systemic nature of the *Right to Housing* legal claim is both novel and central to its essence. It takes on what in the environmental context has been called the “slow violence” perpetrated by existing systems and institutions.⁶ As Rob Nixon writes,

[w]e are accustomed to conceiving violence as immediate and explosive, erupting into instant, concentrated visibility. But we need to revisit our assumptions and consider the relative invisibility of slow violence. I mean a violence that is neither spectacular nor instantaneous but instead incremental ... Emphasizing the temporal dispersion of slow violence can change the way we perceive and respond to a variety of social crises⁷

The national crisis of homelessness has not erupted instantaneously as in the wake of a natural disaster. It is instead a socially constructed disaster that continues to accumulate inexorably. As Cathy Crowe has written, “[a] disaster is not just a single event but a social consequence.”⁸ What this means is that looking at a single law or policy change in isolation fails to reveal the depth of the impact on the rights claimants. Examining discrete state actions in isolation fragments the inherently interconnected consequences experienced by those who are homeless or at risk of homelessness and renders the unconstitutional effect of the state-driven system either invisible or only partially revealed. The claim is novel in that it consciously maps the system and the interrelated systemic effects. In this way, the *Right to Housing* challenge examines the breadth of state action that is necessary to sustain particular power relationships and presents a direct challenge to how we conceive of government accountability for the consequences of its policy choices.

The governments’ response was to launch motions to strike the *Charter* claim in its entirety on the basis that it was not justiciable and that it raised no reasonable cause of action under either section 7 or section 15. The governments argued that the claim was not justiciable because it raised “political” rather than legal concerns and that the remedies sought (which included declarations of rights violations, injunctive relief and supervisory orders) were beyond the institutional competence of the court. The governments argued that neither section 7 nor section 15 of the *Charter* imposed any positive obligations on government, nor did they protect social and economic rights.

The Ontario Superior Court of Justice allowed the motions, striking the claim in its entirety without leave to amend. The motion judge ruled that the claim raised non-justiciable political questions, sought non-justiciable remedies, and raised no reasonable cause of action under either section 7 or section 15.⁹ On appeal, the Ontario Court of Appeal issued a divided ruling.¹⁰ The majority dismissed the claim on the basis that it raised non-justiciable political questions.¹¹ In view of this analysis, the majority did not examine the scope of protection that

⁶ See Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011).

⁷ Rob Nixon, *Slow Violence: Literary and Postcolonial Studies Have Ignored the Environmentalism that Often Only the Poor Can See*, online: The Chronicle of Higher Education (26 June 2011) <<http://chronicle.com/article/Slow-Violence/127968/>>.

⁸ Cited in Layton, *Homelessness*, *supra* note 4 at “Foreword” xiii.

⁹ *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410, Lederer J [*Tanudjaja* 2013].

¹⁰ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja* ONCA].

¹¹ *Ibid* at para 19, Pardu JA.

may be afforded under either section 7 or section 15.¹² In a strong dissent, Feldman JA would have allowed the appeal and allowed the claim to proceed on its merits because “the application raises significant issues of public importance.”¹³ Feldman JA ruled that the application raised justiciable legal claims, sought justiciable remedies, and that there was support in the jurisprudence for both the section 7 and section 15 claims. Characterizing the claim as a “serious *Charter* application” that raised issues that are basic to the life and well-being of a large, marginalized, vulnerable, and disadvantaged group, Feldman JA concluded that it was an error of law to strike the claim at the pleadings stage and that the evidentiary record supporting the claim should be put before the court.¹⁴ At the time of writing, the claimants are seeking leave to appeal to the Supreme Court of Canada.

Regardless of the outcome of the litigation on the motion to strike, the legal analysis supporting the claim warrants closer examination because it presents innovative strategies and analysis on both procedural and substantive elements of *Charter* litigation that can contribute to future thinking on how to ensure that *Charter* rights remain responsive and accessible to those who are most marginalized.

II. FORMULATING THE CASE

Across Canada at least 235,000 people are homeless annually and close to one in five experience extreme housing affordability problems.¹⁵ This has a significant impact on individuals, families, and communities: it takes a serious toll on physical and mental health, reduces life expectancy, and exacerbates mental health problems.¹⁶ In 2013 alone, the public expenditure on emergency responses to homelessness (emergency shelters, health services, social services, and correctional services) cost \$7.05 billion.¹⁷ According to some research, providing adequate housing for all, including supports where needed, would cost about half this amount.¹⁸

In the face of this, the question looms: how do we address this growing crisis of homelessness? Can the right to housing be realized in Canada? In 2008, four activists¹⁹ posed these questions at a workshop. Scheduled early on a Saturday morning, it was packed to capacity

¹² *Ibid* at para 37, Pardu JA.

¹³ *Ibid* at para 43, Feldman JA, dissenting.

¹⁴ *Ibid* at paras 43, 64, 68, 81, 86–88. Feldman JA dissenting.

¹⁵ Gaetz, Gulliver & Richter, *State of Homelessness: 2014*, *supra* note 2 at 5; see e.g. Shapcott, “Affidavit,” *supra* note 2 at 9.

¹⁶ Mental Health Commission of Canada, Paula Goering et al, *National Final Report: Cross-Site At Home/Chez Soi Project* (Calgary, AB: 2014) at 9 [Goering, *National Final Report*].

¹⁷ Stephen Gaetz, et al, *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network Press, 2013), online: <<http://www.homelesshub.ca/sites/default/files/SOHC2103.pdf>> .

¹⁸ See e.g. Stephen Gaetz, “The real cost of homelessness: Can we save money by doing the right thing?” (Toronto: Canadian Homelessness Research Network Press, 2012) at 2, online: <http://homelesshub.ca/ResourceFiles/costofhomelessness_paper21092012.pdf> . As Gaetz points out, it would cost far less to do the right thing, that is, to provide adequate housing [Gaetz, “Real Cost of Homelessness”]. See also Goering, *National Finding Report*, *supra* note 16 at 9. The researchers found that for every \$10 spent on providing adequate housing and supports, the government saved \$15; for similar findings in Alberta, see The Alberta Secretariat, “A Plan for Alberta: Ending Homelessness in 10 Years” (October 2008), online: <http://www.housing.alberta.ca/documents/PlanForAB_Secretariat_final.pdf> .

¹⁹ John Fraser, Centre for Equality Rights in Accommodation; Jennifer Ramsay, Advocacy Centre for Tenants Ontario; Peter Rosenthal, Barrister, Roach, Schwartz; Tracy Heffernan, Kensington-Bellwoods Community Legal Services.

with people with lived experience of homelessness, community activists, students, and lawyers. That meeting marked the beginning of a lively conversation. It also marked an evolution in deep, long-term community organizing. And it has fed an evolution in public discourse to understand housing not only as a necessity for human survival, but to see the systemic erosion of housing security as a violation of fundamental human rights.

Soon after the initial workshop in 2008, the Advocacy Centre for Tenants Ontario (ACTO)²⁰ launched the inaugural Right to Housing (R2H) Coalition meeting, which pulled together a wide range of individuals and groups with a deep concern for housing security.²¹ For a full year the Coalition discussed, debated, and argued about whether we should launch a legal challenge to assert the right to adequate housing in Canada. When four extraordinary individuals and one organization stepped forward as applicants, the Coalition decided to proceed with a constitutional challenge.

It is critical that, from the outset, the *Right to Housing* challenge has been built from the ground up through collaborative efforts by a broad coalition of individuals and community organizations. In keeping with Justice Yacob's admonition, this has never been a case of "lawyers going it alone."²² This collaborative process has been accountable and responsive to the goals of those with lived experience, who were clear from the beginning that they were not seeking monetary damages. Instead, they want real, meaningful, systemic change that will build a future where housing security can be realized for all.

There is a long-standing debate politically and academically about the capacity of litigation to advance social transformation for those who are marginalized.²³ That concern about the utility of litigation was seriously considered in the lead up to the *Charter* challenge. Is the dialectic between rights and politics too unpredictable and vulnerable to co-optation to help those who are marginalized? Can those who are marginalized expect their realities to be understood and protected by those in power to whom those realities are alien or threatening to their own established privilege? Does framing a claim as a *rights* claim disempower a social movement by placing undue reliance on the courts to rectify social power imbalances? At the same time, however, this debate recognizes that rights skepticism is, in large measure, a luxury that is only truly available for those who already enjoy an experience of rights. Opting out of rights discourse is something that marginalized communities do at their peril. As Patricia Williams has written,

²⁰ The Advocacy Centre for Tenants Ontario is a provincial legal clinic focusing on housing and human rights funded by Legal Aid Ontario.

²¹ A few of the founding organizations included the Dream Team (psychiatric survivors advocating for supportive housing), Holland Bloorview Kids Rehabilitation Hospital, the Centre for Equality Rights in Accommodation, Sistering (a drop-in for homeless women), the June Callwood Centre for Young Women, the Social Rights Advocacy Centre, the Toronto Disaster Relief Committee, and the Children's Aid Society (Toronto). For a complete list of all the individuals and organizations that have supported or been involved with the right to housing coalition, see: <<http://www.acto.ca/en/cases/right-to-housing/list-of-organizations-and-individuals-who-have-participated-in-and-or-endorsed-the-right-to-housing.html>>.

²² Yacob, *supra* note 1.

²³ See, e.g. Judy Fudge, "What Do We Mean by Law and Social Transformation?" (1990) 5 Cdn J Law & Society 47; E M Schnieder, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 NYUL Rev 589; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Allan Hutchinson, "Charter Litigation and Social Change: Legal Battles and Society Wars", in *Charter Litigation*, R.J. Sharpe, ed (Toronto: Butterworths, 1987); Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies" (1990) 17:3 Journal of Law and Society 309.

“[Rights elevate] ... one’s status from human body to social being”²⁴ because through the articulation of rights, a group’s experiences acquire public value, are understood as entitlements of social citizenship, and demand a remedy. Ultimately, while it involves risks, litigation is a valid and at times necessary field of engagement both as a process of movement building and as a defence of core entitlements because,

[L]aw is an enormously powerful discourse, both ideologically and practically. It distributes social power and structures the ways in which we understand and value experiences by granting public legitimacy to particular ways of interacting. Legal rights are normative; they identify the boundaries of acceptable social interaction, shape an individual’s [and a community’s] sense of self, and impose a social responsibility to achieve in practice the ideals that are articulated in formal laws. Legal rights thus have intrinsic value because, once articulated as formal principles, they change the way society identifies injuries and recognizes an entitlement to restitution.²⁵

In this context of recognizing the benefits and risks of rights claims, it is important for our Coalition that litigation has been just one strategy of many. While recognizing the role of litigation in shifting entrenched discourses, the Right to Housing Coalition has engaged in an extensive process of community organizing, mobilization, and alliance building.²⁶ We have participated in demonstrations to call for affordable housing with groups across the country. We have been involved in postcard campaigns to encourage the federal government to recognize housing as a human right. We have lobbied both the federal and provincial governments, including lobbying on two federal bills that would have required the adoption of a national housing strategy.²⁷ We have provided workshops to students and community organizations across Canada and begun the process of building a national coalition. We have never forgotten that there “ ... is no option, really, to old-fashioned, back-breaking political mobilization.”²⁸ The litigation and its outcome are neither the only nor the dominant narratives. They are one part of a larger reality of community engagement, used to strengthen and empower the community but always backed up by “...marches, media, legal education and social mobilization.”²⁹

While the litigation is just one piece of the fight for the right to housing, the legal issues it raises are important and warrant examination in their own right for the ways in which they push the boundaries of our thinking about constitutional rights and obligations. To that end, this article

²⁴ Patricia J Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 Harv CR-CL L Rev 401 at 416.

²⁵ Fay Faraday, “Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse” (1994) 32:1 Osgoode Hall LJ 33 at 36, see also 35–40.

²⁶ The issue of community mobilizing is addressed in more detail in Yutaka Dirks’ contribution to this collection: “Community Campaigns for the Right to Housing: Lessons from the R2H Coalition of Ontario.”

²⁷ Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians* was a private member’s bill introduced in 2010 at the time of a Conservative minority government. The bill garnered the support of the Liberals, New Democrats and Bloc Quebecois members of Parliament. It would have passed but for the proroguing of government in March 2011; see Parliament of Canada (Private Member’s Bill – C-304, second reading (40-3)). The now Conservative majority government voted against the Bill and it was defeated at 2nd reading: see also Parliament of Canada (Private Member’s Bill – C-400, (41-1)).

²⁸ Arundhati Roy, *Public Power in the Age of Empire* (New York: Seven Stories Press 2004) at 40.

²⁹ Mark Heywood, “South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health” (2009) 1:1 J Human Rights Practice 14–36 at 22 [Heywood, “South Africa”].

proceeds as follows. Part III provides an overview of the launch of the litigation, the nature and context of the litigation, and a brief history of what has transpired over the last five years. Parts IV and V examine the legal arguments advanced in the case with respect to sections 7 and 15 of the *Charter* grounded in a broader poverty law analysis. Part VI touches on the issue of legal remedies. Part VII concludes with some thoughts about the nature of socio-economic rights and returns to the notion of community organizing.

III. THE RIGHT TO HOUSING CHALLENGE

A. FIVE APPLICANTS STEP FORWARD

When four extraordinary individuals and one small but mighty community organization stepped forward as applicants, the Right to Housing Coalition decided to proceed with the litigation. The evidence in the application describes their situations as follows.

Ansar Mahmood suffered a catastrophic industrial accident that left him unable to work. He has four children: one child, Rohail, has severe cerebral palsy and must use a wheelchair; another is autistic. The family of six lives in a two bedroom non-accessible apartment. They are on the waiting list for an affordable accessible home. It could take twelve years before they are housed. By that time, Rohail, who currently must be carried from room to room as the hallways are too narrow for his wheelchair, will be twenty years old. Mr. Mahmood writes,

[t]he apartment is extremely crowded. There is not even room for a dresser to store our clothes. Nor is it accessible for a person in wheelchair. The bathtub is too small for Rohail's bath chair. Rohail should be sleeping in a hospital bed with sides but, again, we do not have sufficient space. The apartment is too small and too crowded to manoeuvre his wheelchair around. Mostly we have to leave him on his bed in his room.³⁰

For several years Janice Arsenault experienced the bliss of having a home and community. She writes, “[i]t was the best time of my life. I had safe, secure, affordable housing. My children were loved and well cared for. I had a husband who loved me. I had a husband I loved.”³¹

But when her husband died suddenly after routine surgery, Janice and her two young sons found themselves homeless. Taken in by friends and neighbours, she and her children couch surfed for ten months until their welcome ran out and they were forced to move to a shelter. Shelters for the homeless are mostly horrific places in Canada: there is violence, bedbugs, and theft.³² Many lose all their belongings within a short period of time.³³ Heartbroken, Janice sent her children to live with her parents 2,000 kilometres away; she ended up on the streets. Janice is currently housed but her rent consumes 64 per cent of her modest income, placing her at high risk of homelessness.

³⁰ Affidavit of Ansar Mahmood, sworn 13 May 2010, paras 16–17, on file with the authors.

³¹ Affidavit of Janice Arsenault, sworn 12 May 2010, para 11, on file with the authors.

³² See for instance, Erika Khandor & Kate Mason, *Street Health Report 2007*, Toronto: September 2007 at 14–15, online: <<http://www.streethealth.ca/downloads/the-street-health-report-2007.pdf>>.

³³ Despite the appalling conditions it costs on average \$2000 per month for a bed in a homeless shelter; see Gaetz, “Real Cost of Homelessness,” *supra* note 18 at 5.

Jennifer Tanudjaja is a young single mother who was apprehended from her family at the age of twelve. She is a straight “A” college student with high hopes for her future and that of her children. She spends her entire social assistance cheque on rent for a two-bedroom apartment in Toronto and tries to subsist on a child tax benefit to feed herself and her children, buy clothes, and pay for transportation and other costs. She lives in fear of homelessness. She writes,

[i]f I had access to a housing subsidy, I wouldn’t have to worry all the time about how I was going to pay the rent, or afford a metro pass, or pay for my school books. I wouldn’t have to wonder about whether I have the transit fare to take my boys to a doctor’s appointment. I wouldn’t have to worry about the cost of fruit and vegetables and whether I can afford to feed my sons healthy food. I wouldn’t be constantly anxious about ending up in a homeless shelter with my boys.³⁴

Brian DuBourdieu lives on the streets of Toronto. He lost his job when he was diagnosed with cancer and became severely depressed. Without a pay cheque he could no longer pay his rent. He lost his home and has been on the waiting list for affordable housing for four years. He writes,

[I]iving in affordable housing would allow me to completely change my life. The stability housing would give me would relieve the constant stress I feel from being homeless. The ability to control my own diet would improve my health and I would feel secure knowing my medications would not be stolen. I am convinced that if I were able to find housing I would be able to get help for my mental health and addiction problems and would eventually be able to get a stable job and contribute to society again. I would love to have a place to hang my hat.³⁵

The fifth applicant was the Centre for Equality Rights in Accommodation (CERA), an Ontario-based non-profit organization that tackles housing and human rights issues by working with low-income tenants and people who are homeless, providing advice, direct services, and public education. CERA is a membership-based organization and many of its members have themselves experienced homelessness. The precarious and unsettled lives of individuals who are homeless and inadequately housed present an enormous barrier to engaging in protracted litigation and enforcing rights. It is in itself a concrete example of how homelessness erodes the capacity to experience and assert fundamental entitlements in society. In this context, the presence of a public interest applicant was critical in supporting the sustainability of what was anticipated to be lengthy litigation.³⁶

³⁴ Affidavit of Jennifer Tanudjaja, sworn 17 May 2010, para 38, on file with the authors, [Tanudjaja, “Affidavit”].

³⁵ Affidavit of Brian DuBourdieu, sworn 4 October 2010, para 25, on file with the authors.

³⁶ The importance of public interest applicants in supporting litigation by marginalized populations has been well recognized by the courts. See, e.g. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524; *Fraser v Canada (Attorney General)*, 2005 CanLII 47783 (ON SC).

B. CONTEXT AND THE NATURE OF THE LEGAL CLAIM

Under our Constitution’s division of powers, both the federal and provincial governments have jurisdiction to make laws and policies relating to housing. For decades, both levels of government have been actively engaged in designing, implementing, and delivering programs integrally related to ensuring access to adequate housing. While the federal government historically “played the major role in shaping how Canada’s housing stock was financed and allocated, and the degree to which critical social needs for adequate housing were met,” provincial and municipal governments “also played important roles in the shaping and administering of housing and social programs, often supplementing or cost sharing federal programs.”³⁷

Canada’s active and central role in relation to affordable housing began as early as 1935 with the adoption of the *Dominion Housing Act*. It was furthered in 1946 with the establishment of the Central Mortgage and Housing Corporation (now the Canada Mortgage and Housing Corporation). Since then, Canada has had an active role in supporting access to affordable housing through programs such as:

- (a) direct funding for the construction of affordable rental housing units;
- (b) government administration of affordable rental housing through a wide variety of public housing, non-profit housing, co-operative, and rent supplement rental units;
- (c) programs of affordable housing funded through cost-sharing arrangements with the provinces; and
- (d) the provision of rent supplements to tenants in private rental units.

From the end of the Second World War until the late 1970s, the Canadian housing system was explicitly directed to ensuring that residents of Canada were securely housed in adequate housing. This perspective was encapsulated in a 1973 speech in the House of Commons by the Honourable Ron Basford, then federal Minister of State for Urban Affairs (a federal ministry that no longer exists). In introducing amendments to the *National Housing Act*, Minister Basford clearly stated that our society—and our government—has an obligation to see that all people are adequately housed:

...good housing at reasonable cost is a social right of every citizen of this country. ... [T]his must be our objective, our obligation, and our goal. The legislation which I am proposing to the House today is an expression of the government’s policy, part of a broad plan, to try to make this right and this objective a reality.³⁸

Over the next two decades the federal government funded more than 600,000 affordable homes across Canada.³⁹

³⁷ See J. David Hulchanski, Affidavit, *Tanudjaja. v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, at para 29; see online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>> .

³⁸ *House of Commons Debates*, 29th Parl, 1st Sess, (15 March 1973) at 2257 (Honourable Ron Basford).

³⁹ See Shapcott, “Affidavit,” *supra* note 2 at para 19.

In pursuing protections against homelessness and inadequate housing, federal and provincial laws and government policies have been built upon three important and interconnected components:

- (a) access to affordable housing;
- (b) income support to ensure the affordability of housing; and
- (c) physically accessible housing and housing with supports for community living for persons with disabilities.

Since the mid-1990s, each of those three pillars of housing security has been undermined and dismantled through active choices made by the federal and provincial governments. As is set out in detail in the sections that follow, both levels of governments have enacted or amended laws and instituted changes to policies, programs, and services which have resulted in mass homelessness and inadequate housing.⁴⁰

C. ERODING ACCESS TO AFFORDABLE HOUSING

Beginning in the mid-1990s and continuing to the present, the federal government has taken a number of decisions which have eroded access to affordable housing including: (i) cancelling funding for the construction of new social housing; (ii) withdrawing from the administration of affordable rental housing; and (iii) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces. At the same time, the Ontario government has taken its own decisions that erode access to affordable housing, including: (i) terminating the provincial program for constructing new social housing; (ii) amending legislation to eliminate protection against converting affordable rental housing to non-rental uses and eliminating rent regulation; (iii) downloading the cost and administration of existing social housing to municipalities and responsibility for funding development of new social housing to municipalities which lack the tax base to support such programs; and (iv) heightening insecurity of tenancy by creating administrative procedures that facilitate evictions.⁴¹

As of December 2013, there were 165,069 households in Ontario on the waiting list for affordable housing.⁴² The waiting list has increased every year since 2006 and “For every household housed ... three more apply.”⁴³ On average it takes almost four years for a household on the waiting list to receive affordable housing, but in some communities—and particularly for families—the waiting time can be considerably longer, even exceeding ten years.⁴⁴

D. ERODING ACCESS TO INCOME SUPPORTS FOR AFFORDABLE HOUSING

At the same time that policies were being implemented that eroded access to affordable housing, the federal and provincial governments amended legislation and altered policies in various

⁴⁰ *Ibid* at para 17.

⁴¹ *Ibid* at para 12-19 and 29-44.

⁴² *Waiting Lists Survey 2014*, (Ontario: ONPHA’s Report on Waiting List Statistics for Ontario, 2014) at 4 [*Waiting Lists Survey*].

⁴³ *Ibid* at 5.

⁴⁴ *Ibid* at 6.

income support programs. These changes increasingly undermined the ability of low income tenants to pay their rent.

Until 1996, federal transfer payments for social assistance under the *Canada Assistance Plan* (CAP) were conditional on the provinces providing social assistance at a level that would cover the cost of basic necessities, including housing.⁴⁵ In 1996, the federal transfer payments were restructured by repealing this legislated standard. Under the *Canada Health and Social Transfer*, which replaced CAP, federal transfer payments are no longer tied to these substantive thresholds. At the same time, Canada implemented changes to the *Employment Insurance Act*, which resulted in far fewer unemployed workers qualifying for benefits upon losing their jobs, with the result that more unemployed workers must rely on social assistance instead.⁴⁶

In October 1995, the Ontario government cut social assistance rates by 21.6%, one of the most dramatic social assistance decreases across the country. Since that time, Ontario has maintained the social assistance shelter allowances at levels that are far below what is required to secure rental housing on the private market. When the provincial government eliminated most rent controls in 1998, rents increased dramatically and evictions for arrears of rent escalated. In 2012-13, 75,069 eviction applications were filed at the Landlord and Tenant Board; of these 80% were for arrears.⁴⁷

A typical example illustrates the impact of these cumulative federal and provincial legislative changes. In 1994, under Ontario Works, a single mother with two children received a maximum monthly shelter allowance of \$707; the average rent for a two-bedroom apartment in Toronto was \$784, leaving a shortfall of \$77. In 2012, the maximum shelter allowance was \$641; the average rent for a two-bedroom apartment was \$1,183, leaving a shortfall of \$542 per month.⁴⁸ This entirely predictable gap results in many social assistance recipients becoming homeless or being forced to forgo other necessities—such as food—in order to maintain their housing.⁴⁹

E. LACK OF ACCESSIBLE HOUSING AND HOUSING SUPPORTS FOR PERSONS WITH DISABILITIES

Finally, the federal and provincial governments have implemented a range of policy changes that leave persons with disabilities particularly vulnerable to homelessness.

⁴⁵ See Shapcott, “Affidavit,” *supra* note 2 at 14.

⁴⁶ See *Falling Behind: Ontario’s Backslide into Widening Inequality, Growing Poverty and Cuts to Social Program, A Report of the Ontario Common Front* (Ontario: A Report of the Ontario Common Front, 2012) [“Falling Behind”]. At p41 the reports notes that, “[c]urrently only a shocking 40% of unemployed workers across Canada, 26% in Ontario and 22% in Toronto who pay premiums into the Employment Insurance fund actually qualify for employment insurance benefits. As a result, the vast majority of workers, upon losing their jobs become dependent on social assistance.” Meanwhile the accrued \$57 billion EI surplus was quietly transferred into the federal government’s general revenues: see Gregory Thomas, “Canada’s EI surplus: now you see it now you don’t” (6 February 2013) Canada Free Press, Canadian Taxpayers Federation (blog), online: <<http://canadafreepress.com/index.php/article/canadas-ei-surplus-now-you-see-it-now-you-don't>>.

⁴⁷ Social Justice Tribunals Ontario, 2012–2013 Annual Report at 29–30, online at:

<<http://www.sjto.gov.on.ca/stellent/groups/public/@abcs/@www/@sjc/documents/abstract/ec166423.pdf>>.

⁴⁸ See Tracy Heffernan, “The Right to Housing Campaign: In the Courts & the Community,” PPP: Advocacy Centre For Tenants Ontario (2013) at 14, online: <<http://www.acto.ca/assets/files/TrainingSymposium/R2H-symposium-presentation-October-2013-PDF.pdf>>.

⁴⁹ See “Falling Behind,” *supra* note 46 at 26.

Existing affordable housing stock is often physically inaccessible to persons with disabilities.⁵⁰ Meanwhile, sufficient new accessible affordable housing is not being built. As a result, it is not uncommon for people with disabilities to wait ten years or longer to get off the waiting lists and into affordable housing that can accommodate their needs.

Moreover, government policies of deinstitutionalizing persons with psycho-social and intellectual disabilities in the absence of providing effective mechanisms to support their independent community living has resulted in widespread homelessness among persons with these disabilities. In addition, persons with psycho-social and intellectual disabilities are often discharged from medical care without appropriate attention to whether they have access to adequate housing with appropriate supports.⁵¹

There has been international critique of these policies. The United Nations (UN) human rights treaty monitoring bodies, for instance, have expressed concern at Canadian governments' failure to provide adequate supports for community living for persons with mental disabilities, noting that in some instances this has resulted in these individuals being forced to live in detention solely because of a lack of community-based housing with supports.⁵²

F. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

All of these deliberate actions by the two governments—actions to amend legislation and to amend or withdraw policies and programs that had previously protected rights to adequate housing—were made in a context in which Canada has numerous explicit commitments in international human rights instruments to safeguard and promote the right to adequate housing. In particular, these international human rights instruments with respect to economic, social, and cultural rights expressly commit Canada “to take measures to the maximum of its available resources ... with a view to achieve progressively the full realization of these rights,” including the right to adequate housing.⁵³ The actions by the two governments then appeared to run in direct contradiction to these commitments. This squarely raised the question that has been skirted in *Charter* litigation to date, about whether and to what extent social and economic rights are justiciable under the *Charter*.⁵⁴ To what extent does the *Charter* protect social and economic

⁵⁰ See *Waiting Lists Survey*,” *supra* note 42 at 9.

⁵¹ See Michael Bach, Affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688; and see Catherine Frazee & Esther Ignagni, Affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>>.

⁵² See *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2010), ON SC File No. CV-10-403688 (Amended Notice of Application) at para 26, [“Amended Notice of Application”].

⁵³ See International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR, Supp No. 16 at 49, UN Doc A/6316 (1966), 993 UNTS. 3, entered into force 3 January 1976, Article 2 [ICESCR].

⁵⁴ Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Toronto: Carswell, 2012) at 242–244 reviews the existing law on the justiciability of social and economic rights and concludes that, “[i]t is striking that, despite the rights 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.” For a broader discussion of socio-economic rights see: Margot Young et al, ed, *Poverty: Rights, Social Citizenship and Legal Activism*, (Vancouver: UBC Press, 2007); Sandra Rodgers & Sheila McIntyre (eds), *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat*, (Markham, ON: Lexis-Nexis Canada Inc., 2010); Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge: Cambridge University Press, 2008); Helena Alviar Garcia, et al, *Social and Economic Rights in Theory and Practice: Critical Inquiries*, (London and New York: Routledge, 2014).

rights? To what extent must section 7 and section 15 be interpreted in light of Canada's international human rights commitments?

Canada has ratified a range of international human rights instruments that expressly recognize housing as a basic human right. The *Universal Declaration of Human Rights*, adopted in 1948, states,

[e]veryone has the right to a standard of living adequate for the health and wellbeing of himself [or herself] and of his [or her] family, including food, clothing, housing and medical care and necessary social services ...⁵⁵

In 1951, the UN General Assembly drafted two covenants to implement the *Universal Declaration*: the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁵⁶ The right to housing is defined most clearly in Article 11(1) of the latter which commits signatory states to “take appropriate steps to ensure the realization” of “the right of everyone to an adequate standard of living for himself [or herself] and his [or her] family, including adequate food, clothing and housing ...”.

Unfortunately the division into two covenants was not merely symbolic. The ICCPR established an international supervision mechanism with the United Nations system and imposed on states an immediate duty of implementation. In contrast, the mechanisms created under the ICESCR were less developed and imposed only a duty that states take steps “... with a view to achieving progressively the full realization of these rights” to the maximum of their “available resources”.⁵⁷

These international covenants laid the foundation for the *Canadian Charter of Rights and Freedoms*. However, the privileging of civil and political over socio-economic rights has seeped into several *Charter* decisions, particularly at the lower court levels. This has gone neither unnoticed nor unchallenged. While querying the timidity of both lawyers and litigants in advancing socio-economic claims, former Supreme Court of Canada Justice Louise Arbour stated:

The approach of Canada's courts has not escaped the notice of the United Nations Committee on Economic, Social and Cultural Rights. In 1998, when reviewing Canada's compliance with its international obligations, the Committee stated that it had received information about a number of cases in which claims were brought by people living in poverty, alleging that government policies denied the claimants and their children adequate food, clothing and housing. The Committee noted that provincial governments “have urged upon their courts ... an interpretation of the

⁵⁵ Universal Declaration of Human Rights, GA Res. 217(III) U.N. GAOR, 3rd Sess., Supp. No. 13 at 71, UN Doc. A/810 (1948) (art. 25); Canada has subsequently guaranteed the right to adequate housing through the following covenants: *Convention on the Rights of the Child*; *Convention on the Elimination of all Forms of Discrimination*; *Convention on the Rights of Persons with Disabilities*.

⁵⁶ International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UN Doc A/6316 91966), 999 U.N.T.S.171 entered into force 23 March 1976, hereinafter *ICCPR*; and *ICESCR*, *supra* note 53.

⁵⁷ Daphne Barak-Erez & Aeyal M. Gross, “Introduction: Do We Need Social Rights? Questions in the Era of Globalisation, Privatisation, and the Diminished Welfare State” in Daphne Barak-Erez & Aeyal M. Gross, eds, *Exploring Social Rights: Between Theory and Practice* (Oxford and Portland, Oregon: Hart Publishing, 2007) at 4.

Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.” It is important to stress that the Committee is not stating that governments have an obligation to directly provide all things to all peoples. What it has pointed out, however, is that courts in Canada have “routinely opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights.”⁵⁸

This litigation, then, responds to Justice Arbour’s call to take social and economic rights seriously and to ensure that *Charter* rights are meaningful for those most in need of the *Charter*’s protection.

G. ESSENCE OF THE LEGAL CLAIM

The *Right to Housing* challenge argues that the rights to life, security of the person, and equality must be interpreted in light of Canada’s international human rights obligations to provide meaningful protection under section 7 and section 15 for those who are homeless or at risk of homelessness.

The essence of the *Right to Housing* legal claim is that the federal and provincial governments have taken deliberate actions to amend laws, policies and programs in the areas of: (a) affordable housing; (b) income supports to ensure affordability of housing; and (c) physically accessible housing for persons with disabilities and housing with supports for community living for persons with disabilities. They have done so in a way that predictably creates and sustains increasingly widespread homelessness and inadequate housing. In adopting and implementing these legal and policy changes, Canada and Ontario have taken no measures or taken inadequate measures to address the impact of these changes on groups most at risk of homelessness. They 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 conditions that lead to, support, and sustain homelessness and inadequate housing and have produced severe health consequences and death among the most marginalized groups in society contrary to section 7 and section 15 of the *Charter*.

A number of UN bodies responsible for monitoring Canada’s compliance with international human rights commitments have repeatedly raised grave concerns about the effects of homelessness and inadequate housing on vulnerable groups and the failure to take positive measures to address these issues. The UN Committee on Economic, Social and Cultural Rights, as well as the UN Special Rapporteur on Adequate Housing, have repeatedly recommended that Canada adopt a national strategy to ensure that the right to adequate housing is implemented on an urgent basis to address this “national emergency.” They recommend that this strategy be developed in collaboration with provincial and territorial governments.⁵⁹ Despite these concerns and recommendations, Canada and Ontario have failed to implement a coordinated strategy to

⁵⁸ Louise Arbour, “Freedom from want’ – from charity to entitlement Libérer du besoin: de la charité à la justice” (LaFontaine-Baldwin Lecture delivered at the United Nations High Commissioner for Human Rights, 3 March 2005) [unpublished].

⁵⁹ Miloon Khotari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right of non-discrimination in this context, Mission to Canada* (9 to 22 October 2007), UN Human Rights Council, 10th Session, UN Doc A/HRC/10/7 Add. 3 (7 February 2009).

reduce homelessness. Shocking, but true: Canada is the only major country in the world without a national housing plan.⁶⁰ And despite the fact that Canada has repeatedly represented in the international forum that the guarantee of security of the person under section 7 of the *Charter* ensures that persons are not to be deprived of the basic necessities of life, and that the *Charter* is the primary source of legal protection for the rights found in the ICESCR, including the right to adequate housing.⁶¹ As set out below, the governments' responses to the *Right to Housing* claim were to move to strike the application in its entirety on the basis that the rights claimed did not exist under the *Charter* and were non-justiciable.

H. THE LEGAL PROCESS

In May 2010 the applicants issued a Notice of Application under Rule 14 of the *Rules of Civil Procedure*⁶² advising the Attorney General of Canada and the Attorney General of Ontario that they would bring an application for violation of the *Charter* and international law.⁶³

After issuing the Notice of Application, the applicants began the long, arduous work of amassing the evidentiary record. Twelve expert witnesses gave freely of their time to draft expert witness affidavits, including: Miloon Kothari, the former UN Special Rapporteur on Housing; Catherine Frazee, the former Ontario Human Rights Commissioner; Charles Taiowisakarere Hill, Executive Director of the National Aboriginal Housing Association; and Dr. Stephen Hwang, a renowned doctor at St. Michael's Hospital who has conducted research on the correlation between inadequate housing and homelessness, serious illness, and mortality.

The 10,000 page evidentiary record was served on the Attorneys General of Ontario and Canada in November 2011. In response, the Attorneys General requested that they be granted a commensurate amount of time to create a responding record. Instead, six months later, on the second anniversary of the issued Notice, the Attorneys General advised they would bring motions to strike the application in its entirety without a hearing on the evidence.

I. THE GOVERNMENTS' MOTIONS TO STRIKE THE LEGAL CLAIM

A motion to strike⁶⁴ is intended to strike out a legal proceeding where it discloses no "reasonable cause of action" and it is "plain and obvious" that there is "no chance of success."⁶⁵ Such

⁶⁰ Michael Shapcott, "A Housing Year in Review And A Walk Through Numbers" (23 December 2011) Wellesley Institute (blog), online: <<http://www.wellesleyinstitute.com/housing/a-housing-year-in-review-and-a-walk-through-the-numbers/>>; and for a history of the erosion of the national housing plan over the past several decades; also see Shapcott, "Affidavit," *supra* note 2.

⁶¹ See *Core Document Forming Part of the Reports of States Parties (Canada)*, HRI/CORE/1/Add.91 (12 January 1998) at para 127; United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May 1993) at paras 3, 21; Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998) questions 16, 53; *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March 1983) at 23.

⁶² *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 14.

⁶³ See "Amended Notice of Application" and Expert Witness Affidavits, *supra* note 52, online: <[http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.\(R2H\).pdf](http://www.acto.ca/assets/files/cases/Amended%20Not.%20of%20App.(R2H).pdf)>.

motions are generally used to strike out statements of claim. Their purpose is much murkier when it comes to striking out complex *Charter* applications.⁶⁶

It is also an awkward procedural tool in this instance. Whereas a statement of claim details all the material facts pertaining to a claim and can be used to paint a complete picture of the litigation, the same is not true of a notice of application. A notice of application does not set out the material facts, but only the more general legal grounds for the claim. On an application, the facts are established in the affidavits that form the evidentiary record. In the *Right to Housing* challenge, the 10,000 pages of affidavit evidence are the bedrock of the application; the breadth and depth of the record demonstrates that these are not issues to be argued in the abstract. Yet the *Rules of Civil Procedure* expressly provide that no evidence can be before the court on a motion to strike.⁶⁷

Despite the inappropriateness of using motions to strike in *Charter* cases, increasingly it would appear that this is the Attorneys' General tool of choice.⁶⁸ It may be non-democratic but it is effective. The pockets of non-profit organizations are not deep and resources are extremely limited; thus a motion to strike can serve to quell dissent and prevent the voices of marginalized groups from being heard before the courts on a full evidentiary record.

Disturbed by the governments' move to strike down litigation without a full hearing, several groups applied to intervene on the motion including disability rights groups, low income tenants, and Amnesty International.⁶⁹ In March 2013, the motions for leave to intervene were heard over two days at the Superior Court of Justice.⁷⁰

On several occasions the judge asserted that the case was "political" and not "legal", that these were "social" problems. After commenting that he would prefer more "academic" and "less partisan" intervenors—the inference being that if you are poor you are somehow partisan, an inference which corporations, for instance, seem to escape entirely—the judge permitted the following coalitions and one academic organization to intervene: i) Amnesty International/the International Network for Social and Cultural Rights; ii) the Charter Committee on Poverty

⁶⁴ A motion to strike pleadings in Ontario is brought under the *Rules of Civil Procedure*, *supra* note 62, Rule 21.01(b) and Rule 21.01(2)(b) which provide:

21.01(1) A party may move before a judge
(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
and the judge may make an order or grant judgment accordingly.

21.01(2) No evidence is admissible on a motion
(b) under clause (1)(b)

⁶⁵ *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45.

⁶⁶ *Charter* claims are frequently brought by way of application on the basis of affidavit rather than *viva voce* evidence. This is expressly contemplated under the *Rules of Civil Procedure*, *supra* note 62, which allow a proceeding to be brought by application where the relief claimed is "for a remedy under the *Canadian Charter of Rights and Freedoms*" (Rule 14.05(3) (g.1)).

⁶⁷ *Rules of Civil Procedure*, *supra* note 62, Rule 21.01(2)(b).

⁶⁸ See e.g. *Barbra Schlifer Commemorative Clinic v Her Majesty the Queen*, 2012 ONSC 4271, ["Schlifer Commemorative Clinic"] and *Scott v Canada (Attorney General)* 2013 BCSC 1951.

⁶⁹ The groups seeking intervention included: The David Asper Centre for Constitutional Rights, Amnesty International, ESCR-Net, Charter Committee on Poverty Issues, Justice for Girls, Pivot Legal Society, Income Security Advocacy Centre; ARCH Disability Law Centre, Canadian HIV/AIDS Legal Network, The Dream Team, HIV/AIDS Legal Clinic Ontario; Sistering, ACORN, and the Federation of Metro Tenants Association.

⁷⁰ *Tanudjaja v Attorney General (Canada) (Motions to Intervene)*, 2013 ONSC 1878 [Tanudjaja "Motion to Intervene"].

Issues/Pivot Legal Society/the Income Security Advocacy Centre/Justice for Girls; and iii) the David Asper Centre for Constitutional Rights.⁷¹

The motion to strike was heard over three days in May 2013. Without the benefit of evidence, the judge mused about the nature and root causes of homelessness and inadequate housing and whether the government could be held responsible for either. He worried about the costs that might be incurred. Of course, had the judge been able to review the evidentiary record, he would have had access to evidence that it costs half the amount to house people than it does to keep them homeless.⁷² Justice Lederer wrote,

[b]y its nature, such an application would require consideration of how our society distributes and redistributes wealth. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.⁷³

The court's decision is rooted in an inappropriate and unrealistic baseline for considering whether marginalized groups have been made worse off by government choices: current inadequate state action versus a hypothetical state in which the government provides no services whatsoever. Yet in a modern welfare state, government regulation infuses so many spheres of social interaction and governments wield so much power over access to resources that not only direct action but also inertia or inaction must be called to account.⁷⁴

The Ontario Superior Court of Justice ultimately allowed the governments' motions, striking the *Right to Housing* claim in its entirety. The Court found that the section 7 claim had no reasonable chance of success because there can be no positive obligations under the *Charter*.⁷⁵ The Court found that the section 15 claim had no reasonable chance of success again because there could be no positive obligations under the *Charter* but also because the governments' actions did not cause homelessness, homelessness was not an analogous ground, and the claims on distinct and intersecting grounds would necessarily fail.⁷⁶ The Court further held that the claim was political and therefore non-justiciable, and the remedies—particularly requiring governments to develop a national housing strategy and to require court supervision to ensure compliance with the orders—were not justiciable.⁷⁷ The claimants appealed the ruling on all grounds.⁷⁸

The issues at stake on the appeal are significant not only for this particular case but engage issues that are of fundamental importance to the substance and process of *Charter* litigation generally. This was reflected in the extraordinary fact that eight interveners and intervener coalitions, representing sixteen separate well-established public institutions with

⁷¹ *Ibid.*

⁷² See Gaetz, "Real Cost of Homelessness," *supra* note 18 at 2.

⁷³ *Tanudjaja*, *supra* note 9 at para 120.

⁷⁴ See Jenna MacNaughton, "Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune" (2001) 3:2 *University of Pennsylvania JCL* 750 at 754.

⁷⁵ *Tanudjaja*, *supra* note 9 at para 26, 27-90.

⁷⁶ *Ibid* at paras 91-137.

⁷⁷ *Ibid* at 138-148.

⁷⁸ The appeal was scheduled for three days at the Ontario Court of Appeal on 26-28 May 2014 (Court of Appeal File No. C57714).

provincial, federal and international mandates, were granted leave to intervene on the appeal of this motion.⁷⁹ The interveners and intervener coalitions were: (i) David Asper Centre for Constitutional Rights; (ii) Amnesty International Canada and International Network for Economic, Social and Cultural Rights; (iii) Women's Legal Education and Action Fund; (iv) Charter Committee on Poverty, Pivot Legal Society and Justice for Girls; (v) ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario; (vi) Ontario Human Rights Commission; (vii) Colour of Poverty/Colour of Change; and (viii) Income Security Advocacy Clinic, the ODSP Action Coalition, and the Steering Committee on Social Assistance.

The appeal was heard over three days in May 2014. In December 2014 the Court issued a divided ruling.⁸⁰ The majority of the Court of Appeal, per Pardu JA, dismissed the appeal on the basis that the application is not justiciable as “there is no sufficient legal component to engage the decision-making capacity of the courts.”⁸¹ The majority held that the claim was essentially a political claim rather than a rights claim stating “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.”⁸² The majority found that the systemic nature of the claim rendered it non-justiciable because it failed to follow the “archetypal feature of *Charter* challenges” which present a challenge to a single law or single application of a law.⁸³ The majority mistakenly characterized the claims as asserting “a general freestanding right to adequate housing”⁸⁴ and found that there “is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether sufficient 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 legislatures.”⁸⁵ The majority further held in one brief paragraph that the remedies sought were non-justiciable because they were beyond the institutional competence of the courts.⁸⁶ Having determined that the claim was *per se* non-justiciable, the majority held that “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* ... Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.”⁸⁷ Finally, the majority upheld the motion judge's ruling that it was unreasonable to require that the motions to strike be brought before the record was served.⁸⁸

In a strong dissent, Feldman JA would have allowed the appeal. She found that the claim was justiciable under both section 7 and section 15 and that it was “a serious attempt” that “seeks

⁷⁹ *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON CA Court File No. C57714 (Factum of the Proposed Coalition of Interveners) [*Tanudjaja* (Coalition of Interveners)].

⁸⁰ *Tanudjaja* ONCA, *supra* note 10.

⁸¹ *Ibid* at para 27, Pardu JA.

⁸² *Ibid* at para 19, Pardu JA.

⁸³ *Ibid* at para 22, 10, 27-32, Pardu JA. Despite this the majority stated, “[t]his 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,” at para 29.

⁸⁴ *Ibid* at para 17,13, Pardu JA.

⁸⁵ *Ibid* at para 33, Pardu JA.

⁸⁶ *Ibid* at para 34, Pardu JA.

⁸⁷ *Ibid* at para 37, Pardu JA.

⁸⁸ *Ibid* at para 38, Pardu JA. Inexplicably the majority chastised the parties and interveners for failing to make any reference to the evidentiary record even though the Rules expressly prohibit that evidence from being put before the court (at para 39).

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.” She wrote,

[i]n 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.⁸⁹

Feldman JA found that the motion judge had made extensive errors of law in assessing both the section 7 and section 15 claims, including: (i) erring in his characterization of the section 7 claim and stating it in an overly broad manner; (ii) erring in stating that the section 7 jurisprudence on whether positive obligations can be imposed on government is settled; (iii) erring in purporting to define the law in critical areas of jurisprudence on a motion to strike and drawing conclusions of law in a new way; (iv) determining the very legal issues under both section 7 and section 15 that are intended to be addressed by an application judge on a full record and full argument on the merits; and (v) making factual findings that are not in the pleadings, in the absence of evidence, in order to reach those determinations.⁹⁰ Beyond this catalogue of serious errors, Feldman JA held that the “larger error was to strike the claim without allowing a court to review the evidentiary record assembled by the appellants.”⁹¹ Feldman JA ruled that the claim was justiciable. She found that the justiciability of social and economic rights remains an open question in the jurisprudence and that courts have in fact adjudicated poverty-related standards in non-*Charter* cases.⁹² She found that the question of whether the *Charter* imposes positive obligations on government has also expressly been left open by the Supreme Court.⁹³ She found that the novel element of bringing a systemic claim and seeking systemic remedies presented no barrier to justiciability. Acknowledging the complexity of the claimants’ systemic analysis, Feldman JA wrote, “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.” However she concluded that,

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.⁹⁴

⁸⁹ *Ibid* at paras 43, 68, 41, 75–85, Feldman JA, in dissent.

⁹⁰ *Ibid* at paras 51–74, Feldman JA, in dissent.

⁹¹ *Ibid* at para 64, Feldman JA, in dissent.

⁹² *Ibid* at paras 77–81, 86, Feldman JA, in dissent.

⁹³ *Ibid* at paras 53–63, 86, Feldman JA, in dissent.

⁹⁴ *Ibid* at paras 82–85, especially at para 84, Feldman JA, in dissent.

Ultimately Feldman JA addressed the high threshold for striking claims on a preliminary motion and concluded:

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.⁹⁵

At the time of writing, the claimants are seeking leave to appeal to the Supreme Court of Canada.

Regardless of the outcome on the application for leave and any subsequent appeal, the framing of housing security as protected by fundamental constitutional rights is worth examining in more detail because the nature of the framing engages fundamental issues of constitutional law that are relevant to the next evolution in the accessibility and enforceability of these rights.

IV. THE RIGHT TO LIFE, LIBERTY, AND SECURITY OF THE PERSON: SECTION 7 OF THE *CHARTER*, HOUSING, AND HOMELESSNESS

A. OVERVIEW

In the three decades since the *Charter*'s adoption, increasing numbers of Canadians' lives have been shortened and their security lessened by poverty, and the *Charter* has not provided remedies. The *Right to Housing* challenge asserts that the federal and provincial governments have failed to meet their constitutional responsibilities to protect those aspects of housing that are fundamental to life and security of the person. The legislative, policy, and program changes they have implemented exacerbated housing insecurity and directly contributed to increased homelessness and reduced access to adequate housing. They violate the right to life by reducing life expectancy of those who are homeless and inadequately housed. They violate security of the person by causing significant damage to the physical, mental, and emotional health of those who are homeless and inadequately housed. The governments' actions and policies that have caused these deprivations of life and security of the person are not in accordance with the principles of fundamental justice because they have been arbitrary and have been implemented without regard to the impact on the homeless and inadequately housed.

The challenge directly engages with three critical issues in section 7 jurisprudence that are both unsettled in the case law and subject to extensive critical commentary. The claim probes: (a) the extent to which the rights to life and security of the person protect social and economic rights that are so fundamental as to be necessities of life; (b) the extent to which section 7 imposes positive obligations on government to protect socio-economic rights; and (c) the extent to which a government's actions/inactions may contravene the *Charter*.

⁹⁵ *Ibid* at paras 88, especially at para 84, Feldman JA, in dissent.

The degree to which section 7 protects social and economic rights is unresolved in Canadian law. However, there are significant statements in the law that anchor the *Right to Housing* claim. There is *obiter* in several Supreme Court of Canada judgments, going back to 1989, that suggests a section 7 claim may successfully challenge governmental failures to provide necessities of life. Moreover, there is a powerful dissent in the 2002 case of *Gosselin* that specifically supports such claims.⁹⁶ The legal principles in that dissent were not rejected by the majority. Nonetheless, in the *Right to Housing* case the Ontario Superior Court of Justice struck the section 7 claim. The judge seemed to acknowledge that *Gosselin* left the door open to pursue such an application if an appropriate evidentiary foundation established “hardship.” However, he struck the application before any evidence was tendered, relying on two lower court cases⁹⁷ decided prior to *Gosselin* whose holdings are inconsistent with *Gosselin*. He wrote,

[a]s of this moment, there is no positive obligation placed on Canada or Ontario, arising out of an allegation of a breach of s. 7 of the *Charter*, having been found to apply in circumstances such as this. To the contrary, *Clark* and *Masse* demonstrate the opposite. It may be that values, attitudes and perspectives will change, but this evolution is not sufficient to trigger reconsideration in the lower courts.⁹⁸

If this proposition is allowed to stand, the question of whether section 7 can protect necessities of life will never be resolved by the Supreme Court. This proposition creates a conundrum: the Supreme Court of Canada requires an appropriate evidentiary foundation to determine the scope of section 7, but the lower court does not allow evidence to be introduced on a motion to strike.

B. THE LEADING CASE: *GOSSELIN V QUÉBEC (ATTORNEY GENERAL)*

The section 7 claim in the *Right to Housing* turns largely on the proper interpretation of both the majority and dissenting reasons in *Gosselin*. That case addresses both the scope of section 7 protection for necessities of life and government’s positive obligation to protect those rights. The *Right to Housing* application asserts that both the majority and dissenting reasons support the conclusion that, if there is a proper evidentiary record, a court can find under section 7 that governments have a positive obligation to protect necessities of life, including aspects of housing, and that actions or inaction which undermine life and security of the person in this context violate the *Charter*.

Since 1989, the Supreme Court of Canada has acknowledged the possibility that section 7 may guarantee positive rights to the necessities of human life, including shelter:

Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property–contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be

⁹⁶ *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 308–309, 320–357 [*Gosselin*].

⁹⁷ *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20, 89 OAC 81 (Ont Div Ct); *Clark v Peterborough Utilities Commission* (1995), 24 OR (3d) 7, [1995] OJ No. 1743 (Gen Div).

⁹⁸ See Tanudjaja, “Affidavit,” *supra* note 34 at para 58.

precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.⁹⁹

The possibility that section 7 could protect “economic rights fundamental to human life or survival” was reaffirmed by the majority in *Gosselin*.¹⁰⁰ This possibility remains open today. *Gosselin* addressed whether reduced social assistance benefits for youth violated the *Charter*. In rejecting the claim concerning “positive rights” to adequate income security, the majority in *Gosselin* did not hold that the application was deficient in law but merely that it was deficient in evidence:

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.

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.¹⁰¹ [emphasis added]

Justice Arbour’s dissent in *Gosselin*, joined in by Justice L’Heureux-Dubé and referred to with respect by the majority, held:

I would allow this appeal on the basis of the appellant’s s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to “life, liberty and security of the person” include a positive dimension. ...

This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state—as in this case—for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s.7. In my view, far from resisting this conclusion, the language and structure of the *Charter*—and of s. 7 in particular—actually *compel* it. ...¹⁰² [emphasis in original]

The majority decision in *Gosselin* differs from the dissents of Arbour J and L’Heureux-Dubé J primarily with respect to whether there was sufficient evidence of hardship to support the section 7 claim. The majority reasons do not at any point suggest—explicitly or implicitly—that

⁹⁹ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003.

¹⁰⁰ *Gosselin*, *supra* note 96 at para 80.

¹⁰¹ *Ibid* at paras 82–83.

¹⁰² *Ibid* at paras 308–309.

any of the legal propositions in the judgments of Justice Arbour or Justice L'Heureux-Dubé are incorrect.¹⁰³

Several cases have since held that section 7 does not protect “mere economic rights.” But as Justice Arbour concluded in *Gosselin*, “the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of ‘economic rights’.”¹⁰⁴

The *Right to Housing* claim similarly asserts that it is “a gross mischaracterization” to label a right to live and sleep in a reasonably safe environment a mere “economic right”. Access to adequate housing is not a mere “property right”; thus any purported choice by the framers of the *Charter* to exclude “property rights” from section 7 is irrelevant to the claim. It requires a deeper analysis of the meaning of the rights to life and security of the person.

On the second question of “state action,” Arbour J held section 7 can impose positive obligations on government to act to protect socio-economic rights:

In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.¹⁰⁵

Arbour J held that on the evidence in *Gosselin*, section 7 was violated.

Given that the majority in *Gosselin* does not disavow any of Arbour J’s section 7 analysis, that leading decision leaves open the extent to which section 7 protects the necessities of life, the extent to which governments may have positive obligations under section 7, and whether state action is required to trigger a section 7 deprivation. Such fundamental questions must be decided on the basis of a sufficient evidentiary record. The housing application is novel in focusing squarely on a necessity of life—housing—rather than on means (such as adequate social assistance) of obtaining a necessity of life. With 10,000 pages of evidence waiting to be heard, the *Right to Housing* challenge provides an opportunity to squarely determine these key legal questions and should not be peremptorily dismissed on a motion to strike.

Recognizing aspects of adequate housing as protected under section 7 would not represent a “massive” change in the meaning of section 7, nor would it represent a substantial imposition on elected governments. The British Columbia Court of Appeal recently recognized that section 7 grounds a right to at least minimal shelter from the elements.¹⁰⁶ The Court held that a bylaw preventing homeless people from erecting temporary shelters to protect themselves during the night violated section 7 and was not justified under section 1:

[T]he homeless represent some of the most vulnerable and marginalized members of our society, and the allegation of the respondents in this case, namely that the Bylaws impair their ability to provide themselves with shelter that affords adequate protection from the elements, in circumstances where there is no practicable shelter

¹⁰³ *Ibid* at paras 83, 141.

¹⁰⁴ *Ibid* at para 312.

¹⁰⁵ *Ibid* at paras 357.

¹⁰⁶ *Victoria (City) v Adams*, 2009 BCCA 563 at para 75, 100 BCLR (4th) 28 [*Victoria (City) v Adams*].

alternative, invokes one of the most basic and fundamental human rights guaranteed by our Constitution—the right to life, liberty and security of the person.¹⁰⁷

Moreover, the *Right to Housing* application does not request that the court order either government to implement any particular measures that would provide housing or would entail the expenditure of any monies. The most extensive remedy sought is merely an order that the governments begin addressing the problem of homelessness by adopting strategies to reduce and eliminate homelessness and inadequate housing. It is difficult to imagine a more incremental advance towards remedying such a serious *Charter* violation.

C. DEPRIVATION OF RIGHTS TO LIFE AND SECURITY OF THE PERSON

On a motion to strike, the facts alleged in the pleadings are deemed to be proven. These facts include: housing is a necessity of life; homelessness and inadequate housing cause reduced life expectancy and cause significant damage to physical, mental, and emotional health; and homelessness and inadequate housing can cause death. The application also alleged that “Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. ... As a result, they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.”¹⁰⁸

The 16 volumes of evidence tendered in support of the application can be found on the Advocacy Centre for Tenants Ontario website. This evidence is much more compelling than any summary in a Notice of Application could be. For example, Dr. Stephen Hwang, one of the world’s leading experts on the connection between homelessness and health, describes some of the research that he and others have done and deposes that there is now “good evidence to support a scientific finding that homelessness causes harm to health and increases the risk of death.”¹⁰⁹

Dr. Hwang’s evidence shows that the probability that a 25-year-old man living in shelters, rooming houses, or hotels would survive to age 75 is only *half* that of the general population (32 per cent compared to 64 per cent. Amongst women, the study found that 60 per cent would survive to 75, compared with 79 per cent in the entire cohort. Compared with the entire population, life expectancy was shorter by thirteen years for men and eight years for women living in shelters; eleven and nine years, respectively, for those living in rooming houses; and eight and five years, respectively, for those living in hotels. Thus Dr. Hwang provides irrefutable evidence that homelessness cause a substantial reduction in life expectancy.¹¹⁰ He also finds that the same can be said for those who are vulnerably housed.¹¹¹

¹⁰⁷ *Ibid* at para 75.

¹⁰⁸ *Amended Notice of Application*, *supra* note 52 at para 14.

¹⁰⁹ Stephen Hwang, Affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC Court File No. CV-10-403688, see online: <http://www.acto.ca/en/cases/right-to-housing/application-material.html>.

¹¹⁰ *Ibid* at paras 10–17.

¹¹¹ *Ibid* at paras 41–45.

Professor Paula Goering, a very well respected researcher on homelessness and mental health, deposes that homelessness exacerbates mental health issues and addictions.¹¹² Each of the four individual applicants' affidavits describes their own suffering from homelessness or inadequate housing.

D. CANADA'S AND ONTARIO'S ACTIONS AND FAILURES TO ACT

The *Right to Housing* application impugns both actions and failures to act by Canada and Ontario. When a government institutes changes, it is taking positive action. It is well settled that repealing a statute in whole or in part is government action that is properly subject to section 7 scrutiny.¹¹³ Similarly, a Minister's failure to issue a discretionary permit is an action that can be challenged under section 7.¹¹⁴ There is substantial support in the jurisprudence for the proposition that government failures to act can breach *Charter* rights.¹¹⁵

Ultimately, the Supreme Court has concluded that the distinction between legislative action and inaction is "very problematic" and provides "no legal basis" for determining whether the *Charter* applies.¹¹⁶ As noted in the unanimous judgment in *Vriend*,

[t]he relevant subsection, s. 32(1)(b), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province." There is nothing in that wording to suggest that a *positive act* encroaching on rights is required; rather the subsection speaks only of *matters within the authority of the legislature*. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" ... The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.¹¹⁷ [emphasis in the original]

A full factual record is required to understand the relationships between the various governmental actions and failures to act.

E. VIOLATIONS ARE CONTRARY TO THE PRINCIPLES OF FUNDAMENTAL JUSTICE

An infringement of a section 7 right will offend "principles of fundamental justice" if it violates "basic tenets of our legal system." These tenets "may be reflected in the common-law and

¹¹² Paula Nina Goering, Affidavit, *Tanudjaja. v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>>.

¹¹³ *Barbra Schlifer Commemorative, supra* note 68; *SEIU Local 204 v Ontario*, [1997] OJ No. 3563; *Ferrel v Ontario* (Attorney General), [1998] OJ No 5074.

¹¹⁴ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [Insite].

¹¹⁵ *Ibid* at para 104; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, [New Brunswick]; *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Gen. Div.); *Vriend v Alberta*, [1998] 1 SCR 493 [Vriend]; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [Eldridge v British Columbia].

¹¹⁶ *Vriend, supra* note 115 at paras 53 and 56.

¹¹⁷ *Ibid* at para 60.

statutory environment which exists outside of the *Charter*, they may be reflected in the specific and enumerated provisions of the *Charter*, or they may be more expansive than either of these.”¹¹⁸ They include principles recognized both in domestic law and under international conventions.¹¹⁹ As stated in *Godbout v Longueuil*,

... if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be “fundamentally just” not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally.¹²⁰

The *Right to Housing* application asserts that the governments’ actions and failures to act that caused the deprivations of life and security of the person were arbitrary, disproportionate to any governmental interest, and contrary to international human right norms. Such deprivations are clearly not in accordance with the principles of fundamental justice.¹²¹

F. INTERNATIONAL OBLIGATIONS SUPPORT ACCESS TO ADEQUATE HOUSING

In dissent in the 1987 *Alberta Reference*, then Chief Justice Dickson stated that, “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”¹²² The majority of the Supreme Court has since regularly adopted this statement.¹²³ Moreover, the Supreme Court has ruled that, “In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction.”¹²⁴

In *Victoria v Adams*, the trial judge used international law to inform interpretation of the *Charter*’s application to housing rights. On appeal, the British Columbia Court of Appeal found,

[t]here is no issue raised on the appeal with respect to the trial judge’s reference to international instruments as an aid to interpreting the *Charter*. Nor could there be. The use of international instruments to aid in the interpretation of the meaning and scope of rights under that *Charter*, and in particular the rights protected under s. 7 and the principles of fundamental justice, is well established in Canadian jurisprudence.¹²⁵

¹¹⁸ *R v S (RJ)*, [1995] 1 SCR 451 at para 49, Iacobucci J; *R v Ruzic*, 2001 SCC 24 at para 49, Iacobucci, J and at para 28, per LeBel; *R v Seaboyer*, [1991] 2 SCR 577 at 603, per McLachlin J.

¹¹⁹ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503, per Lamer J; *United States v Burns*, 2001 SCC 7 at paras 79–81.

¹²⁰ *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 74.

¹²¹ *Amended Notice of Application*, *supra* note 52 at para 34; and see *e.g. Schlifer Commemorative Clinic*, *supra* note 68 at para 73.

¹²² *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para 59.

¹²³ See, for example, *Slaight Communications Inc. v Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 at 1056; *R v Hape*, 2007 SCC 26 at para 55 [*Hape*].

¹²⁴ *Hape*, *supra* note 123 at para 56.

¹²⁵ *Victoria (City) v Adams*, *supra* note 106 at para 35.

As outlined above, numerous international human rights instruments recognize the right to housing as a fundamental human right. The evidence on the application addresses the significance of those rights both for determining the scope of section 7 and for understanding productive solutions to homelessness. The application includes evidence from Miloon Kothari, who was the United Nations Special Rapporteur on Adequate Housing from 2000 to 2008. UN Special Rapporteurs are independent experts who are appointed by and report to the United Nations Human Rights Council. They are mandated to investigate states' compliance with international human rights either within a particular country or in relation to a particular theme, investigating, monitoring, and recommending solutions to human rights problems. In his affidavit, Mr. Kothari deposes, "My over-arching recommendation is for Canada to adopt a comprehensive and coordinated national housing strategy based on the recognition of the right to adequate housing, the indivisibility of human rights and the protection of the most vulnerable. Canada is one of the few countries in the world without a national housing strategy."

G. CONCLUSION WITH RESPECT TO SECTION 7

Given its pre-eminence within the overall scheme of the *Charter*, "the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7" is, as Justice LeBel suggests in *Blencoe*, crucial.¹²⁶ Also, as Justice L'Heureux-Dubé asserts in *G(J)*, it is necessary to interpret section 7 through an equality rights lens "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."¹²⁷ This is especially important if poor people are to benefit equally from the section 7 guarantee.

As many cases illustrate, the poor have fared poorly in attempts to use the *Charter*. As the *Right to Housing* claim identifies, people with disabilities, aboriginal people, racialized communities, seniors, and youth are all disproportionately affected by homelessness and inadequate housing. In this context, "the need to safeguard a degree of flexibility in the interpretation and evolution of section 7" and the need to ensure that "our interpretation of the Constitution responds to the realities and needs of all members of society" require that the legal challenge be allowed to proceed to a hearing on its merits.

Although this is a novel case, there are no clear rulings that make it certain or even likely to fail. International law supports the section 7 claim, as do Canada's assertions to the UN. The leading case, *Gosselin*, implies that success will turn on whether the evidence makes a compelling case that the claimants and others have been deprived of necessities of life. That can only be determined at a hearing based on a full factual record.

V. TAKING SYSTEMIC DISCRIMINATION SERIOUSLY: SECTION 15, HOUSING, AND HOMELESSNESS

A. OVERVIEW

For three decades, Canada's equality rights jurisprudence has recognized that most discrimination arises not as a result of isolated acts motivated by discriminatory intent but through the operation and persistence of *systems* and established practices that disproportionately

¹²⁶ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 188.

¹²⁷ *New Brunswick*, *supra* note 115 at para 115.

favour dominant groups while disproportionately marginalizing, disempowering, and disadvantaging many groups throughout our communities. In her landmark 1984 Royal Commission Report on *Equality in Employment*, Justice Rosalie Abella called this “systemic discrimination.” Examining the policies, procedures, and institutions that shape our daily interactions, she stressed that in identifying discrimination, “it is important to look at the *results of a system*” [emphasis added]. Rather than “stamping out brush fires” on a case-by-case basis, it is necessary to see “the incendiary potential of the whole forest” and to devise remedies that respond to discrimination’s systemic roots.¹²⁸

This understanding of discrimination has been developed somewhat further in the intervening decades by recognizing that the differential privileges that are enjoyed by groups in society are not natural and inevitable. Instead, all discrimination is socially constructed. Systemic discrimination arises when systems, practices and institutions of mainstream society reflect and reinforce the norms, attributes and privileges of dominant groups.¹²⁹ As the Supreme Court of Canada wrote in *Eaton v Brant County Board of Education* in the context of disability-based discrimination:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. ... [I]t is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.¹³⁰

While our equality jurisprudence has long endorsed this understanding of systemic discrimination, there have been very few legal claims that have directly impugned a discriminatory system. The *Right to Housing* challenge does this. It is a deliberately and consciously systemic challenge. The claim does not examine an individual law or policy in isolation. To do so would provide only an incomplete and correspondingly inaccurate picture of the social harm. It would pixelate the human experience of disempowerment in a way that obscures its true operation and that obscures government accountability for its outcomes. Instead, the *Right to Housing* challenge explicitly names the elements of government action that construct and sustain the discriminatory system. It identifies the ways in which these elements operate cumulatively *as an interconnected system*, and it identifies the ways in which they actively and predictably drive discriminatory effects and outcomes. The systemic nature of the *Right to Housing* legal claim is both novel and central to its essence.

The equality claim in the *Right to Housing* challenge addresses three themes. It examines the principle of substantive equality; the government’s role in *creating* a new disempowered class within society; and the discriminatory impacts that the federal and provincial actions have on discrete and identifiable marginalized populations.

B. SUBSTANTIVE EQUALITY

¹²⁸ Ottawa, Minister of Supply and Services Canada, *Equality in Employment: A Royal Commission Report* by Rosalie Silberman Abella, (Ottawa: Canadian Government Publishing Centre, 1984) at 8.

¹²⁹ Mary Cornish, Fay Faraday & Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Toronto: Canada Law Book, 2009) at 7.

¹³⁰ *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 67.

The equality guarantee in section 15 of the *Charter* must be interpreted in a “purposive and contextual manner in order to permit the realization of the provision’s strong remedial purpose.”¹³¹ The remedial purposes of section 15 are: (a) “to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in society”; (b) “the amelioration of the conditions of disadvantaged persons”; and (c) “the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹³²

The Supreme Court has focused its analysis under section 15 around two inquiries: (1) Does the law create a distinction based on an enumerated or analogous ground?; and (2) Does the distinction create a disadvantage by perpetuating prejudice and stereotype?¹³³ However, the Court has repeatedly emphasized that this framework does not “describe discrete [sic] linear steps” and that “it would be inappropriate to attempt to confine analysis under s 15(1) of the *Charter* to a ‘fixed and limited formula.’”¹³⁴ Rather, these guidelines “should be understood as points of reference.”¹³⁵

Since 2011, the Supreme Court has emphasized that ultimately the legal test under section 15 is this: “at the end of the day, there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?”¹³⁶

Substantive equality recognizes that section 15 of the *Charter* is not operating on a blank slate. It recognizes that laws operate in a pre-existing legal, political, social, economic, and historical context that is marked by inequality and that this inequality is socially constructed as opposed to natural or inevitable. For this reason, section 15 has a strong remedial and ameliorative purpose.¹³⁷ Substantive equality is rooted in the recognition that identical treatment can produce or exacerbate inequality and that, often, differential treatment that takes into account pre-existing differences relative to dominant groups is necessary to secure the remedial purposes of section 15.¹³⁸

For this reason, section 15 imposes a duty on government to ensure that the formulation of law and policy takes account of potentially differential impacts on different groups in society to ensure that government action does not exacerbate pre-existing disadvantage:

Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact

¹³¹ *Lovelace v Ontario*, [2000] 1 SCR 950 at para 54, L’Heureux-Dubé J, [*Lovelace v Ontario*]; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 88, McLachlin J (as she then was) [*Law v Canada*]; *M v H*, [1999] 2 SCR 3 at para 47, Cory J, [*M v H*].

¹³² *Lovelace v Ontario*, *supra* note 131 at paras 54, 60; *Eldridge v British Columbia*, *supra* note 115 at para 54; *R v Kapp*, [2008] 2 SCR 483 at para 15, [*R v Kapp*]; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, [*Andrews*]; *Law v Canada*, *supra* note 131 at paras 42–43, 47, 51.

¹³³ *R v Kapp*, *supra* note 132 at para 17; and *Withler v Canada*, [2011] 1 SCR 396 at para 30, [*Withler v Canada*].

¹³⁴ *Auton v British Columbia*, [2004] 3 SCR 657 at para 24 [*Auton*]; and *Law v Canada*, *supra* note 131 at para 3.

¹³⁵ *Law v Canada*, *supra* note 131 at paras 88, 88(1); *M v H*, *supra* note 131 at paras 46–47; *Auton* *supra* note 134 at para 26.

¹³⁶ *Quebec (Attorney General) v A*, 2013 SCC 5 at para 325 (per Abella J) [*Quebec v A*].

¹³⁷ *Andrews*, *supra* note 132.

¹³⁸ *Ibid*; *Eldridge v British Columbia*, *supra* note 115; and *Vriend*, *supra* note 115.

on already disadvantaged classes of persons.¹³⁹

To determine if government action or inaction violates the norm of substantive equality, “the matter must be considered in the *full context of the case*, including the law’s *real impact* on the claimants and members of the group to which they belong.”¹⁴⁰ “The focus of the inquiry is on the actual impact of the impugned law, *taking full account of social, political, economic and historical factors concerning the group*” [emphasis added].¹⁴¹

Courts have repeatedly held that where government enters a field it has an obligation to ensure that it does so in a non-discriminatory way. As the Supreme Court stated in *Eldridge*, “in many circumstances, this will require governments to take positive action.” The Court in that case rejected as a “thin and impoverished vision of section 15(1)” the argument advanced by governments “that section 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action.”¹⁴²

As detailed above, the federal and provincial governments have been actively engaged in the field of adequate and affordable housing for decades. The *Right to Housing* challenge argues that the range of actions the federal and provincial governments have undertaken to restructure governments’ role in housing failed to take into account the needs and circumstances of those who are homeless and at risk of homelessness. The governments’ actions make those who are already vulnerable, even more vulnerable. The governments’ actions exacerbate their pre-existing disadvantage. The cumulative effect of the changes to the laws and policies has been to drive more people into homelessness and inadequate housing and to sustain conditions that perpetuate homelessness, inadequate housing, and the accompanying physical, psychological, social, and material harms.

This brief example illustrates how government actions are interrelated and have a cumulative effect: government actions that set social assistance rates significantly below market rent, *at the same time* that government *also* terminates funding for and construction of affordable housing, eliminates rent regulation, and introduces procedures to expedite evictions, predictably and inevitably have a differential burden on those who are homeless or at risk of homelessness. It fails to examine the law’s impact from the perspective of those who are homeless and at risk of homelessness and so fails to ensure that the law and policy changes are fine-tuned to address and ameliorate the conditions of disadvantaged groups. As a result the governments’ actions produce more homelessness and more vulnerability.

As the Supreme Court of Canada has recognized, “[i]f the state conduct *widens the gap* between the historically disadvantaged group and the rest of society *rather than narrowing it*, then it is discriminatory.”¹⁴³

Whether this differential burden is substantively discriminatory must be considered in a full context—on the basis of evidence—taking into consideration factors such as the pre-existing disadvantage of the claimant group (those who are homeless or at risk of homelessness), the

¹³⁹*Eldridge v British Columbia*, *supra* note 115 at para 64, citing and adopting this passage from the dissent of Lamer CJC in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

¹⁴⁰*Withler v Canada*, *supra* note 133 at para 2.

¹⁴¹*Ibid* at para 39. See also, *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222 at paras 193–94; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 63–64 (per L’Heureux-Dubé J, dissenting but not on this point) [*Corbiere v Canada*]; *Law v Canada*, *supra* note 131 at paras 59–61; *R v Turpin*, [1989] 1 SCR 1296 at 1331–1332, [*Turpin*]; *Andrews*, *supra* note 132 at 165.

¹⁴²*Eldridge v British Columbia*, *supra* note 115 at paras 72–73.

¹⁴³*Quebec v A*, *supra* note 136 at para 332.

needs, capacities and circumstances of the claimant group, and in particular the nature of the interest that is affected.¹⁴⁴

The Supreme Court of Canada has unanimously ruled that,

[t]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating *not only the economic but also the constitutional and societal significance attributed to the interests adversely affected* by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects ‘*a basic aspect of full membership in Canadian society,*’ or ‘constitute[s] a complete non-recognition of a particular group’.¹⁴⁵ [emphasis added]

Canada’s international law commitments are essential to the understanding of the nature of the interests at stake and the significance of the impact on those interests. Canada’s international human rights commitments clearly assert that housing is a basic human right. Thus, the harm that is imposed or exacerbated by the impugned laws, policies, and activities is of profound constitutional significance.

C. STATE CONSTRUCTION OF A NEW DISEMPOWERED GROUP

From its first section 15 case in *Andrews*, the Supreme Court of Canada has recognized that the *Charter* must be responsive to the multiple inventive and evolving ways in which human beings discriminate against each other. While the text of the *Charter* enumerates specific grounds on which discrimination frequently occurs, the text also expressly identifies that this is not a closed list. As Justice Wilson wrote in *Andrews*, the *Charter* guarantees protection from discrimination on the basis of the enumerated grounds, but also on the basis of an open-ended list of grounds which are “analogous”:

I believe also that it is important to note that the range of discrete and insular minorities [targeted by discrimination] has changed and will continue to change with changing political and social circumstances. ... It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the ‘unremitting protection’ of equality rights in the years to come.¹⁴⁶

The *Right to Housing* challenge argues that the impugned government actions have a discriminatory impact on groups protected by section 15, identified by the analogous ground of homelessness, and by the grounds of sex, disability, race, and reliance on social assistance.

The claim asserts that the impugned changes to the laws and policies have an unconstitutional effect because they failed to take into account the impact that the changes have on: (i) those who are homeless and/or at risk of homelessness; and (ii) those who are affected on the basis of sex, race, disability, and receipt of social assistance, thereby exacerbating their pre-

¹⁴⁴*Law v Canada*, *supra* note 131 at paras 62–75, 88; *R v Kapp*, *supra* note 132 at paras 19, 23–24; *Withler v Canada*, *supra* note 133 at paras 37–38.

¹⁴⁵*Law v Canada*, *supra* note 131 at para 74.

¹⁴⁶*Andrews*, *supra* note 132 at para 6.

existing disadvantages, marginalization, exclusion, and deprivation.

What is also novel is that the legal argument not only demands recognition of “homelessness” as a protected analogous ground, but it also implicates the governments in constructing and sustaining a new marginalized group within society—the homeless. Outside of section 15, courts have acknowledged the marginalization and vulnerability of the homeless.¹⁴⁷ But whether homelessness constitutes an analogous ground under section 15 remains an issue of first impression for the courts.

The touchstones to determine if a ground of distinction is “analogous” are “the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political, and legal history of Canadian society’s treatment of the group.” Analogous grounds “serve to advance the fundamental purpose of s. 15(1)” and are based on “characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.” They will often encompass those “lacking in political power”, “vulnerable to having their interests overlooked and their rights to equal concern and respect violated,” and “vulnerable to becoming a disadvantaged group.”¹⁴⁸

The legal claim argues that those who are homeless are among the most marginalized, disempowered, precariously situated, and vulnerable in Canadian society. They are subject to widespread discriminatory prejudice and stereotype and have been historically disadvantaged in Canadian society. Their rights, needs and interests are frequently ignored and overlooked by government. Those who are at risk of homelessness are “vulnerable to becoming a disadvantaged group.” All of these are factors that have been recognized as contributing to the identification of an analogous ground.

The fact that those who are homeless are “heterogeneous” in the sense of encompassing all races, religions, abilities, sexes, and routes into homeless has no significance. Any group of people identified by a single ground—whether an enumerated or an analogous ground—will always be heterogeneous as there is never a single characteristic that is definitive of a group. For example, women, though protected by the enumerated ground of sex are, at the same time, utterly heterogeneous in terms of race, ability, sexual orientation, class, religion, and other characteristics. What is relevant under the section 15 analysis is whether the impugned government policy affects the group in a way that is meaningfully understood with reference to the identified enumerated or analogous ground. The *Right to Housing* challenge argues that examining the impugned law and policy changes with reference to the ground of homelessness illuminates impacts that are constitutionally meaningful.

As Marie-Eve Sylvestre has written,

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.¹⁴⁹

¹⁴⁷*Victoria (City) v Adams*, *supra* note 106, at para 75; *R v Clarke*, [2003] OJ No. 3883.

¹⁴⁸*Corbiere v Canada*, *supra* note 141 at paras 11–13; *Andrews v Law Society of British Columbia*, *supra* note 132 at 152–153; *R v Turpin*, *supra* note 141 at 1331–1332; *Law v Canada*, *supra* note 131 at paras 29, 37, 42–43, 93–94.

¹⁴⁹ Marie-Eve Sylvestre Affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>>.

Moreover, the governments' response to homelessness has been increasingly marked by a tendency to criminalize the homeless and regulate their use of public space. These government responses in turn feed into and fuel stereotypes about and prejudice towards those who are homeless.¹⁵⁰

D. DISCRIMINATION AGAINST DISTINCT MARGINALIZED POPULATIONS

The third part of the equality rights claim details how the impugned laws and policies have distinct adverse impacts on groups who are identified by enumerated grounds, that the impacts are experienced specifically in relation to those grounds, and that the impugned laws and policies as a result violate section 15 on grounds including sex, disability, race, and receipt of social assistance.¹⁵¹

For example, the impugned laws and policies have a very specific adverse impact on women trying to escape domestic violence. As Janet Mosher has written, "Violence against women in their intimate relationships is one of the most commonly cited pathways into homelessness (whether visible or hidden) for women and children."¹⁵² Because of a lack of support for affordable housing, emergency shelter, and transitional housing with supports, women are forced to choose between homelessness for themselves and their children or returning to, or remaining in, a violent situation.¹⁵³ Moreover, single mothers often lose custody of their children upon becoming homeless, exacerbating the social harms.¹⁵⁴

As detailed above, the governments' actions also have very specific discriminatory impacts on the basis of disability.¹⁵⁵ Existing housing is often inaccessible to persons with disabilities and new affordable housing that is accessible is not being built. This has an adverse impact on those with physical disabilities because the failure to take the needs, capacities and circumstances of this group into account results in individuals and families waiting ten years or longer for affordable housing that meets their needs. Deinstitutionalization in the absence of supports for community living has resulted in thousands of persons with psycho-social and developmental disabilities becoming homeless. UN human rights treaty monitoring bodies have expressed concern that Canadian governments' failure to provide adequate supports for community living has resulted in persons with mental disabilities being forced to live in detention solely due a lack of supports for living in housing in the community.

The *Right to Housing* challenge also details that Aboriginal people are overrepresented among the homeless and inadequately housed population, suffering some of the worst housing conditions in the country. Newcomers and racialized persons are also disproportionately affected.

¹⁵⁰ *Ibid.*

¹⁵¹ *Amended Notice of Application*, *supra* note 52 at paras 28, 29, 30.

¹⁵² Janet E Mosher, Affidavit, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>>.

¹⁵³ See also UN Committee on Economic, Social and Cultural Rights, 36th Sess, Geneva, 1-19E/C.12/36/1/CRP.1 (4.1072) (May 2006) at para 26; following a 2006 review of Canada's implementation of the UN convention, "Economic, Social and Cultural Rights" expressed concern that "women are prevented from leaving abusive relationships due to the lack of affordable housing and inadequate assistance."

¹⁵⁴ *Amended Notice of Application*, *supra* note 52 at para 29.

¹⁵⁵ *Ibid* at paras 7, 12, 25, 26, 30. *Convention of the Rights of Persons with Disabilities*, art. 2, 9, 28; *CESCR General Comment 5 on People with Disabilities*.

Overall, the harms arising from the impugned government actions have created a system that fails to take into account and address those who are homeless and most at risk of homelessness. As a result, they exacerbate the pre-existing disadvantages of these groups and entrench the marginalization of those who are most vulnerable.

VI. REMEDIES

Just as the legal claim asserts that the harms perpetuated by the impugned government actions are systemic, the remedies must equally be systemic. The *Right to Housing* claim seeks: (a) declarations that rights under section 7 and section 15 have been violated; (b) an order to implement national and provincial housing strategies; and (c) a supervisory order in respect of developing these strategies. Each of these remedies falls entirely within the repertoire of remedies that courts can and have fashioned under the *Charter*.

Section 24 of the *Charter* states that, where *Charter* rights and freedoms have been infringed, the court has the authority to order “such remedy as the court considers appropriate and just in the circumstances.” What is “appropriate and just in the circumstances” can only be decided after a full hearing, on the basis of evidence, which makes findings about “the circumstances” which produce the breach and support the efficacy of particular remedies:

Section 24(1) ... merely provides that the appellant may obtain such remedy as the court considers ‘appropriate and just in the circumstances.’ It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.¹⁵⁶

Courts must take a purposive approach to *Charter* remedies that provides “a full, effective and meaningful remedy for *Charter* violations,” bearing in mind that “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.”¹⁵⁷ A rights violation requires a responsive and effective remedy.¹⁵⁸

An appropriate and just remedy “is one that meaningfully vindicates the rights and freedoms of the claimant,” “take[s] account of the nature of the right that has been violated” and is “relevant to the experience of the claimant”:

As such, s.24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.¹⁵⁹

¹⁵⁶*Mills v The Queen*, [1986] 1 SCR 863 at para 278.

¹⁵⁷*R v 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 at paras 19–20.

¹⁵⁸*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 25 [*Doucet-Boudreau*]; *Insite*, *supra* note 114 at para 142.

¹⁵⁹*Doucet-Boudreau*, *supra* note 158 at paras 54–59.

Remedies ordered under section 24 can address the harm a violation causes both to an individual and to society because *Charter* violations impair public confidence and diminish “public faith in the efficacy of the constitutional protection.”¹⁶⁰

Ultimately what the *Right to Housing* challenge seeks is constructive, coordinated government action in compliance with the government’s *Charter* obligations that supports and sustains the most vulnerable group’s rights to life, security of the person, and equality.

VII. CONCLUSION

Socio-economic rights claims challenge the fundamental tenets of classic liberal constitutional theory: they require the judiciary to scrutinize, evaluate, and if necessary order changes so that socio-economically marginalized groups have real access to rights and resources. The problem, of course, is that these functions have traditionally been seen as the exclusive purview of the executive and legislative, not the judicial, branches of government.¹⁶¹ As the former Chief Justice of South Africa, Pius Langa notes, this formal interpretation allows “... judges to avoid engagement and evade the search for justice.”¹⁶²

Unfortunately the motion judge and majority of the Ontario Court of Appeal chose to do exactly that in *Tanudjaja*, raising a fundamental question as to the nature of access to justice in Canada and the right of some of the most marginalized communities to have their critical, unresolved constitutional claims heard on a full evidentiary record.

Systemic rights claims grounded in assertions of social and economic rights are necessarily complex. That complexity is a reflection of the depth of marginalization and oppression experienced by the claimants. Extensive evidence is necessary to bring these experiences and impacts to light. Such claims do the hard work of challenging systemic privilege and they require that lawyers and judges confront some of the unspoken assumptions of how the legal system engages with constitutional rights claims. *Charter* litigation that proceeds on the basis of challenging a single law in isolation is premised on the notion that the baseline experience is one of constitutional compliance that delivers security and rights protection. The unspoken assumption is that an individual starts with an experience of rights protection and the impugned state action is an aberrant divergence from that presumed status of security. As a result, the more a claimant has a lived experience of rights protection and security—the closer an individual sits to the centre of privilege—the easier it is to see a rights violation as an unconstitutional aberration. By contrast, the more bricks there are in the state edifice that supports and sustains discrimination and marginalization, the more immune it is to challenge. If one challenges a single statute in isolation, even if successful, the edifice does not fall; it simply readjusts. Pursuing real rights protection then requires that a detailed evidentiary record reveal

¹⁶⁰ *Ward v Vancouver*, [2010] 2 SCR 28 at para 28.

¹⁶¹ Sandra Liebenberg, *Socio-economic Rights: Adjudication Under a Transformative Constitution* (Claremont: Juta & Co., 2010) at 26. This point was underscored by the Attorney General of British Columbia in *Victoria (City) v Adams*, *supra* note 106, where the AGBC argues that “the solutions to the difficult and challenging circumstances faced by the homeless lie in the hands of the democratically elected legislative and executive branches of government, and not in the courts.” Quoted in Martha Jackman, “Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?” in Robert J. Sharpe and Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) at 290.

¹⁶² Pius Langa, “Transformative Constitutionalism” (2006) 17 Stellenbosch Law Review 351 at 357.

and map the components and consequences of an integrated system. This is not an unreasonable or impossible task.

Canadian courts do not always evade the search for justice when there is a collision between the judicial, executive and legislative branches of government. In *Vriend* the Supreme Court stated,

... we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be ... Democratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate.¹⁶³

Mobilization of public support is often necessary for struggles to gain recognition from the courts. They must be "... fought for, described as rights, and linked to a more refined and legally developed argument about the positive obligations of the state."¹⁶⁴

The 10,000 pages of evidence which have not yet been allowed before the courts include two affiants who found themselves both homeless and battling mental illness. One of them is Linda Chamberlain. She lived on and off the streets for close to 35 years. She speaks with a compelling voice about the importance of holding the state accountable for ensuring adequate housing is truly a right for all and about what the right to housing really means:

When I got my apartment at Mainstay Housing, it felt like I was awake for the first time in my life. I was 47 years old. I had a clean home, my own space, and a feeling of safety after thirty years of living in shelters, on the street, or in rooming houses. At first I thought it was a mistake; that I wasn't good enough; that it was too good to be true. I didn't unpack for the first year I lived there because I was so afraid that I wouldn't be able to stay.¹⁶⁵

We hope that the *Right to Housing* challenge will provide all those who live in Canada with the security and community that Linda Chamberlain finally found.

¹⁶³ *Vriend*, *supra* note 115 at paras 140, 142.

¹⁶⁴ Heywood, "South Africa", *supra* note 29 at 23.

¹⁶⁵ See Linda Chamberlain, Affidavit, at para 20, *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* (2011), ON SC File No. CV-10-403688, online: <<http://www.acto.ca/en/cases/right-to-housing/application-material.html>>.