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Can the Homeless Find Shelter in the Courts?

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Case Commented On: *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852

Late in 2014, the Ontario Court of Appeal considered a *Charter* challenge to provincial and federal (in)activity allegedly contributing to homelessness and inadequate housing (*Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 ("*Tanudjaja CA*")). The appellants sought to overturn a motion judge's decision striking their application at the pleadings stage (*Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410 ("*Tanudjaja SC*")). A majority of the Court of Appeal (the "Majority") upheld the motion judge, while the dissenting judgment (the "Dissent") would have overturned the motion judge and allowed the *Charter* challenge to proceed to trial. This comment analyzes both judgments and concludes that the Dissent provides a more compelling analysis of the governing legal principles and their application in this case.

The Issues

Two legal issues are discussed in *Tanudjaja CA*, namely, whether the motion judge correctly dismissed the application because:

1. it was not justiciable for being
    a. too political, or
    b. too vague; and
2. it disclosed no reasonable cause of action regarding violations of
    a. section 7 of the *Charter*, or
    b. section 15 of the *Charter*.

I discuss each of these issues in turn and conclude that the Dissent is preferable on all accounts.

1. The Application is Justiciable

The Majority and Dissent both agree that, in essence, an issue is justiciable if the courts are competent to address it (Majority at para 35; Dissent at para 80). Accordingly, the justiciability inquiry in *Tanudjaja CA* was whether the courts are competent to adjudicate the appellants' *Charter* application relating to homelessness and inadequate housing.

In my view, the Majority's two main arguments – that such *Charter* applications cannot be adjudicated because they are too political or too vague – can be refuted.

a. The Application is not Too Political

The Majority claims that the application is not justiciable because it boils down to Canada and Ontario giving "insufficient priority" to issues of homelessness and inadequate housing – a political matter best left to the legislature (Majority, at paras 19-22). This analysis is flawed because it (1) mischaracterizes the application and (2) disregards how the competence of the courts often intersects with political issues.

First, the Majority mischaracterizes the application. Specifically, the Majority conflates assigning the level of priority given to homelessness and inadequate housing (a political inquiry for the legislature) and adjudicating whether or not that level of priority falls below the level demanded by the *Charter* (a legal inquiry for the courts). I fully agree that the strategic considerations weighing on a legislature in its fight against poverty, and the specific approach it adopts in that fight, would be inappropriate for the courts to assign. But the applicants in *Tanudjaja* were not seeking a court-imposed legislative framework governing poverty-reduction. Rather, they were seeking declarations and orders implementing "effective" poverty-reduction programs (see Majority, at para 15) – presumably, because the applicants considered effective programs to be the threshold demanded by the *Charter*.

Admittedly, the applicants sought extensive remedies, some of which would have partially constrained legislative autonomy. In particular, one of the orders sought by the applicants required that the new legislation be "developed and implemented in consultation with affected groups" and include "timetables", "monitoring regimes", and "complaints mechanisms" (Majority, at para 15). But one of several remedies sought by the applicants being arguably overreaching should not render their claim non-justiciable. Moreover, the thought of a poverty-reduction strategy that ignores affected groups and that lacks timetables, monitoring, and complaints mechanisms appears destined to be ineffective. While imposing such requirements on the legislature may seem overreaching, that view raises the question as to what a *Charter*-compliant regime, without such basic requirements, would even look like.

In addition to mischaracterizing the application, the Majority disregards how courts often appropriately adjudicate issues with political dimensions. On this point, the Dissent cites Dean Lorne Sossin who aptly observes that courts may equally be accused of improperly deciding on "political" or "policy" matters when analyzing section 1 of the *Charter* (Dissent, at para 78) – an exercise indisputably within their competence. Indeed, through the enactment of the *Charter*, the court is duly empowered to rule on legal issues with undeniable political dimensions. For example, consider the Supreme Court's ruling in *Carter v Canada (Attorney General)*, 2015 SCC 5. In *Carter*, the Court concludes, without any concern about justiciability, that the ban on physician assisted death breaches the *Charter* "to the extent that" it applies to a specific court-imposed group of individuals: competent adults who clearly consent and have a grievous and irremediable medical condition that causes enduring and intolerable suffering (at para 147). And yet, delineating such a specific group of individuals is steeped in the "moral, strategic, ideological, historical, [and] policy considerations" the Majority considers beyond the scope of competent adjudication in *Tanudjaja CA* (at para 21).

Similarly, the application in *Tanudjaja*, despite its political implications, addressed a legal question within the competence of the courts, namely, whether Canada and Ontario's approach to poverty-reduction complies with sections 7 and 15 of the *Charter*. Courts should not consider questions with political dimensions non-justiciable. Indeed, in *Reference Re Canada Assistance*

Plan, [1991] 2 SCR 525 ("*CAP*") the Supreme Court distinguished questions that are "purely political" from questions with a "sufficient legal component" (at 545; emphasis added). In other words, a legal issue must, arguably, be exclusively political to be non-justiciable. Otherwise, while the question may have numerous political implications (like physician assisted death from *Carter*), it nonetheless has a legal component appropriate to the jurisdiction of the court.

To be fair, there is some grey area between a question that is "purely political" (*i.e.* 100% political/0% legal) and a question that has a "sufficient legal component" (90% political/10% legal?). The Supreme Court's use of the word "sufficient" in *CAP* connotes an obscure threshold of legality that must be reached to satisfy justiciability, and that threshold remains undefined in the jurisprudence (see *e.g. Reference Re Secession of Quebec*, [1998] 2 SCR 217 at paras 26-28 and *Reference Re Same-Sex Marriage*, 2004 SCC 79 at paras 8-11).

In any event, the application in *Tanudjaja* – a *Charter* complaint on behalf of "a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice" (Dissent, at para 88) – had, in my view, a sufficient legal component. I am sympathetic to the concern that applicants may attempt to reroute purely political questions through the courts with creative phrasing that superficially engages the *Charter*. But the application in *Tanudjaja* is far from superficial. Substantive equality is the "animating norm" of section 15 of the *Charter* (*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2) and that norm will remain "meaningless for a vast number of Canadians" without greater attention to the experience of the poor (Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 78). Further, section 7 of the *Charter* addresses, in part, autonomy and quality of life (see *Carter* at para 62) – two things the homeless notoriously struggle to achieve. While section 7 is typically construed as providing for negative rights (*i.e.* a right to not have autonomy interfered with by government actions), the Court left open the possibility of section 7 providing positive economic rights (*i.e.* a duty on the government to provide a minimum standard of living) in *Gosselin v Québec (Attorney General)*, 2002 SCC 84. Accordingly, the application in *Tanudjaja* is not an illegitimate case abusing the broad strokes of the *Charter*. Rather, *Tanudjaja* is a critical opportunity to explore economic rights under the *Charter* on behalf of some of the most economically disenfranchised individuals in Canadian society.

b. The Application is not Too Vague

The other main argument advanced by the Majority regarding justiciability is that the application is too vague. Specifically, the Majority argues that the broad application – which impugns the "decisions, programs, actions and failures to act" by Canada and Ontario – is too general, and accordingly, lacks a "sufficient legal component" for competent adjudication by the court (at para 27). This argument, too, is flawed.

First, the Majority later concedes that "constitutional violations caused by a network of government programs" should remain open to judicial scrutiny, "particularly when the issues may otherwise be evasive of review" (at para 29). But homelessness and inadequate housing are precisely such issues. In particular, homelessness and inadequate housing are influenced by a complex web of state activity. Indeed, the Majority recognizes that housing policy is "enormously complex […] influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing" etc (Majority, at para 34). That complexity leaves the government's approach evasive of review, and

according to the Majority's own logic, such an approach should not be immune from review simply because that review fails to impugn a specific law.

Second, if we assume, for the purposes of the justiciability analysis, that the *Charter* imposes positive obligations on the state, then it is not technically necessary for the application to identify specific laws for review. Depending on how positive rights evolve in the courts, assessing whether a *Charter*-imposed minimum standard of living was satisfied may depend on deficient economic outcomes (*i.e.* the minimum standard not being met) rather than deficient laws (*i.e.* the government's inadequate approach to meeting that minimum standard). Accordingly, specific laws need not always be impugned in an application to substantiate a breach of the government's positive obligations under the *Charter*, and in turn, the failure to identify specific laws should arguably not be fatal to such a *Charter* application. Admittedly, such a broad view of positive obligations under the *Charter* has yet to be affirmed by the Supreme Court. In particular, the Court has only gone so far as to require that benefit programs which the government elects to provide must provide such benefits in a manner that complies with the *Charter* (see *e.g. Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 72-73). But arguments about how the Court is unlikely to affirm such a broad conception of the *Charter* belong under the analysis of whether the application discloses a reasonable cause of action, not whether the application was justiciable.

The Majority also argues that the vagueness of the complaint makes established *Charter* principles too awkward to apply and potential remedies too difficult to determine. In particular, the Majority argues that, without a specific impugned law, the analysis under section 1 of the *Charter*, which is predicated on the law's purpose and means, is impossible to conduct (at paras 27-28 and 32).

However, the Dissent refutes this position satisfactorily. In particular, the Dissent makes two arguments in response to the Majority's view that the application is non-justiciable because it is too vague, namely, that:

1. the application should not be barred because of its novelty, especially given the need for novel applications in the evolution of *Charter* jurisprudence (at para 84); and
2. the difficulty of crafting appropriate remedies (such as an order compelling the government to implement effective poverty-reduction strategies) does not preclude the court from granting declaratory relief, which was also sought in the application (at para 85).

In sum, the application is neither too political, nor too vague, to be justiciable. Rather, the application is sufficiently rooted in legal principles to fall within the competence of the courts and should not have been struck at the pleadings stage merely because of potential difficulties when applying those legal principles to the application.

I note, parenthetically, that some of the Majority's observations regarding justiciability are more suited to the analysis of whether or not the application discloses a reasonable cause of action. For example, the Majority, in the course of its justiciability analysis, describes section 7 conferring a positive right to housing as a "doubtful proposition" in light of prior decisions denying such positive rights (at para 30). But justiciability relates to whether or not the court is competent to adjudicate the claim, not whether the court is likely to grant the claim. Instead, such observations should have been dealt with under the second issue: whether the application discloses a reasonable cause of action, which I turn to next.

2. The Application Discloses a Reasonable Cause of Action

The Majority does not discuss whether the application discloses a reasonable cause of action because it dismissed the appeal on the basis of justiciability (at para 37). However, having addressed the flaws in the Majority's justiciability analysis, I will now reinforce the arguments raised by the Dissent regarding how the application discloses a reasonable cause of action (*contra* Gerard Kennedy, "The Right Result for the Wrong Reason: The Court of Appeal's Decision in Tanudjaja").

The Dissent begins its analysis on this point by outlining the legal test regarding striking an application for lacking a reasonable cause of action. Specifically, the Dissent provides that an application should only be struck for lacking a reasonable cause of action if one of various synonymous conditions is satisfied, namely:

1. it being "plain and obvious" that the claim discloses no reasonable cause of action;
2. there being no chance that the plaintiff might succeed; or
3. the action being "certain to fail."
   (Dissent, at paras 45-46).

Of particular importance to this application, the Dissent notes that "novelty alone is not a reason to strike a claim" and similarly, that a motion to strike should not be used "as a tool to frustrate potential developments in the law" (Dissent, at para 47). As McLachlin CJ aptly observes in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. […] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions […] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

With that in mind, the applicants' claims under sections 7 and 15 of the *Charter* are not certain to fail, and accordingly, should not have been struck.

a. The Section 7 Claim is not Certain to Fail

The motion judge dismissed the applicants' section 7 claim, in essence, because section 7 has not yet been interpreted to impose a positive obligation on the state to provide life, liberty, and security of the person (*Tanudjaja SC*, at para 31). This is a flawed basis on which to dismiss the application because whether section 7 provides for positive rights is a legitimate and arguable claim worthy of the court's attention.

First, the text of section 7, on a plain reading, provides for a positive right to life, liberty and security of the person. Specifically, section 7 reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (emphasis added).

The phrasing of section 7 is conjunctive, and arguably provides for two rights:

1. the positive section 7 right: "the right to life, liberty and security of the person;" and
2. the negative section 7 right: "the right not to be deprived [of the right to life, liberty and security of the person] except in accordance with the principles of fundamental justice" (emphasis added).

In contrast, section 9 of the *Charter* only provides for a negative right, which limits the state's actions against citizens without imposing positive obligations on the state: "[e]veryone has the right not to be arbitrarily detained or imprisoned (emphasis added).

To be clear, my point is not that the *Charter* must be interpreted literally as providing for a right to eternal life (which would be absurd) or that statutory interpretation of the *Charter* is limited to textual analysis (which belies the established purposive approach to *Charter* interpretation). Rather, my point is that there is a weak textual basis for interpreting section 7 of the *Charter* as without positive obligations when such obligations are entirely consistent with the phrasing of the provision (see generally *Gosselin*, at paras 319-28 per Arbour J, dissenting).

Second, the Supreme Court expressly left open the possibility of positive section 7 rights in *Gosselin* at paras 82-83, per McLachlin CJ for the majority:

> One day s. 7 may be interpreted to include positive obligations […] It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases […] 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 leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.

Indeed, the Majority and Dissent in *Tanudjaja CA* both agree that the Supreme Court has not precluded the possibility of positive obligations under section 7 of the *Charter* (Majority, at para 37; Dissent, at para 81).

Accordingly, striking a claim simply because it relies on positive *Charter* obligations is inappropriate. In particular, striking the application at the pleadings stage, before the record could be reviewed to determine whether homelessness qualifies as one of the "special circumstances" that warrant positive intervention, was premature (Dissent, at paras 64-66). Indeed, if there was ever a suitable case for imposing positive *Charter* obligations on the state – an admittedly onerous obligation – the basic necessity of adequate housing would be it.

b. The Section 15 Claim is not Certain to Fail

In a previous ABlawg post, I outlined the errors made by the motion judge when he concluded that homelessness is not an analogous ground of discrimination under section 15 of the *Charter*

(see Joshua Sealy-Harrington, "Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the Charter"). In sum, the motion judge's analysis of analogous grounds was flawed because it:

1. implied a requirement for analogous grounds – which I labelled "definability" – based on an erroneous reading of the jurisprudence;
2. conflated this false definability requirement with a legitimate factor relating to the identification of analogous grounds, namely, status as a discrete and insular minority; and
3. misunderstood the proper approach to identifying analogous grounds which weighs multiple factors rather than considering those factors as each independently required for a ground to be analogous.

In addition to those errors, I echo the observations of the Dissent regarding the motion judge's erroneous dismissal of the applicants' section 15 claim. Specifically, I echo the Dissent's concerns about the motion judge ruling that homelessness and inadequate housing are not "caused" by state activity without a review of the record put to the court (Dissent, at paras 70-72). At the furthest extreme, governments have been known to participate in intentional discriminatory housing practices (see *e.g.* Ta-Nehisi Coates, "The Racist Housing Policies That Built Ferguson"). To be clear, my point is not that the current plight of the Canadian homeless has the same causal relationship to state activity as the struggle by Black Americans against segregation, or even that the Canadian government has deliberately sought to discriminate against the homeless in its housing policies (not that such intent is required for a violation of section 15: see *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174-75). But we cannot claim to understand the struggles of the homeless, or the state's role in contributing to that struggle, without a review of the evidence. Indeed, to reach preliminary conclusions about the causes of homelessness without reviewing evidence is likely to rely on the prejudicial reasoning section 15 is specifically meant to counteract (*i.e.* that the homeless are the authors of their own misfortune).

Conclusion

The application in *Tanudjaja* should have proceeded to trial for a decision following a full review of the record; not because it would have clearly succeeded, but because it would not have been "certain to fail."

Admittedly, a finding of positive rights under the *Charter* would be a marked departure from the Supreme Court's prior jurisprudence and would have wide-ranging implications for government activity. But, as the Dissent concedes, the Supreme Court left the door to such positive rights "slightly ajar" (at para 37). Further, inadequate housing is an ideal candidate for such positive rights. Positive obligations, which are onerous to demand from the state, should be limited to the basic necessities of life – necessities without which life, liberty and security of the person cannot be achieved. Adequate housing is fairly characterized as such a necessity. Accordingly, if there was ever a case to test the limits of positive *Charter* rights, this was it.

The appellants have sought leave to appeal at the Supreme Court of Canada. Given the devastating impact of homelessness throughout Canada, we can only hope that the Supreme Court will decide to hear the appeal, overturn the motion judge's decision, and give those without inadequate housing their day in court.

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