SCC File No.: 36283

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

B E T W E E N:

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)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT, THE ATTORNEY GENERAL OF ONTARIO
ON THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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I. OVERVIEW AND FACTS

1. A majority of the Court of Appeal for Ontario correctly held that an application which sought non-judicial remedies based on non-justiciable claims had no reasonable prospect of success, even if the pleaded facts were assumed to be true. That panel, and the motion judge before them, applied well-established principles of justiciability and constitutional law to come to that conclusion. This application for leave to appeal to this Honourable Court poses no legal question of public importance.

2. This case attempts to litigate the entire range of government housing policies and homelessness strategies, decisions that are inherently political and fall within the jurisdiction of the legislatures. The “adequacy” of the public resources dedicated to housing and homelessness is a complex economic and social policy question, which is interconnected with a broad range of other, equally complex economic and social policy issues. The applicants ask the judiciary to oversee and implement new, unspecified policies, a task well outside the institutional competence of the courts. The Court of Appeal properly dismissed the appeal on this basis.

3. Ontario submits that no question of public importance arises in this case, and that the application for leave to appeal should be dismissed.

A. Facts

4. Ontario accepts the facts as pleaded in the Amended Notice of Application dated November 15, 2011.[1]

5. The affidavits filed by the Applicants on this application for leave are inadmissible.[2] In particular, they provide legal opinions on the very question before this Court: whether this case raises a legal question of public importance.[3] They should be given no weight by this Court.

B. The Decision of the Motion Judge

6. Lederer J granted the motions to strike brought by Ontario and Canada (the "Respondents") on the basis that it was "plain and obvious" that the Applicants' *Charter* ss. 7 and 15 claims could not succeed.[4]

7. With respect to s. 7, Lederer J held that there is no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the life, liberty and security of the person. He carefully reviewed previous cases in which courts have considered and rejected claims under s. 7 to a "right to a minimal level of social benefits" or a "right to housing",

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[1] Application for Leave to Appeal at 194-209 ["NOA"].
[2] Affidavit of Diane O'Reggio, sworn January 26, 2015, Application for Leave to appeal at Tab 4C; Affidavit of Bruce Porter, affirmed January 26, 2015 at Tab 4D; Affidavit of Ivan Petricone, affirmed January 23, 2015 at Tab 4E; Affidavit of Alex Neve, sworn January 26, 2015 at Tab 4F; Affidavit of Michael Kerr, affirmed January 26, 2015 at Tab 4G.
[3] *Ballard Estate v Ballard Estate*, [1991] SCCA No 239.
[4] *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410, Application for Leave at Tab 2A at para 152 ["Lederer J Reasons"]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras. 22-23.

and concluded that there were no "special circumstances" in this case that might warrant a "novel application" of s. 7.[5]

8. With respect to s. 15, Lederer J found that there was no distinction made by any law that denied the Applicants a benefit given to others, or imposed on them a burden not placed on others. To the extent that the impugned programs benefit anyone, they benefit the claimant group by providing assistance to the homeless and the inadequately housed. These programs do not differentiate between the Appellants and others in a manner that offends s. 15.[6]

9. On the issue of justiciability, Lederer J characterized the application as a misconceived attempt to have the court usurp the policy-making role of the competent legislatures. Lederer J noted in particular that the remedy the Applicants sought was "a process initiated and supervised by the court, the implementation of which would cross institutional boundaries and enter into the area reserved for the Legislature."[7]

C. The Decision of the Court of Appeal

10. Justice Pardu (joined by Strathy JA) held that the application was not justiciable based on several key determinations:

a. The Applicants expressly declined to challenge any particular legislation or policy.[8] Impugning a particular law or action is an

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[5] Lederer J Reasons at paras 48, 54, 58-59, 82; *Gosselin v Quebec (AG)*, 2002 SCC 84 at paras 81-83.
[6] Lederer J Reasons at paras 91-96, 107-108, 116, 121; *Withler v Canada (AG)*, 2011 SCC 12 at para 62.
[7] Lederer J Reasons, paras. 4, 87-88, 120, 135, 138-148.
[8] *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852, Application for Leave at Tab 3, at para 10 ["Appeal Reasons"].

archetypal feature of a *Charter* challenge under sections 7 and 15. Absent such particulars, comparison between legislative means and purpose, which is crucial to considering a *Charter* claim under both sections 1 and 7, is impossible.[9]

b. There is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given to the needs of the homeless. Therefore, the court is being asked to embark on a public inquiry into housing policy.[10]

c. The remedy of judicial supervision over government housing policy is beyond the institutional competence of the judiciary, and a bare declaration would be effectively meaningless.[11]

11. Justice Pardu applied this Court's principles of justiciability, both relying on early *Charter* jurisprudence[12] and distinguishing this claim from successfully litigated contemporary cases.[13] Pardu JA followed Dickson CJ's guidance that "[a]n inquiry into justiciability, is first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding

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[9] Appeal Reasons at paras 29, 32.
[10] Appeal Reasons at para 33.
[11] Appeal Reasons at para 34.
[12] *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 ["*Canada v. Canada*"]; *Re Canada Assistance Plan*, [1991] 2 SCR 525 at 545; Appeal Reasons paras 20-22
[13] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35; Appeal Reasons paras 23-28.

a given issue, or instead deferring to other decision making institutions of the polity".[14]

12. Ultimately, Pardu JA concluded that the underlying application lacked a sufficient legal component to be properly adjudicated by a court. The adequacy of housing policy "is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review".[15] Pardu JA held that Lederer J was therefore correct to dismiss the underlying application on the basis that it was not justiciable.[16]

13. Finally, Pardu JA saw no reason to interfere with Lederer J's decision to hear the motion to strike despite it being brought six months after the Applicants served their record, given the size of the record and the significance of the issues.[17]

14. Pardu JA concluded that the application is "demonstrably not suitable for adjudication".[18] Given this conclusion, it was not necessary to decide whether positive obligations may arise under s. 7, nor whether homelessness can be an analogous ground under s. 15.[19]

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[14] *Canada v Canada*, supra at 90-91. Quoted at Appeal Reasons at para 20.
[15] Appeal Reasons at para 33.
[16] Appeal Reasons at para 36.
[17] Appeal Reasons at para 38.
[18] Appeal Reasons at para. 36.
[19] Appeal Reasons at para. 37.

15. Writing in dissent, Feldman JA would have allowed the appeal on the basis that it was "premature" to decide justiciability of socioeconomic rights at the pleadings stage.[20]

II. QUESTIONS IN ISSUE

16. The issue in this application is whether leave to appeal should be granted under s. 40 of the *Supreme Court Act*.[21] Ontario submits that it should not.

III. ARGUMENT

D. The Claim is not Justiciable

17. Assessing whether a particular claim is justiciable requires a judge to consider whether it is sufficiently legally grounded to engage a court's adjudicative function. As this is a legal determination, there is no reason it cannot be done at the pleadings stage, as this Court did in its first decision addressing justiciability under the *Charter*.[22] There are many forms of non-justiciable claims, but the determination always engages the same core principles, which this Court and lower courts have applied for at least thirty years. The application of those well-established principles to a particular pleading does not give rise to a question of public importance.

18. In this case, even the most generous application of these principles leads to the conclusion that the application does not engage the judiciary's proper function. This is because the Notice of Application is focussed on matters properly

[20] Appeal Reasons at paras 86, 88.
[21] *Supreme Court Act*, RSC 1985, c S-26, s 40.
[22] *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

reserved for the legislatures. The first ground of relief sought, for example, invites the court to make determination on the free-standing effectiveness of government policy:

> THE APPLICANTS make an application for:
> A declaration that the decisions, programs, actions and failures to act by the government of Canada ("Canada") and the government of Ontario ("Ontario") have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing. Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing.[23]

19. While the pleadings invoke two sections of the *Charter*, there is no connection drawn between those constitutional rights and sweeping complaints about government policy contained in the Amended Notice of Application, including:

a. Mid-1990s fiscal restructuring at the provincial and federal level.[24]

b. The termination of various federal and provincial programs in the area of housing.[25]

c. Mid-1990s changes to the federal *Employment Insurance Act.*[26]

d. The 1995 reduction in Ontario's social assistance rates.[27]

e. The de-institutionalization of persons with psycho-social and intellectual disabilities.[28]

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[23] NOA at 1.
[24] NOA at paras 16-17, 21.
[25] Ibid.
[26] NOA at para 22.
[27] NOA at para 23.
[28] NOA at para 25.

20. This is not an exhaustive list of the "actions and inactions" impugned by the Applicants, and indeed they have declined to plead such a list. A claim which challenges every action and inaction by two levels of government that touches on a given policy area across decades, is, as held by the Court of Appeal, "demonstrably unsuitable for adjudication".[29] No legal question of public importance arises from the holding that the Applicants must identify the laws or actions that they seek to impugn as unconstitutional.

21. The Applicants seem to argue that a court hearing a motion to strike should not consider the remedies sought in determining whether or not the claim is justiciable. This argument should be rejected. In every case considering justiciability, the role of the court is to consider whether or not the remedy claimed is within the range of remedies that are appropriate for a court to grant. For example, the Applicants seek the following remedies:

> e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:
> i. must be developed and implemented in consultation with affected groups; and
> ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;
>
> f) An order that [the Superior Court of Justice] shall remain seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e).[30]

[29] Appeal Reasons at para 36; see also *Canada Bar Association v HMQ et al*, 2006 BCSC 1342 at paras 47, 49, aff'd 2008 BCCA 92, leave denied 2008 CanLII 39172 (SCC).
[30] NOA at 1-2.

22. As the courts below noted, the expansive relief sought in this proceeding illustrates the fundamental problem with the underlying application. For the court to engage in the type of judicial supervision of government compliance with court-imposed "adequate" or "effective" housing standards or strategies as the Applicants seek would require detailed social and economic balancing and decision-making that properly falls within the purview of the legislature. Judgments "indicating to the public whether or not their governments are taking adequate steps to relieve society's unfortunates of the burdens of disadvantage" do not "lie within the proper and effective judicial domain in this country." This would involve "the resolution of issues that are not justiciable."[31]

23. The order sought by the Applicants "that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness" amounts to a request for mandamus compelling Legislatures to pass legislation. While the remedial options available to a superior court where a *Charter* breach is found include, *inter alia*, declaratory relief, injunctions on terms and retaining supervisory jurisdiction, structured injunctive relief is inapposite where the relief sought extends beyond the institutional competence of the court. The type of relief the Applicants seek here would upset the constitutional separation of powers and is unavailable:

> The question of whether Parliament should pass a particular law is not a justiciable question. The role of courts is not to legislate, but to interpret and apply the law. Thus, courts are not relevant in this context until after legislation has been enacted .... As such, any

[31] *Ferrel v Ontario (Attorney General)* (1998), 42 OR (3d) 97 (CA) at para. 69; *Chaudhary v Ontario (AG)*, 2010 ONSC 6092 at para 17.

> pleading alleging a failure to enact law fails to assert a reasonable cause of action against the federal government.[32] [emphasis added]

24. Canadian courts have always exercised caution and restraint in awarding supervisory remedies of the type the Applicants seek as such relief represents an incursion into the normal jurisdiction of the legislature. This kind of remedy has generally been restricted to litigation respecting *Charter* s. 23, which unlike ss. 7 or 15 explicitly grants positive rights to claimants in the area of minority language education rights, in those cases where the government has refused to carry out its constitutional responsibilities.[33] Where, as here, the Applicants seek to establish a positive right under *Charter* ss. 7 and 15, which has been repeatedly rejected by Canadian courts, structural relief is inappropriate. No question of public importance arises from Pardu JA's rejection of the proposed remedy in this context.

25. In the same way that a court considering an argument that a claim is moot must look at the remedy sought, so must a court considering whether a claim is justiciable examine the relief claimed, in order to determine if it falls within the appropriate scope of judicial review. The Court of Appeal committed no error in its analysis, and leave should not be granted on this basis.

E. Leave to Appeal Not Justified Because of s. 7 Claim

26. Justice Pardu found that, because of the fundamentally non-justiciable nature of the claim in this case, it was not necessary to consider the limits of the

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[32] *Hamalengwa v Bentley*, 2011 ONSC 4145 at para 28 (emphasis added, citation omitted).
[33] *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596 (Ont. H.C.); *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 4; *Lavoie v Nova Scotia (AG)* (1988), 47 DLR (4th) 586 (NS SC (TD)); *Commission Scolaire Francophone du Yukon v Procureure Generale du Yukon*, 2011 YKCA 10.

extent to which positive obligations may arise under s. 7 of the *Charter*. Applying the law as it currently stands, she noted that it was a "doubtful proposition" that s. 7 confers a general freestanding right to adequate housing.[34]

27. *Gosselin*, relied on heavily by the Applicants, does not support the application for leave. As the Court of Appeal noted in this case, *Gosselin* left open the possibility that s. 7 could one day be interpreted to include a positive obligation on the state to sustain life, liberty and security of the person. However, *Gosselin* itself considered a constitutional challenge to a particular provision of a particular law.

28. There is nothing in *Gosselin* that suggests that claims that exceed the institutional competence of a court should be adjudicated by the courts. The possibility that a court might someday recognize a positive obligation under s. 7 in a properly justiciable case was left open by the Court of Appeal, and there is no reason to grant leave on this basis.

F. Leave to Appeal not Justified because of s. 15 claim

29. As with the s. 7 claim, Justice Pardu found it unnecessary to consider the s. 15 claim, which means this Court would have no reasoning from an appellate court to consider if it were to grant leave to appeal.

30. Both Lederer J and Pardu JA correctly held it was not necessary to determine whether homelessness is an analogous ground under s. 15 of the *Charter* to conclude that the application has no reasonable prospect of success.[35]

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[34] Appeal Reasons at paras 30-31.
[35] Lederer J Reasons at para 121; Appeal Reasons at para 37.

Ontario submits that it does not raise a question of public importance warranting this Court's granting leave.

IV. COSTS

31. Ontario seeks no costs.

V. RELIEF REQUESTED

32. Ontario requests that the application for leave be dismissed.

All of which is respectfully submitted this 27th day of February, 2015.

_____	_____
Michael S. Dunn	Padraic Ryan

Counsel for the Respondent, the Attorney General of Ontario

VI. TABLE OF AUTHORITIES

Tab	Cases	Paragraph Reference in Factum
1.	*Ballard Estate v Ballard Estate*, [1991] SCCA No 239	5
2.	*Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49	11
3.	*Canada Bar Association v HMQ et al*, 2006 BCSC 1342, aff'd 2008 BCCA 92, leave denied 2008 CanLII 39172 (SCC)	20
4.	*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35	11
5.	*Chaudhary v Ontario (AG)*, 2010 ONSC 6092	22
6.	*Commission Scolaire Francophone du Yukon v Procureure Generale du Yukon*, 2011 YKCA 10	24
7.	*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62	24
8.	*Ferrel v Ontario (Attorney General)* (1998), 42 OR (3d) 97 (CA)	22
9.	*Gosselin v Quebec (AG)*, 2002 SCC 84	7
10.	*Hamalengwa v Bentley*, 2011 ONSC 4145	23
11.	*Lavoie v Nova Scotia (AG)* (1988) 47 DLR (4th) 586 (NS SC (TD))	24
12.	*Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596 (Ont HC)	24
13.	*Operation Dismantle v The Queen*, [1985] 1 SCR 441	17
14.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44	11
15.	*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42	6
16.	*Re Canada Assistance Plan*, [1991] 2 SCR 525	11
17.	*Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410	4
18.	*Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852	10(a)
19.	*Withler v Canada (AG)*, 2011 SCC 12	8

VII. LEGISLATION

	Paragraph Reference in Factum
Supreme Court Act, RSC 1985, c S-26, s 40	15

Supreme Court Act

i. R.S.C., 1985, c. S-26

33. An Act respecting the Supreme Court of Canada

Appeals with leave of Supreme Court

G. **40.** (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

H. (2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(*a*).

Appeals in respect of offences

I. (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

J. (4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

R.S., 1985, c. S-26, s. 40; R.S., 1985, c. 34 (3rd Supp.), s. 3; 1990, c. 8, s. 37.

Loi sur la Cour suprême
R.S.C., 1985, c. S-26 L.R.C. (1985), ch. S-26

Loi concernant la Cour suprême du Canada

Appel avec l'autorisation de la Cour

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

Demandes d'autorisation d'appel

(2) Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 58(1)a).

Appels à l'égard d'infractions

(3) Le présent article ne permet pas d'en appeler devant la Cour d'un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l'une ou l'autre de ces décisions dans le cas d'un acte criminel ou, sauf s'il s'agit d'une question de droit ou de compétence, d'une infraction autre qu'un acte criminel.

Prorogation du délai d'appel

(4) Dans tous les cas où elle accorde une autorisation d'appel, la Cour ou l'un de ses juges peut, malgré les autres dispositions de la présente loi, proroger le délai d'appel.

L.R. (1985), ch. S-26, art. 40; L.R. (1985), ch. 34 (3e suppl.), art. 3; 1990, ch. 8, art. 37