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Charter Litigation, Social and Economic Rights & Civil Procedure

VASUDA SINHA, LORNE SOSSIN & JENNA MEGUID*

Dans cet article, nous considérons l'étendue des litiges sur les droits économiques et sociaux en vertu de la *Charte canadienne des droits et libertés*, en faisant référence à la récente décision *Tanudjaja c Canada (Procureur général)* sur le droit au logement. Dans *Tanudjaja*, les demandeurs cherchaient à contester le droit et les politiques en matière de logement, à la fois en Ontario et au Canada, en vertu des articles 7 et 15 de la *Charte*. La Cour d'appel de l'Ontario a confirmé la décision de la Cour supérieure de radier l'application de la *Charte* en avançant qu'un droit au logement, tel que plaidé, n'était pas justiciable (la Cour suprême du Canada a par la suite rejeté l'autorisation d'appel). Cet article remet en question le raisonnement utilisé lors des deux instances. Nous avançons que de nouvelles approches relatives à la *Charte* devraient servir de catalyseur pour examiner une panoplie de questions cruciales et non résolues dans la pensée et la pratique relatives à la Constitution canadienne. L'article traite d'abord de la décision *Tanudjaja*. Nous considérons ensuite l'application de principes de procédure civile dans le contexte de litiges relatifs à la *Charte*. Nous explorons aussi la décision *Tanudjaja* et ses conséquences sur le droit de la justiciabilité, en particulier dans des cas impliquant la *Charte*. Nous voyons ensuite l'état actuel des droits sociaux et économiques positifs au Canada, y compris suite à la décision *Tanudjaja*. Nous concluons en proposant une nouvelle approche à la justiciabilité dans le contexte de litiges relatifs à la *Charte* : une forme de justiciabilité d'intérêt public qui s'harmonise avec l'approche des tribunaux relativement à la qualité pour agir dans l'intérêt public et qui n'empêche pas automatiquement les plaideuses et les plaideurs qui présentent des allégations nouvelles et/ou complexes fondées sur la *Charte* d'intervenir devant le tribunal.

In this article we consider the scope of social and economic rights litigation under the *Charter of Rights and Freedoms* with reference to the recent right to housing case, *Tanudjaja v Canada (Attorney General)*. In *Tanudjaja*, the applicants sought to challenge both Ontario's and Canada's housing-related law and policy, under sections 7 and 15 of the *Charter*. The Ontario Court of Appeal upheld the Superior Court's decision to strike the *Charter* application on the basis that a right to housing as pleaded was not justiciable (the Supreme Court of Canada subsequently denied leave to appeal). This article challenges the reasoning used by both levels of court. We argue that novel approaches to the *Charter* should serve as a catalyst for examining a series of crucial and unresolved questions for Canadian constitutional thought and practice. The article begins with a discussion of the *Tanudjaja* case. We then consider the application of civil procedure principles in the context of *Charter* litigation. We also explore the case and its implications for the law of justiciability, especially in *Charter* settings. We then examine the current state of positive social and economic rights in Canada, including in the

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aftermath of the *Tanudjaja* decision. We conclude by proposing a new approach to justiciability within the context of *Charter* litigation: a form of public interest justiciability that aligns with the approach the courts have adopted towards public interest standing and does not automatically preclude litigants who advance novel and/or complex *Charter* claims from having their day in court.

QUESTIONS REGARDING THE SCOPE OF SOCIAL AND ECONOMIC RIGHTS under the *Charter of Rights and Freedoms*¹ (*Charter*) are often addressed through procedural litigation rather than substantive hearings on the merits. Because such claims are frequently novel, or yet to be confirmed as spheres of *Charter* protection, they regularly lead the Crown or other public respondents to seek to have them set aside prior to a hearing on the merits. The principles upon which courts approach such procedural motions may determine how (and whether) the substantive aspects of the *Charter* develop. Consider, for example, the application regarding homelessness and the right to housing in *Tanudjaja v Canada (Attorney General) (Tanudjaja)*.² In this case, the Ontario Court of Appeal heard the matter arising from a motion by the respondent governments (of Canada and the Province of Ontario) to dismiss the application under Rule 14.09 and Rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*.³ The respondent governments sought to have the application dismissed on the ground that it disclosed no reasonable cause of action. While the claimants provided an extensive record in support of their application, the evidence was not tested or explored in the procedural dispute, which ultimately resulted in the disposal of the application before its factual and legal bases could be fully considered by the courts. The majority of the Court of Appeal dismissed this ambitious *Charter* application, asserting that a right to housing as pleaded was not justiciable under the *Charter*. The Supreme Court of Canada subsequently denied leave to appeal.⁴

In our view, this type of litigation serves as a catalyst for examining a series of crucial and unresolved questions for Canadian constitutional thought and practice, including: What is the future for social and economic rights in Canada? Does the *Charter* include “positive rights” to any social and economic benefits (whether housing, health care, or social welfare) or does it protect only negative liberties? Should the justiciability threshold, like the threshold for standing, be relaxed or modified in cases of *Charter* and/or public interest litigation? And finally, what role can *Charter* challenges play in establishing and shaping the rationales for policy and law reform? In this paper, we address these questions and the broader implications of the *Tanudjaja* decision in light of subsequent applications of the case.

In the first section, we explore *Tanudjaja* and the application of civil procedure principles in the context of *Charter* litigation. In the second section, we explore the case and its implications for the law of justiciability, especially in *Charter* settings. Finally, in the third section, we explore the case’s implications in light of the current state of positive social and economic rights in Canada. We propose an alternative approach to procedural thresholds in the

¹ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*].

³ *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Rules*].

⁴ *Tanudjaja v Canada (Attorney General)*, 2015 SCC 9613 [*Tanudjaja, SCC*].

context of *Charter* litigation, one that enhances the public interest and access to the courts and, in so doing, advances *Charter* values.

I. THE ROLE OF PROCEDURAL JUSTICE IN *CHARTER* LITIGATION

The *Tanudjaja* case sheds light on a number of important issues arising at the intersection of *Charter* claims and the civil litigation process. The first step to exploring these issues is to understand the original application, as well as its treatment by the courts, culminating with the Supreme Court's decision to refuse leave to appeal.

In May 2010 the applicants issued a Notice of Application informing the Attorney General of Canada and the Attorney General of Ontario that the Applicants were bringing an application for violation of the *Charter* and international law.⁵ Among other remedies, the Applicants sought to require the government to develop a national housing strategy and to require court supervision to ensure compliance with the orders. An evidentiary record of approximately 10,000 pages was served on the Attorneys General of Ontario and Canada in November 2011. In May of 2012, the Attorneys General notified the Applicants that they would bring motions to strike the application in its entirety without a hearing on the evidence.

Several groups sought the opportunity to intervene on the motion to strike the claim, which led to motions for leave to intervene, heard over two days at the Superior Court of Justice in March of 2013.⁶

The Ontario Superior Court of Justice allowed the governments' motions and struck the claim.⁷ The Court found that the claim had no reasonable chance of success both because there can be no positive obligations under sections 7 and 15 of the *Charter* and because the governments' actions did not cause homelessness. Justice Lederer further held that the claim was political and therefore non-justiciable, and the remedies were not justiciable. The claimants appealed the ruling to the Court of Appeal.

At the Court of Appeal, eight organizations and a consortium of organizations were granted intervener status: (1) David Asper Centre for Constitutional Rights; (2) Amnesty International Canada and International Network for Economic, Social and Cultural Rights; (3) Women's Legal Education and Action Fund; (4) Charter Committee on Poverty, Pivot Legal Society and Justice for Girls; (5) ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario; (6) Ontario Human Rights Commission; (7) Colour of Poverty/Colour of Change; and (8) Income Security Advocacy Clinic, the ODSP Action Coalition, and the Steering Committee on Social Assistance.⁸

In December 2014, the Court of Appeal released its judgment upholding the trial judge's decision to strike the claim, though the panel was divided.⁹ The majority of the Court of Appeal,

⁵ See Tracy Hefferman, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 *Journal of Law & Social Policy* 9 at 24 [Fighting for the Right].

⁶ *Tanudjaja v Attorney General (Canada)* 2013 ONSC 1878.

⁷ *Tanudjaja v Attorney General (Canada)* 2013 ONSC 5410.

⁸ *Tanudjaja v Attorney General of Canada and Attorney General of Ontario* ON CA Court File No. C57714 (Factum of the Proposed Coalition of Intervenors), discussed in *Fighting for the Right*, *supra* note 5 at 27.

⁹ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852.

led by Justice Pardu, held that the application was not justiciable as it lacked a “sufficient legal component to engage the decision-making capacity of the courts.”¹⁰ Pardu JA found that the claim was essentially a political claim asserting that, “Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.”¹¹ 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* ... [n]or is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.”¹²

In a pointed dissent, Feldman JA would have allowed the appeal. She found that 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.”¹³ In June 2015, the Supreme Court of Canada denied the Applicants request for leave to appeal, thus bringing an end to the litigation.¹⁴

A. THE PURPOSE OF A MOTION TO STRIKE

The particular procedural mechanism pursuant to which the application was summarily dismissed by the lower court—a motion to strike under Rule 21.01(1)(b) of the *Rules of Civil Procedure*—is important context, as it is often the procedural mechanism at issue in cases of the justiciability of *Charter* claims involving social and economic rights.¹⁵ A motion to strike permits a party to a proceeding to move to strike out a pleading that “discloses no reasonable cause of action or defence.”¹⁶ The test has also been described as eliminating pleadings that have “no chance of success”¹⁷ or are “doomed to fail.”¹⁸ On either formulation, the threshold for having a pleading struck is quite high.

Rule 21.01(2)(b) stipulates that no evidence is admissible on a motion to strike.¹⁹ Rather, the facts pleaded by the parties are taken to be true and the court’s role is to determine whether the pleading in question is palpably unsustainable on the combination of facts and law pleaded. The main reason for this restriction is relatively clear: if the court is being asked to throw out a party’s pleading, and thereby to abruptly end any chance that party has of advocating for the rights it has asserted therein, then the underlying defect must be obvious from the pleading itself.

¹⁰ *Ibid* at para 27.

¹¹ *Ibid* at para 19.

¹² *Ibid* at para 37.

¹³ *Ibid* at para 43.

¹⁴ *Tanudjaja*, SCC, *supra* note 4.

¹⁵ See e.g. *Vail v Prince Edward Island (Workers’ Compensation Board)*, 2011 PESC 6 at para 49. “Judicial intervention into matters of public policy should be reserved only for the clearest of cases where it is necessary to constrain government action that is patently unfair or unreasonable. I do not find there to be any prospect for such intervention on this occasion. Therefore I reject the plaintiffs’ claim under s.7 of the *Charter* as it discloses no reasonable cause of action and has no possibility of success.”

¹⁶ *Rules*, *supra* note 3, s 21.01(1)(b).

¹⁷ See e.g. *Apotex Inc v Schering Corporation*, 2016 ONSC 3407.

¹⁸ See e.g. *Tanudjaja*, *supra* note 2.

¹⁹ *Rules*, *supra* note 3, s 21.01(2)(b).

From this perspective, a pleading may be struck if the material facts needed to establish the claim or defence were not actually pleaded, so that even if the relevant party went on to prove all of the facts it pleaded, the court would not have sufficient evidence before it to make the legal determination being asked of it. In contrast, if evidence is needed to establish why a pleading has no chance of success, then its likelihood of failure is not so obvious as to justify denying the relevant party its right to argue and prove its case through the litigation process. The evidentiary point can be a complicated and complicating one where a motion is brought to strike the originating process in an application rather than an action. This is because a statement of claim must contain “a concise statement of the material facts on which the party relies for the claim”²⁰ whereas a notice of application needs only to identify the relief sought, the grounds to be argued, and the documentary evidence that will be used,²¹ while material facts may form the grounds to be argued, they may otherwise be set out as evidence in the accompanying affidavit material. As a result, in the context of an application, the originating process may not itself, without reference to the supporting evidence, make evident why the underlying application is not doomed to fail; yet, under Rule 21.01(2)(b), the respondent on a motion to strike may not use evidence to demonstrate the legal tenability of its underlying application. As is discussed below, this was a relevant factor in the *Tanudjaja* litigation.

Generally, the litigation system indeed benefits from a mechanism that allows the courts to strike pleadings that clearly will not succeed. These benefits were well-articulated by Chief Justice McLachlin in the oft-cited *R v Imperial Tobacco Canada Ltd. (Imperial Tobacco)* case:

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

This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties’ respective positions on those issues and the merits of the case.²²

As the Chief Justice’s words make clear, a court’s ability to strike a claim or defence in certain circumstances is an important procedural mechanism for streamlining the litigation process, developing a more efficient litigation system, and facilitating access to justice by keeping unmeritorious pleadings from using the judicial system’s scarce time and resources.

²⁰ *Rules*, *supra* note 3, s 25.06(1).

²¹ *Rules*, *supra* note 3, s 38.04.

²² *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 19 & 20 [*Imperial Tobacco*].

Efficiency is not, however, so elevated a goal that it serves as a singular justification for striking claims or defences. Accordingly, and to protect the rights of legitimate litigants, it is well accepted that the moving party on a motion to strike must meet a very high threshold in order to be successful, as mentioned above. The critical decision of the Supreme Court of Canada in *Hunt v Carey Canada Inc.* (*Hunt*) exemplifies how cautious courts are advised to be in their determinations on Rule 21 motions.²³ On this point, Justice Wilson stated:

Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).²⁴

Justice Wilson's words are instructive: a motion to strike cannot be used to trump a litigant's substantive or procedural motion if its pleadings do not contain a "radical defect." That is, only in the clearest of circumstances can a claim be dismissed before an inquiry into its merits.

In addition to setting out the relevant test, the jurisprudence also helpfully identifies specific situations where courts may be inclined to grant a motion to strike, but should not do so. The complexity of a claim, or concerns about whether a claimant will be able to prove its case, are insufficient bases for striking out a claim. For instance, in *Hunt v Carey*, Justice Wilson also stated:

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed.²⁵

Courts have also repeatedly confirmed that a motion to strike should not be used to finally determine a claim on the basis that the law in respect of the cause of action being advanced is undetermined. For instance, in *Imperial Tobacco*, the Supreme Court stated (in relation to the analogous rule under British Columbia's *Supreme Court Civil Rules*):

Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been

²³ *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959.

²⁴ *Ibid* at 980.

²⁵ *Ibid* at 990.

regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.²⁶

More recently, in *Apotex Inc. v Eli Lilly and Company* the Ontario Superior Court held:

The fact that the law has not yet recognized a particular cause of action is not determinative on a motion to strike. The law is not static and unchanging. It is evolving continuously to meet the needs of a dynamic society. In dealing with novel claims on a motion to strike, the court must ask whether, assuming the facts pleaded to be true, there is a reasonable prospect that the claim will succeed.²⁷

In *Dalex Co. v Schwartz Levitsky Feldman*, Justice Epstein (as she then was) provided the following guidance on how the “radical defect” standard applied where the claim being advanced had similarities with a previously rejected claim:

In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended²⁸

While, as Justice Brown noted in a more recent case, the case law has not confirmed the test is as strict as set out by Justice Epstein, the courts have demonstrated a “strong reluctance . . . to strike out claims unless they are devoid of any reasonable prospect of success”²⁹ in the context of “the law and the litigation process.”³⁰

The reasoning underlying the jurisprudential approach to the motion to strike a case is relatively straightforward. New or difficult points of law often raise important questions about the meaning of the existing state of the law, as well as how a court should apply that law to the facts of the case at hand; in all but the most obvious of circumstances, the courts should not take shortcuts in resolving such questions. Rather, for decisions on such issues to have integrity, the adjudicating court must be properly briefed on the evidence and jurisprudence, and be aware of the arguments on all sides. Full evidence and argument provides the basis for an informed, well-

²⁶ *Imperial Tobacco, supra* note 22 at para 21.

²⁷ *Apotex Inc v Eli Lilly and Company*, 2012 ONSC 3808 at para 12.

²⁸ *Dalex Co v Schwartz Levitsky Feldman*, (1994) 19 OR (3d) 463 at para 4, quoted in *Barbra Schlifer Commemorative Clinic v HMQ Canada*, 2012 ONSC 5271 at para 49 [*Barbra Schlifer*] [footnotes omitted].

²⁹ *Barbra Schlifer, ibid.*

³⁰ *Brookfield Financial Real Estate Group v Azorim Canada (Adelaide Street) Inc*, 2012 ONSC 3818 at para 28 [*Brookfield*].

reasoned decision. This level of consideration is not enabled by the normal practice on a motion to strike where evidence is not admitted, as the purpose is to determine only whether “legally sufficient claims” are being advanced.³¹ Even a brief review of jurisprudence in respect of motions to strike reveals two clear underlying principles and objectives. First, such motions play an important role in the civil litigation process, as they help to develop a litigation system that is devoid of wholly unmeritorious claims or defences. Additionally, motions to strike can be used to facilitate a more efficient process, by streamlining claims or defences and dispensing with the completely unmeritorious aspects of a claim or defense in a dispute that otherwise should be properly litigated. Second, courts are compelled to protect against abusive or overzealous use of motions to strike. This procedural mechanism should be used to finally determine a claim or defense sparingly, and only in the most clear and obvious of circumstances. The jurisprudence from *Hunt* onwards cautions courts not to grant a motion to strike simply on the basis of the complexity of a pleading, the novelty of the legal positions taken therein, and questions regarding whether it will be supported on the evidence. Absent a claim or defence being “doomed to fail,” the courts must let disputes proceed through the normal litigation process, where they will be determined on the strength of their underlying arguments and evidence.

B. THE COURT OF APPEAL’S MAJORITY DECISION

In our view, the Court of Appeal’s majority decision in the *Tanudjaja* case is flawed for its failure to consider, let alone give effect to, a fundamental purpose of *Charter* litigation: the critical role of the litigation process in developing and defining *Charter* rights. The decision to dismiss the appeal, and accordingly uphold the lower court’s decision to strike the application, is clearly grounded in a concern that the applicants were asking the courts to intervene in questions of housing policy, rather than to determine the appropriate content and limits of the *Charter* rights at issue.³²

The starting point of the majority’s discomfort with the application as advanced is gleaned from Justice Pardu’s characterization of the claim with respect to the entitlement of affected persons to a right to adequate housing in the following terms:

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

³¹ See, for example *Rules*, *supra* note 3 at Rule 21.01(2); see also *Barbra Schlifer*, *supra* note 28 at para 49. Counsel for the applicants in *Tanudjaja* discuss how the motion to strike effectively negated judicial consideration of the 10,000 pages of evidence that was compiled in support of the application in *Fighting for the Right*, *supra* note 5 at 24–25.

³² *Tanudjaja*, *supra* note 2 at paras 22–23. The applicants relied on ss 7 and 15(1) of the *Charter*.

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

- (a) cancelling funding for the construction of new social housing;
- (b) withdrawing from administration of affordable rental housing;
- (c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces; and
- (d) failing to institute a rent supplement program comparable to those in other countries.

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

- (a) terminating the provincial program for constructing new social housing;
- (b) eliminating protection against converting affordable rental housing to non-rental uses and eliminating rent regulation;
- (c) downloading the cost and administration of existing social housing to municipalities;
- (d) failing to implement a rent supplement program comparable to those in other countries;
- (e) downloading responsibility for funding development of new social housing to municipalities which lack the tax base to support such construction; and
- (f) heightening insecurity of tenancy by creating administrative procedures that facilitate evictions.

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

Finally, the appellants submit that deinstitutionalization of persons afflicted with disabilities without adequate community support has resulted in widespread homelessness amongst those persons.³³

The majority summarized the remedies sought by the claimants, which focused on a series of declaratory orders, as follows:

- a) A declaration that decisions, programs, actions and failures to act by the government of Canada (“Canada”) and the government of Ontario (“Ontario”) have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing. Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing.

³³ *Ibid* at paras 10–14; see also *Fighting for the Right*, *supra* note 5 at 23.

- b) A declaration that Canada and Ontario have obligations pursuant to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.
- c) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants’ and others’ rights to life, liberty and security of the person contrary to s.7 of the *Charter*. These violations are not in accordance with the principles of fundamental justice and are not demonstrably justifiable under section 1 of the *Charter*.
- d) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants’ and others’ right to equality contrary to s. 15(1) of the *Charter*. These violations are not demonstrably justifiable under section 1 of the *Charter*.
- e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:
 - i. must be developed and implemented in consultation with affected groups; and
 - ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;
- f) An order that [the Superior Court of Justice] shall remain seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e).³⁴

In dismissing the appeal, Justice Pardu concluded that the claim as framed could not give rise to a judicially cognizable standard:

Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a “court-like” function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.³⁵

In essence, the Court of Appeal determined that the issues raised by the application were essentially ones of pure policy, which fundamentally lay to legislators, not the courts, to resolve. This determination was made notwithstanding the fact that one of the core questions the application put to the courts was their role in holding governments accountable to their *Charter* obligations for successive and inter-related policy decisions. By dismissing the appeal, the majority decision avoids any risk of crossing the line between constitutional law and policy. In

³⁴ *Tanudjaja*, *supra* note 2 at para 15.

³⁵ *Ibid* at para 33.

the context of constitutional litigation, however, that line must be considered as one that is drawn in the sand—there can be no doubt that there is an interactive relationship between constitutional law and public policy. For example, as they develop and give effect to evolving understandings of *Charter* rights, courts regularly make decisions that have clear implications for public policy.³⁶ By upholding the lower court’s decision to strike the application under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, the Court of Appeal’s decision served as an effective barrier to proper judicial consideration (*i.e.*, informed by full argument and evidence) of the merits of the applicants’ case.

C. THE CASE FOR AN ALTERNATIVE APPROACH TO PROCEDURAL THRESHOLDS IN *CHARTER* LITIGATION

In our view, there is particular importance to ensuring, as Justice Feldman stated in her dissenting reasons in *Tanudjaja*, that the motion to strike is not used “as a tool to frustrate potential developments in the law.”³⁷ When questions of civil procedure arise in the context of important social issues, such questions should be viewed through a specific public interest lens, with a clear and higher standard than that applicable in other civil procedure settings. This is because *Charter* litigation is properly understood to have at least two purposes: (i) it exists to allow the courts to adjudicate the particular claims advanced by the claimant or applicant; and (ii) it can be understood to serve a wider purpose, in defining and enforcing the principle of constitutionality of government action.

Regarding the former, certainly a primary purpose of *Charter* litigation is to allow individuals to seek a remedy in respect of government action that allegedly breaches *Charter*-guaranteed rights. Such litigation has a clear role in clarifying the content of *Charter* rights and the corresponding responsibilities of governments. A successful claim signals to a government that the impugned act is impermissible, and may, depending on the circumstances, result in the courts requiring a government to stop, undo, or going forward, alter the impugned legislation or action.

Of course, even a failed *Charter* claim plays a role in defining *Charter* rights. A claimant’s unsuccessful *Charter* claim results in the identification of the parameters of legitimate, or *Charter*-compliant, legislation or government action, and sets the stage for the continuing evolution of the right. This is illustrated, for example, in the Supreme Court’s evolving understanding of section 7 between the time of the *Rodriguez v British Columbia* litigation upholding the assisted suicide prohibition in the *Criminal Code* in 1993,³⁸ and striking down the same provision under section 7 in the *Carter v Canada (Attorney General)* (*Carter*) litigation in 2015.³⁹ All *Charter* litigation, whether successful for the claimants or not, can advance our understanding of the meaning and practical implications of Canada’s constitutional framework.

³⁶ Additionally, as others have observed, decisions in relation to policy are not automatically excluded from *Charter* scrutiny, see, for example, Margot Young, “*Charter* Eviction: Litigating Out of House and Home” (2015) 24 *Journal of Law and Social Policy* 46 at paras 61, 64.

³⁷ *Tanudjaja*, *supra* note 2 at para 49.

³⁸ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

³⁹ *Carter v Canada (Attorney General)*, 2015 SCC 5.

Critically, however, our view is that the purpose of *Charter* litigation is properly understood to lie far beyond the simple determination of the particular right or rights at issue in a given case. Consequently, our understanding of *Charter* rights is not wholly dependent on the success or failure of any particular claim. Rather, *Charter* litigation must be regarded as an iterative process involving the courts, governments, individual, and social actors through which the rights framework in Canada is constantly re-evaluated and, where appropriate or necessary, redefined. The litigation process itself is integral to the development of the rights that characterize the relationship between individuals and government.

The potential for the content of a *Charter* right to evolve significantly as it is litigated is particularly evident in the jurisprudence in respect of the two *Charter* rights at issue in the *Tanudjaja* case, sections 7 and 15(1), where the jurisprudence is clear that the relevant scope of the rights has not yet been determined. As discussed below, a number of cases in relation to sections 7 and 15 illustrate how courts (i) leave open the possibility of expanding the scope of a right in a fact situation that so merits; (ii) rely on *obiter dicta* and dissents in previous decisions to develop the understanding of a particular right; and (iii) embrace wholesale reversal of earlier decisions where it is merited by a difference in the specific facts or the evolution of the law.

By its nature, *Charter* litigation is not static. While a given right may be determined in one way at one time on a particular set of facts, such a decision does not preclude courts from differently determining the substance of a given right based on different facts or evolving social, political, and economic realities. Indeed, a hallmark of *Charter* litigation is that the particular facts and general circumstances in which a claim is advanced are often what provide the impetus for a court to expand the scope of a right or alter how it is conceived or applied. Accordingly, the Supreme Court itself cautioned in *Carter* that strict adherence to precedent by lower courts hearing *Charter* claims is to be avoided:

The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.”⁴⁰

Further insight can be gleaned from the context in which this statement was made in *Canada (AG) v Bedford (Bedford)*.⁴¹ In that application, the Court was asked to consider the constitutionality of provisions of the *Criminal Code* that prohibited prostitution, provisions that had previously been considered and declared constitutional by the Supreme Court in the *Prostitution Reference*.⁴² The application judge held that the *Prostitution Reference* did not preclude the principal applicant from seeking adjudication of the section 7 arguments in the *Bedford* case because “the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990;

⁴⁰ *Ibid* at para 44, quoting *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42 [*Bedford*] [footnotes omitted].

⁴¹ *Bedford, ibid.*

⁴² *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123.

the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied;”⁴³ The Supreme Court affirmed the application judge’s reasoning, agreeing with the argument that “the common law principle of stare decisis is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional.”⁴⁴ The implication here is clear: the Constitution (and the *Charter* as a component of it) must reign supreme, including the principles that underlie it, and the objectives it is intended to achieve; courts should not blindly adhere to precedents in constitutional law in circumstances where doing so would affect results antithetical to the very purpose of the Constitution. Yet, as is exemplified by the *Tanudjaja* case, from its initial stages to the point the Supreme Court refused to grant the applicants’ leave to appeal, the objective of upholding constitutional supremacy is difficult to achieve when complications arise from the intersection of *Charter* litigation and civil procedure.

In *Tanudjaja*, the claim was commenced as an application in accordance with Rule 14.04(3)(g.1) of the *Rules of Civil Procedure*, which specifically provide that where the relief claimed is “a remedy under the Canadian *Charter of Rights and Freedoms*,” a proceeding may occur as an application. This procedural decision is understandable given that the applicants were not seeking damages or other relief against a particular action by the respondent governments; rather, the request for declaratory and mandatory relief was framed and informed by the approach to the content of the sections 7 and 15(1) rights the applicants claimed. The government action in respect of which the applicants were seeking relief constituted a critical component of the application.

The *Tanudjaja* application advanced a novel approach to, among other things, the kind of government action that is open to *Charter* scrutiny. Rather than seeking to impugn a particular legislative act or policy implementation, the applicants argued that the sections 7 and 15 violations arose from the interaction between various legislative and policy decisions taken over the course of a number of years. Indeed, as counsel for the applicants have written, the deliberate focus on systemic factors and their interaction with sections 7 and 15 of the *Charter* was “both novel and central to [the application’s] essence.”⁴⁵ In light of these allegations, the applicants’ case had to establish (i) what the legislative and policy changes were and how they were put into place by the governments; (ii) how the legislative and policy changes interacted with each other over the course of many years; and (iii) how those interactions created the situation of ongoing sections 7 and 15 violations in respect of which the application had been commenced. Indeed, given that the applicants spent eighteen months developing a comprehensive record (consisting of nineteen affidavits, including eleven proposed expert reports), they were no doubt aware of the complexity of the factual allegations underlying their claims after commencing the application. In fact, the depth and breadth of the evidence required by the application matched, if not outpaced, the evidentiary requirements of many complex actions. Even where facts are not in dispute, the depth of the record advanced is a relevant consideration. For example, in *Allen v Alberta*, discussed below, the Alberta Court of Appeal allowed a motion to strike a claim based on the absence of such a record.⁴⁶

The decisions of both the lower court and the Court of Appeal suggest that this approach was perhaps too novel. It is certainly not possible to predict how events would have transpired

⁴³ As paraphrased by the Supreme Court’s decision in *Bedford*, *supra* note 40 at para 41.

⁴⁴ *Ibid* at paras 43–44.

⁴⁵ *Fighting for the Right*, *supra* note 5 at 12.

⁴⁶ *Infra* note 50.

had the applicants proceeded differently than they did. However, had the applicants taken a more well-trodden path, such as bringing an action seeking individual relief, or by seeking to impugn particular legislation or policy implementations, or focusing on the implications of homelessness for a discrete and well-defined population, the applicants would likely have been less susceptible to procedural attack. Instead, the Court of Appeal defined the application as essentially a policy case where the applicants were litigating the issue of whether “Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing”⁴⁷ guised in the cloak of a *Charter* application. On this premise, the Court of Appeal then held that a *Charter* challenge to policy, rather than to particular legislation or government action, was inconsistent with the jurisprudential requirement, as set out in *Re Canada Assistance Plan*,⁴⁸ that “challenge to a particular law or particular application of such law is an archetypal feature of *Charter* challenges under ss. 7 and s. 15.”⁴⁹ The apparent procedural simplicity of the claims made by way of application was, therefore, misleading, given their substance and the manner in which they were framed. On one hand, the Court’s decision can be regarded as an attempt to safeguard the well-established principle that courts are not political bodies and do not exist to adjudicate political disputes, and that ever-precious court-time and resources should not be wasted on such disputes. On the other hand, in holding in favour of the respondents’ motion to strike, both Justice Lederman and the Court of Appeal effectively denied even the possibility of a new approach to understanding what kind of government action can give rise to a *Charter* duty or violation—they effectively held that there was no evidence or argument that would ever make the questions raised by the application open to determination by judicial adjudication.⁵⁰ In this context, the potential ramifications of the decision are significant.

The decision of the Court of Appeal highlights the existence of a potential discord between the *Rules of Civil Procedure* and the multifaceted purposes of *Charter* litigation. Rules of civil procedure exist to ensure a fair, consistent, and principled litigation process. They set the standards for litigation, advising, among other things, claimants that they must meet certain basic thresholds if they wish to use the public resource of the legal system to resolve a dispute.⁵¹ The rules also create procedural predictability aimed at creating a level playing field, where the slide from strategy into tactics is discouraged, if not always prohibited. In this way, a primary purpose of rules of civil procedure is to assist the parties to understand their own and each other’s cases, particularly through the pleading and discovery or cross-examination processes in conjunction with the rules of evidence. The gatekeeping function incorporated into the rules reflects these principles, as well as a concern for judicial economy and the proper role of the courts. In the

⁴⁷ *Tanudjaja*, *supra* note 2 at para 19.

⁴⁸ *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525.

⁴⁹ *Tanudjaja*, *supra* note 2 at para 22.

⁵⁰ It is possible that the Court of Appeal would have been less willing to shut down this possibility had it had the opportunity to consider the detailed facts, if not the evidence itself, underlying the Application. On this point, however, the applicants were doubly disadvantaged. First, as noted above, because Rule 21.01(2)(b) specifically prevented any evidence from being submitted (including with respect to the extensive factual and expert evidence that the applicants had compiled in support of their Application). Secondly, because the claim was commenced by way of an application under Rule 14.05(3) rather than a statement of claim, the originating process itself did not set out all of the material facts relied on by the applicants. As set out above, unlike a statement of claim, a notice of application is required to identify only the relief sought, grounds for the application, and the evidence to be relied upon at the hearing.

⁵¹ See *e.g.* Lorne Sossin, “Constitutional Accommodation and the Rule(s) of Courts” (2005) 42 Alb L Rev 607-33.

Charter context, this gatekeeping function is particularly important, and is undertaken in combination with other provisions in the *Charter* and the Constitution, which demarcate its scope (for example, through the limitation of *Charter* claims to “Government action” under section 32 of the *Charter*).⁵² However, as noted, *Charter* litigation is not simply about dispute resolution. It is also about informing our understanding of the interaction between individual rights and government action, and ensuring the constitutionality of government action through the court process. This understanding increases through the success and failures of *Charter* claims; indeed, claims that advocate for novel approaches to the content or scope of a *Charter* right play a particularly critical role in this respect.

In the context of novel *Charter* litigation, such as in *Tanudjaja*, where the viability of legal argument is often contingent on the strength of the evidence that underlies it, the ruling that there was no evidence or argument that would ever make the questions raised by the application open to determination by judicial adjudication is a significant determination. Recall that under the “no chance of success” threshold, the pleaded facts supporting a claim are assumed to be true, and the viability of the legal claims advanced are assessed against those facts as pleaded. Justice Brown (as he then was) explained this threshold on a motion to strike in a recent *Charter* application case:

If the pleading asserts a legally sufficient claim, Rule 21.01(1)(b) does not subject the claim to an analysis of the strength or weakness of the evidence advanced by the party in support of its claim. That is why under the Rule a court assumes the facts pleaded in the claim can be proved. Put another way, Rule 21.01(1)(b) does not provide a vehicle by which an opposing party can seek a final disposition of a claim on the evidence⁵³

Elsewhere in the same decision, Justice Brown identified the challenge with applying rule 21.01(1)(b) in the context of an application:

The facts supporting an application usually are found in the accompanying affidavit material, not necessarily in the notice of application. Consequently, some degree of caution must be exercised when applying a pleadings-oriented rule, such as Rule 21.01, to a notice of application, making due allowance for the different requirements mandated for the content of those different originating processes.⁵⁴

That is, Justice Brown, rightfully in our view, cautioned against the strict application of a pleading rule to a notice of application.

In *Tanudjaja*, however, the majority of the Court of Appeal adopted the opposite approach, and took a strict view of what a *Charter* application should look like and consist of; it then determined that the application strayed from that norm in such a way that the claims were not only patently invalid, they simply did not belong in front of the courts. In so doing, the lower court and the Court of Appeal could be interpreted as rejecting outright not only the legal

⁵² *Charter*, *supra* note 1.

⁵³ *Brookfield*, *supra* note 30 at para 30.

⁵⁴ *Barbra Schlifer*, *supra* note 28 at para 41.

sufficiency of the notice of application with the relief sought and grounds to be argued as pleaded, but also the possibility that the whole factual matrix underlying the application—including numerous expert reports related to the causes of homelessness in Canada and the effects of related legislation and policy—may have shed some light on why the claims did fall to the courts to determine. The narrow approach to procedure taken by both courts in the context of public law litigation was considered and specifically rejected by the Supreme Court in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society* [*Downtown Eastside*] in relation to the threshold for public interest standing.⁵⁵ In *Downtown Eastside*, Justice Cromwell, writing for the Court, outlined the test for public interest standing as developed in a trilogy of cases, including *Borowski*,⁵⁶ and observed:

My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, *they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.*⁵⁷

Justice Cromwell emphasized that the Supreme Court has taken a “purposive approach” to the development of procedural law in public law cases and described the key issue in an analysis of standing in this context as the need to strike a balance between ensuring access to the courts and preserving judicial resources.⁵⁸

In our view, both Courts’ decisions in *Tanudjaja* did not sufficiently consider that since *Charter* litigation often takes its cues from social evolution, the legal viability of a claim can often not be separated from the underlying factual matrix. As we discuss in the next section, the Court of Appeal’s procedural analysis in *Tanudjaja* has had jurisprudential implications for the issue of the justiciability of *Charter* claims more generally that run counter to the purposive approach advanced by Justice Cromwell in *Downtown Eastside*.

II. JUSTICIABILITY AFTER TANUDJAJA

Certain kinds of claims framed as positive rights have been characterized as non-justiciable, as they fall outside the kind of subject-matter that can be addressed through a judicial process. For example, a claim that the government should allocate more resources to social programs and less to law enforcement would not be justiciable.⁵⁹ The jurisprudence on the justiciability of broad-based social and political questions has been influenced by the Ontario Court of Appeal’s decision in *Tanudjaja* in at least two ways. In *Abbotsford (City) v Shantz*, the court interpreted

⁵⁵ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].

⁵⁶ *Minister of Justice of Canada v Borowski*, [1981] 2 SCR 575.

⁵⁷ *Downtown Eastside*, *supra* note 55 at para 20 [emphasis added].

⁵⁸ *Ibid* at para 23.

⁵⁹ For further discussion, see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd edition (Toronto: Carswell, 2012) at 242–44.

Tanudjaja as standing for the idea that legal issues framed in the context of positive rights are non-justiciable.⁶⁰ In *Allen v Alberta*, the Court deploys *Tanudjaja* to distinguish the justiciability of governmental *inaction* from the justiciability of government *action* on social and economic issues.⁶¹ In a related approach, the British Columbia Supreme Court in *JP v Plecas*⁶² holds that judicial review is not available for government policies or appointments involving advisory roles or views that are not binding.

In each of these cases, *Tanudjaja* is cited as a case which broadens the non-justiciable sphere. In our view, in such cases, *Tanudjaja* is being invoked for propositions which go much further than the majority of the Court of Appeal decided. For example, while the majority of the Court in *Tanudjaja* found the necessary “legal component”⁶³ to support a section 7 claim missing, an implication of the majority reasons is that a claim with sufficient legal specificity and an evidentiary foundation could proceed where the remedy sought is positive state action. Indeed, the Supreme Court itself has never set a general bar to the assertion of a positive right, let alone such a strict bar as the one for which the *Tanudjaja* decision is now being relied on.

Caution in the reliance on non-justiciability as a bar to *Charter* litigation is particularly appropriate in the shadow of the Supreme Court decision in *Downtown Eastside*. In that case, as discussed above, Justice Cromwell emphasized the need for a “flexible and purposive” approach to procedural gatekeeping in the context of *Charter* litigation.⁶⁴ In considering the element of the test for public interest standing, by which a court must find a case raises a serious, justiciable issue, Justice Cromwell concluded that unless the subject matter of the claim cannot succeed as a “foregone conclusion,” it should not be dismissed on justiciability grounds.

The idea that questions of justiciability should be viewed in a “flexible and generous manner”⁶⁵ is underscored in the context of justiciability and *Charter* litigation raising novel claims. While a specific “public interest justiciability” category would be a welcome companion to public interest standing, justiciability issues in a *Charter* context should, at the very least, be interpreted and applied in ways that are consistent with advancing *Charter* values.⁶⁶ While not every claim that raises a *Charter* breach is justiciable, the novelty of a *Charter* argument in settings of social and economic rights ought not to be a sufficient basis on which to screen out *Charter* claims. Accordingly, we consider in the remainder of this paper how the *Tanudjaja* decision demonstrates the need for a specific approach to justiciability tailored to the evolving area of positive social and economic rights under the *Charter*.

⁶⁰ *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at para 148 [*Abbotsford*].

⁶¹ *Allen v Alberta*, 2015 ABCA 277 at para 34 [*Allen*].

⁶² *P(J) v Plecas*, 2015 BCSC 1962.

⁶³ *Tanudjaja*, *supra* note 2 at paras 27, 35.

⁶⁴ *Downtown Eastside*, *supra* note 55 at para 52.

⁶⁵ *Ibid.*

⁶⁶ The Supreme Court has confirmed that *Charter* values should inform the development of common law doctrines. See *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, and *Grant v Torstar Corp*, 2009 SCC 61 at para 44.

III. THE CURRENT STATE OF POSITIVE SOCIAL AND ECONOMIC RIGHTS IN CANADA

The notion of positive social and economic rights appears clear on its surface. Such rights are premised on the obligation of the state to provide certain guarantees that may include sufficient food, basic health care, public education and adequate shelter. By contrast, negative rights arise where the state seeks to curtail individual access to a benefit or freedom—for example, by limiting the kinds of food one can buy or preventing people from purchasing private health insurance. In almost every case, however, the distinction between positive and negative social and economic rights appears blurred at best. For example, if a person with disabilities needs an assistive device to be mobile and the state does not fund such devices, has the person’s positive or negative right been infringed? If the state is aware of the risks of homelessness and takes no steps to address those risks, is this an inquiry into positive or negative rights? Would the answer to these questions change if it becomes clear that homelessness is due to the failure to provide other state services, such as mental health care? While the discussion below assumes a coherent boundary between positive and negative rights in relation to housing, we believe such a boundary needs to be seen as contingent and variable, dependent on the circumstances and the perspective of the person drawing the distinction.

For many years and in many settings, the debate about whether the door is closed to the courts recognizing positive social and economic *Charter* rights—particularly under sections 7 and 15 of the *Charter*—has persisted. In *Gosselin v Québec (Attorney General)*, for example, Chief Justice McLachlin, writing for the majority, observed in dismissing a section 7 challenge to certain social welfare penalties that applied to those under thirty who did not actively seek employment:

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey’s celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the Canadian *Charter* must be viewed as “a living tree capable of growth and expansion within its natural limits”: see Reference *re Provincial Electoral Boundaries* (Sask.), [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.

...

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.⁶⁷

Notwithstanding the possibility referred to in the passage above, and a lengthy dissent authored by Justice Arbour, which did find a violation of section 7, *Gosselin* has been taken as the Supreme Court's affirmation that no "free-standing" right to social welfare could be found in the *Charter*.⁶⁸ Similarly, in *Chaoulli v Canada*,⁶⁹ although three Justices were prepared to find that a bar on private health insurance leading to substantial wait times for particular kinds of surgery was a violation of section 7 of the *Charter*, all Justices agreed that the *Charter* contained no positive obligation on the state to provide healthcare.⁷⁰ Although courts have been reticent to find in favour of any particular positive right put to them so far, there is no doubt that the jurisprudence has been seen to have consistently left the door to social and economic rights ajar. This open door has spawned significant academic literature and advocacy pursuing the idea.⁷¹ These pursuits are largely rooted in an oft cited passage from *Vriend v Alberta*,⁷² in which the Supreme Court stated, "[i]t has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*."⁷³ In these and other cases, the Supreme Court has routinely referred to social and economic rights under the *Charter* as an open question, and one to be determined through the case-by-case evolution of subsequent *Charter* litigation.

Notwithstanding the complex sections 7 and 15 case advanced and the voluminous underlying evidentiary record, because *Tanudjaja* was decided on justiciability grounds in the context of a motion to strike rather than on its merits, the discussion of the substantive claims to a right to housing were only cursorily addressed. Justice Pardu, for the majority, stated simply:

Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v. Quebec*, 2002 SCC

⁶⁷ *Gosselin v Québec (Attorney General)*, 2002 SCC 84, at paras 82–83 [emphasis added].

⁶⁸ See e.g. *Wynberg v Ontario*, (2006) 82 OR (3d) 561, leave to appeal denied, [2006] SCCA No 441, at para 225.

⁶⁹ *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

⁷⁰ *Ibid* at para 104. For discussion of the implications of this case for positive rights and in comparative context with *Gosselin*, see Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Colleen M Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161.

⁷¹ See e.g. Martha Jackman, "The Protection of Welfare Rights Under the Charter," (1988) 20:2 *Ottawa L Rev* 257; Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*" (2003) 20 *SCLR* (2d) 65; Bruce Porter, "Expectations of Equality" (2006) 33 *SCLR* 23; Jamie Cameron, "From the MVR to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 *SCLR* (2d) 105; Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2009); Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007); Margot Young, "The Other Section 7" (2013) 62 *SCLR* (2d) 3; Martha Jackman & Bruce Porter, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014).

⁷² *Vriend v Alberta*, [1998] 1 SCR 493.

⁷³ *Ibid* at para 64.

84, [2002] 4 S.C.R. 429. Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.⁷⁴

Justice Feldman, in dissent, took a different approach, concluding that existing jurisprudence does not preclude the courts from adjudicating a claim to a positive obligation under section 7 of the *Charter*: “In my view, the motion judge erred by concluding that it is settled law that the government can have no positive obligation under s. 7 to address homelessness. To the contrary, *Gosselin* specifically leaves the issue of positive obligations under s. 7 open for another day.”⁷⁵

This divergence on the status of positive social and economic rights under the *Charter* was playing out, not just in *Tanudjaja*, but in other concurrent litigation as well. Before the decision in *Tanudjaja* was released by the Ontario Court of Appeal, the Federal Court in *Canadian Doctors for Refugee Care v Canada* also considered the question of whether section 7 included a positive right to health-care, and concluded that it did not.⁷⁶ The applicants in that case asserted that the changes to the *Interim Federal Health Program* violated the section 7 rights of refugees.⁷⁷ The applicants framed their claim in a manner similar to *Tanudjaja*. The Federal Court noted: “The applicants acknowledge that although the government may not be prohibiting refugees and asylum seekers from obtaining health care *per se*, the government is nevertheless creating a situation of deprivation in which the lives and the security of the person of vulnerable individuals are being jeopardized.”⁷⁸ The Court concluded, “the current state of the law in Canada is that section 7 of the *Charter*’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care.”⁷⁹ The Court also noted that the applicants relied on *Dunmore*⁸⁰ as an authority for the proposition that “there are circumstances where positive action on the part of the state may be required to allow vulnerable claimants access to a *Charter*-protected right that they could not otherwise enjoy.”⁸¹ However, the Court dismissed the claim as the applicants failed to establish the basis for a positive obligation—namely, that their claim was grounded in a fundamental *Charter* right, not just access to a statutory regime.⁸² Through the course of its findings, the Federal Court engaged the *Tanudjaja* 2013 lower court decision, and stated that “[like] *Tanudjaja*, a number of the other cases cited by the respondents involve the sort of broad, values-based social policy questions that might be better addressed through a Royal Commission than a *Charter* challenge.”⁸³

After the Ontario Court of Appeal’s judgment in *Tanudjaja*, the expansion of the scope of non-justiciability and the reduction of any scope for positive social and economic rights have converged. For example, in *Allen*, discussed above in the context of justiciability, the Alberta Court of Appeal commented on the current state of section 7 jurisprudence on social and

⁷⁴ *Tanudjaja*, *supra* note 2 at para 37.

⁷⁵ *Ibid* at para 62.

⁷⁶ *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 [*Canadian Doctors*].

⁷⁷ *Ibid* at para 477.

⁷⁸ *Ibid* at para 500. [Emphasis added.]

⁷⁹ *Ibid* at para 571. See paras 493–571 for review of section 7.

⁸⁰ *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.

⁸¹ *Canadian Doctors*, *supra* note 76 at para 568.

⁸² *Ibid* at para 570.

⁸³ *Ibid* at para 529.

economic rights in Canada.⁸⁴ The appellant, Dr. Allen, had injured himself playing hockey, and was forced to pay out of pocket for a number of MRIs, and an eventual surgery in Montana, due to long wait times for surgeries in Alberta. He brought a section 7 challenge to the constitutionality of section 26(2) of the *Alberta Health Care Insurance Act*, which he claimed stopped him from obtaining private health insurance that would have defrayed at least part of his \$77,000 in medical costs. At trial, Dr. Allen sought a summary judgment that the *Alberta Health Care Insurance Act* had violated his section 7 rights to healthcare on the basis of precedents in *Chaoulli* and *PHS Community Services*.⁸⁵ The chambers judge was unsatisfied with the evidence presented by the applicant for the summary motion. He held that there was an insufficient causal connection between the state action and the harm suffered by Dr. Allen, and therefore that section 7 of the *Charter* was not engaged.⁸⁶ The chambers judge further held that a consideration of whether section 7 rights were engaged by the prohibition on private health insurance would require a full trial with a sufficient record.⁸⁷

On appeal, the issue was whether the chambers judge had made an error in law by failing to apply *Chaoulli* properly. Specifically, the appellant claimed that the precedent of *Chaoulli* bound the Court to rule in his favour on the issue of the constitutionality of 26(2) of the *Alberta Health Care Insurance Act*. The Court of Appeal commented on the current state of positive rights by noting that section 7 is “notoriously open-ended, and its application to the constitutional review of social and economic policies is controversial and unsettled. A full factual record is therefore particularly important in a s. 7 and s. 1 analysis.”⁸⁸ The Court of Appeal held that “since there is no freestanding constitutional right to health care, there cannot be any constitutional requirement that the health care system be given a blank cheque. There will always have to be decisions about spending priorities, which are outside the purview of the constitution.”⁸⁹ Further, “the challenge to the prohibition on private health care insurance should not be allowed to become an indirect way of subjecting spending policies and priorities to constitutional review.”⁹⁰

In *Allen*, the Court of Appeal also cited *PHS Community* for the principle that drug use and addiction are complex problems that attract complex social, policy, scientific, and moral reactions, and that therefore, governments, not the court, must make criminal and health policy.⁹¹ As a result, the Court of Appeal ruled that “the constitutionality of s. 26(2) must be pursued at a full trial.”⁹² The trial judge’s decision to dismiss the application for insufficient evidence was upheld.

In dismissing the appeal in *Allen*, the Alberta Court of Appeal also referred approvingly to the Ontario Court of Appeal’s *Tanudjaja* decision. Specifically, the Court noted:

⁸⁴ *Allen*, *supra* note 61.

⁸⁵ *Ibid* at para 8.

⁸⁶ *Ibid* at para 12.

⁸⁷ *Ibid* at para 37.

⁸⁸ *Ibid* at para 31.

⁸⁹ *Ibid* at para 52.

⁹⁰ *Ibid*.

⁹¹ *Allen*, *supra* note 61 at para 35.

⁹² *Ibid* at para 53.

The Ontario Court of Appeal highlighted the problem of attempting to constitutionalize social policies in *Tanudjaja v Canada (A.G.)*, 2014 ONCA 852 (CanLII), 123 OR (3d) 161, leave to appeal denied, June 25, 2015, SCC #36283. That case involved an assertion of a free-standing constitutional right to “adequate housing,” and amounted to an open invitation to the courts to take charge of housing policy in Ontario.⁹³

In *Abbotsford*, a case also discussed above, the British Columbia Supreme Court adopted a similar view in relation to positive economic or social rights and the implications of *Tanudjaja* simply by observing: “[t]here has been no recognition by courts in Canada that the *Charter* creates positive obligations in relation to social and economic interests (see *Tanudjaja*).”⁹⁴ In *Abbotsford*, the Court was asked to consider whether the section 7 rights of the city’s homeless included the right to erect “temporary, non-obstructing shelter during the day as well as at night, on City park lands and public spaces,” and whether certain provisions of the city’s bylaws that affected the homeless breached section 7, among other sections of the *Charter*.⁹⁵ With regard to the section 7 claim, the Court ruled that “while the City may have no obligation to provide housing or services to the City’s homeless, the City does have an obligation to respect the guarantees of freedom of assembly, freedom of association, life, liberty, security of the person and equality of all its citizens, including the City’s homeless.”⁹⁶ Together, *Allen and Abbotsford* suggest a retrenchment from the prior view from *Gosselin* and *Chaoulli* where the door is open to positive social and economic rights where circumstances warranted such a finding, to a new gatekeeping principle that positive social and economic rights claims are non-justiciable.

Not every court has gone as far in screening out positive social and economic rights claims. The Alberta Queen’s Bench in *Schulte v Alberta (Appeals Commission for Alberta Workers’ Compensation)*, for example, resisted such a finding in the face of a claim that section 7 of the *Charter* mandated the government to provide compensation to an injured worker.⁹⁷ The appeal considered two questions: first, whether the applicant’s Workplace Safety and Insurance Board (WSIB) entitlement should be recalculated according to cost of living adjustments; and second, whether the applicant’s health problems in 2006 and 2010 could reasonably be attributed to a 1987 accident for which he was receiving WSIB payments.⁹⁸ The self-represented appellant argued that section 7 of the *Charter* imposed on the Workers Compensation Board a positive obligation to provide compensation benefits, vocational assistance and medical aid to all individuals with acceptable worker’s compensation claims.⁹⁹ The applicant argued that a failure to provide the compensation he was entitled to was a breach of the principles of fundamental justice.

The Alberta Court cited *Chaoulli* and *Gosselin* to argue that given that the content of section 7 is not frozen or exhaustively defined, the question for the court was whether a case

⁹³ *Ibid* at para 34.

⁹⁴ *Abbotsford*, *supra* note 60 at para 177.

⁹⁵ *Ibid* at para 4.

⁹⁶ *Ibid* at para 148.

⁹⁷ *Schulte v Alberta (Workers’ Compensation Board, Appeals Commission)*, 2015 ABQB 17 [*Schulte*].

⁹⁸ *Ibid*.

⁹⁹ *Schulte*, *supra* note 97 at paras 113–114.

requires a novel application of section 7 as a basis for state obligation to provide positive rights. The decision noted, “[the] courts have consistently held that interference with purely economic rights does not constitute a section 7 breach. The courts have not gone so far, however, as to rule out interferences with economic rights which result in serious stress, stigma and anxiety that substantially affect a person’s security of the person.”¹⁰⁰ The Court considered the question of whether Mr. Schulte’s experience rose to the level of interference with economic rights resulting in serious stress, stigma, and anxiety which might engage section 7. It concluded that Mr. Schulte’s experience did not rise to such a level.¹⁰¹ The Court once again left open “the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances,” but noted that Mr. Schulte’s petition was “not such a case.”¹⁰² The Court concluded by noting that “the frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.”¹⁰³

The Ontario Divisional Court similarly was not prepared to rule out positive social and economic rights in *Dixon v Director, Ministry of the Environment*.¹⁰⁴ In this case, the Ontario Divisional Court considered whether provisions of the *Environmental Protection Act* (EPA) violated section 7 positive rights to security of the person. Specifically, the Court reviewed whether the EPA’s provisions allowing the placement of private wind farms within a certain distance of populated areas violated the right to security of the person through potential health concerns related to windmills. The Court noted the Tribunal’s finding that: “the jurisprudence to date has not promoted the notion that s. 7 *Charter* claims are intended to further positive rights, but instead, to protect claimants from state imposed harms.”¹⁰⁵

Noting Justice Arbour’s dissent in *Gosselin*, the Tribunal in *Dixon* signaled that it was “cognizant that the courts, such as in the dissent in *Gosselin*, have considered the possibility that positive rights may be the subject of a s. 7 *Charter* claim in the future.”¹⁰⁶ The Tribunal accepted the Director of the Ministry of the Environment’s claim that in asserting a right to more protection in environmental matters than was provided by the *Environmental Protection Act*, the appellant was asserting positive rights.¹⁰⁷ Ultimately, the Tribunal held that there was not sufficient evidence that the harm alleged was causally connected to a state action, and on that basis, the section 7 claim failed.¹⁰⁸

For potential *Charter* litigants raising positive social and economic rights arguments, we believe an important lesson can be learned from the *Tanudjaja* decision and the subsequent jurisprudence, namely that positive rights claims need to articulate a clear factual basis regarding the causal link between state (in)action and harm to an individual or group. On this view, a litigant framing a section 7 claim, or a court assessing one, should focus on the specificity of the underlying allegations rather than assuming, as a matter of procedural gatekeeping, that all claims that may allege the existence of state obligations to undertake positive action to remedy

¹⁰⁰ *Ibid* at para 130.

¹⁰¹ *Ibid* at paras 130–131, 163.

¹⁰² *Ibid* at para 128.

¹⁰³ *Ibid*.

¹⁰⁴ *Dixon v Director, Ministry of the Environment*, 2014 ONSC 7404 [*Dixon*].

¹⁰⁵ *Ibid* at para 48, quoting *Dixon v Director, Ministry of the Environment*, (2014) 84 CELR (3d) 106 (OERT) at para 41.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Dixon*, *supra* note 104 at para 38.

¹⁰⁸ *Ibid* at para 50.

the *Charter* breach will be doomed to fail. The procedural framework of the *Charter*, and particularly the scope of justiciability, should not be interpreted in ways that stunt the growth of the *Charter*, particularly in underdeveloped doctrinal contexts such as social and economic rights.

IV. CONCLUSION

Charter litigation is critical for defining the government's obligations and the scope of its legislative authority in light of Canada's constitutional framework. The role of the courts is to determine the legal frameworks for the analysis of *Charter* rights and to consider and apply those frameworks in light of the particular facts of a given case. In this vein, it is often crucial that *Charter* litigants have the opportunity to present factual scenarios on which arguments on the violation *Charter* rights depend. In *Tanudjaja*, a significant factual record was never considered due to the invocation of non-justiciability.

The fact that a judge on a preliminary motion may not think that the facts can support a claim on the current state of the law does not mean that a court hearing the merits, with the benefit of full evidence and argument, may not take issue with the law itself. That factual inquiry, and any resulting change in the law, is simply not possible on a summary motion such as a motion to strike, where the evidence supporting the claims is not meant to be considered as a matter of course (and indeed, any facts alleged by the claimants are assumed to be true provided they are capable of proof).¹⁰⁹

Given the importance of the litigation process in advancing *Charter* jurisprudence, courts overseeing such cases should ensure the *Rules of Civil Procedure* enhance rather than impede the development of our constitutional jurisprudence. In fact, given the unique characteristics of public law litigation, and the manners in which it differs from mainstream civil litigation, where it is permitted by the *Rules* and the law, at a minimum, the courts should take a broad and flexible approach to the application of civil procedure rules that encourages such litigation to be heard and determined on its merits, rather than disposed of summarily without a full hearing.

More than just applying the existing *Rules of Civil Procedure* and common law standards (standing, justiciability, etc.) flexibly, or purposively, our analysis suggests the need for a new approach—a public interest justiciability perspective that aligns with the approach the courts have adopted towards public interest standing. In *Charter* settings and other analogous contexts, the threshold for a finding of non-justiciability should be different. Apart from settings where the facts as alleged are not susceptible to the judicial process (as set out in *Operation Dismantle v The Queen*), the circumstances under which a *Charter* claim should be dismissed on justiciability grounds should be extremely rare.¹¹⁰ The assertion of a positive right to adequate housing (*Tanudjaja*), or a positive right to legal aid (*Canadian Bar Association v British Columbia*),¹¹¹ or a positive right to other social and economic rights (from access to health care to access to health insurance), should, save for in the clearest of circumstances otherwise, be viewed as justiciable.

¹⁰⁹ *Operation Dismantle v R*, [1985] 1 SCR 441 at paras 75–79.

¹¹⁰ *Ibid* at paras 51–54.

¹¹¹ See *Canadian Bar Association v British Columbia*, [2006] BCSC 1342, affirmed on appeal [2008] BCCA 92, leave to appeal dismissed, [2008] SCCA No 185. See also for discussion Lorne Sossin, “The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?” (2007) 40:2 UBC L Rev 727.

Courts may well choose to remain skittish about recognizing such sweeping positive rights, but this possibility should not preclude those wishing to assert such rights from having their day in court. The fact that the applicants in the *Tanudjaja* case failed to invoke a particular law or policy to challenge poses particular problems for *Charter* litigation but ought not to have been understood, in our view, as rendering the claim non-justiciable. In other words, the question of whether the *Charter* recognizes broad, positive obligations on the state to act in areas of inaction, is a question that goes to the merits of the *Charter* claim, not a party's ability to have such a claim heard and decided.

The Ontario Court of Appeal's judgment in *Tanudjaja*, in our view, suggests the need for a doctrine of public interest justiciability in Canada. Such a doctrine could unambiguously and coherently differentiate such *Charter* and analogous public interest settings from other civil procedure rules and approaches to motions to strike claims prior to any consideration of that claim's merits. As we have sought to show through an analysis of *Tanudjaja* and its related case law, the development of substantive rights under the *Charter* may well turn on the development of procedural frameworks designed to advance *Charter* values.