SCC File No.: 36283

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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

APPLICANTS
(Appellants)

-and-

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

RESPONDENTS
(Respondents)

REPLY OF THE APPLICANTS

(JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU and CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION, APPLICANTS)

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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REPLY OF THE APPLICANTS

(i) Justiciability of rights with regard to necessities of life is an open question

1. Contrary to lower court findings relied upon by the Respondents, this Court has explicitly left open the question of whether *Charter* claims for rights with regard to the necessities of life are justiciable.[1]

2. The Attorney General Ontario relies on *Operation Dismantle v. The Queen* to argue that such determinations can rightfully be made at the pleadings stage.[2] However, *Operational Dismantle* did not concern a question left open by this Court. It concerned a potential threat of future harm as a result of the government's decision to allow cruise missile testing and whether this decision was in breach of section 7.[3] By contrast, this case relies on facts in the Amended Notice of Application which detail current and substantiated harm to those who are homeless and inadequately housed as a result of government decisions, policies and laws.

3. The danger of striking applications at the pleadings stage is underscored by Justice Feldman. "As a result", she writes, "courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate."[4]

4. In *Operation Dismantle* the Court found that, even if taken as true, the statement of claim did not prove that the Canadian government was in breach of the *Charter*. Such a finding has not been made in the present case.

(ii) A novel procedural lens does not constitute grounds for striking out an application

5. The Attorneys General greatly exaggerate the scope of the Application. For example, the Attorney General of Ontario asserts that the Application "... challenges every action and inaction ... that touches on" housing policy.[5] To the contrary, no specific action or inaction is challenged. The Applicants simply ask for a finding that the combined effects of governmental actions and inactions violate sections 7 and/or 15 of the *Charter*. The facts alleged in the Amended Notice of Application,

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1 Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* 2ed, (Carswell, 2012), at p. 244
2 Memorandum of Argument of the Respondent, The Attorney General of Ontario, at para. 17
3 *Operation Dismantle v. The Queen*, [1985] 1 SCR 441
4 *Judgment of the Court of Appeal,* per Feldman J.A. (dissent), at para. 81
5 Memorandum of Argument of the Respondent, The Attorney General of Ontario, at para. 20

which the Respondents accept for present purposes, support such a finding. No specific actions are impugned because none of the involved actions would be unconstitutional if considered in isolation. As pled, the problem was created by the interaction of many actions and inactions, although the problem might be solved by one or two specific actions.

6. The Attorneys General confuse the material facts as detailed in the Notice of Application with the application of law. The factual basis is nuanced because one must consider the cumulative impact of inter-related government actions and inactions on those who are homeless and inadequately housed. This is required in order to properly assess whether the governments' actions and inactions violate the *Charter*. The *Charter* claims are brought by Applicants who are caught in a web of laws.

7. The factual basis required to determine the nature of the deprivation of rights in this case may be unusual. In the end, however, standard *Charter* questions remain: (a) what is the impact of these actions and inactions, and (b) have these inactions and actions resulted in sections 7 and 15 breaches of the *Charter*?

8. At a hearing of the Application with a full evidentiary record, the Court would determine whether the evidence supports the Applicants' assertion that "Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing". Moreover, the Court would determine whether the evidence establishes the other factual requirements of the *Charter* claims. The evidentiary record would provide a solid platform for resolving section 7 legal issues left open by this Court in cases such as *Gosselin*, as well as for deciding the novel section 15 claim.

9. The Attorneys General and the majority of the Court of Appeal do not provide any cogent support for their conclusion that it would be inappropriate for a court to determine whether or not the Applicants' *Charter* rights have been violated. The Application as framed would provide an excellent foundation for such a determination. There is no basis for the conclusion that the courts do not have the institutional competence to decide these questions. The questions concerning violations of *Charter* rights surely provide a sufficient legal component for proper adjudication by a court.

10. The majority of the Court of Appeal acknowledged that, "This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the

issue may otherwise be evasive of review."[6] The Court, however, failed to explain why a court should not decide whether a network of programs caused *Charter* violations in the present case.

(iii) The application should not be struck on the basis of remedy requested

11. There are a range of remedies requested in the Amended Notice of Application.[7] There is no reason to dismiss the entire Application at this pleadings stage on the basis that some of the remedies sought may be beyond the institutional competence of the judiciary. The majority decision of the Court of Appeal acknowledges that declarations of unconstitutionality are within judicial competence, but asserts that any such would be "effectively meaningless".[8] There is no basis for this conclusion.

12. Should a violation of rights be found, the ultimate solution to the problem might require only one or two specific actions (such as re-institution of supportive housing programs). In recognition of both the wide variety of possible solutions to the problem of homelessness, and of the right of governments to choose to act in any way that does not contravene *Charter* rights, this Application does not request specific remedies that would directly solve the problem. The incremental remedies that are requested would merely require governments to recognize their responsibility for the problem and to develop strategies directed towards solving it.

(iv) Delay is an issue of national importance

13. The Attorney General of Canada asserts that the decision on delay cannot be of public importance.[9] However, if the decision of the Court of Appeal is allowed to stand without any clarification, Attorneys General will be encouraged to bring Rule 21 applications to strike for disclosing no reasonable cause of action only after applicants have served their entire evidentiary record, even though no evidence is admissible on such applications.

14. The concluding paragraph of the majority decision[10] includes the assertion "none of the parties or intervenors felt it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions." This assertion suggests that the majority was unaware of the fact that Rule 21 precludes referring to evidence in the course of a

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6 *Judgment of the Court of Appeal,* per Pardu J.A. (majority), at para. 29
7 *Amended Notice of Application,* Application for Leave, Tab 4(A), Exhibit I, at p. 193
8 *Judgment of the Court of Appeal,* per Pardu J.A. (majority), at para. 34
9 Memorandum of Argument of the Respondent, the Attorney General of Canada, at para. 32
10 *Judgment of the Court of Appeal,* per Pardu J.A. (majority), at para. 39

motion to strike a claim as disclosing no reasonable cause of action. This fundamental misunderstanding of the relation of evidence to a Rule 21 motion appears to be the basis for the majority's conclusion that it was not reasonable to require that a motion to strike be brought before the record is served.[11] Failure to address this holding will burden future applicants with significant and unnecessary time and expense.

(v) The affidavits in support are fully admissible

15. Contrary to the Respondents' assertions, the affidavits in support provide context for this Honourable Court. The affidavits detail the impact of the Court of Appeal decision on marginalized communities across Canada:

(a) Affidavit of ARCH Disability Law Centre[12]

16. "Through the advancement of novel *Charter* claims by marginalized groups, rights protected by the *Charter* have become more robust, more meaningful and more empowering. By striking this application at the Motion to Strike stage, the Court has created a precedent that has the potential to severely hinder the advancement of future *Charter* claims of the disability community and other equality seeking groups. This could halt or distort the development of the scope and meaning of substantive equality as protected by the *Charter,* thereby freezing the meaning of equality in law where it is today. Moreover, the understanding of section 7 would also be frozen in its current state, leaving many questions about the requirements of diverse populations to achieve life, liberty and security of the person unresolved."

(b) Affidavit of Women's Legal Education and Action Fund[13]

17. "In LEAF's experience, the advancement and evolution of *Charter* Rights, and section 15 in particular, has been and continues to be dependent on the ability of *Charter* litigants to make novel claims. How a court expands or circumscribes the content of the equality guarantee has significant implications for members of historically marginalized and discriminated against groups."

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11 *Judgment of the Court of Appeal,* per Pardu J.A. (majority), at para. 38

12 Affidavit of ARCH Disability Law Centre, Application for Leave, Tab 6(E), at p. 229, para. 7

13 Affidavit of Women's Legal Education and Action Fund, Application for Leave, Tab 6(C), at p. 222, para. 10

(c) Affidavit of Charter Committee on Poverty Issues[14]

18. "If allowed to stand, the Court of Appeal's finding that a justiciable *Charter* claim must impugn a particular law, policy or government action, would also have a serious detrimental effect on those whom CCPI represents. As Chief Justice Dickson underscored in *Irwin Toy v Québec (Attorney General)*, while advantaged groups are more likely to challenge government action or legislation that interferes with their rights, vulnerable groups are more likely to challenge governments' failures to act to protect their rights.[15]"

(d) Affidavit of Amnesty International Canada[16]

19. "If allowed to stand, the Court of Appeal's decision would irrevocably sever the ongoing interpretation and application of the *Charter* from international human rights values, which are its historic foundation."

(e) Affidavit of Colour of Poverty/Colour of Change Network[17]

20. "…allowing claims such as those made by the applicants… to proceed would help to bring to light the lived experiences of racialized group members..."

ALL OF WHICH IS SUBMITTED THIS 6th DAY OF MARCH, 2015.

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Tracy Heffernan
Peter Rosenthal
Counsel for the Applicants

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14 Affidavit of Charter Committee on Poverty Issues, Application for Leave, Tab 6(D), at p. 226, para. 11
15 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993
16 Affidavit of Amnesty International Canada, Application for Leave, Tab 6(F), at p. 234, para. 7
17 Affidavit of Colour of Poverty/Colour of Change Network, Application for Leave, Tab 6(G), at p. 256, para. 7