Les Cahiers de droit

Temerity and Timidity : Lessons from *Tanudjaja* v. *Attorney General (Canada)*

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Volume 61, numéro 2, juin 2020

Culture juridique des droits de la personne et justiciabilité des droits sociaux : nouvelles perspectives

URI : https://id.erudit.org/iderudit/1070652ar
DOI : https://doi.org/10.7202/1070652ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Young, M. (2020). Temerity and Timidity : Lessons from *Tanudjaja* v. *Attorney General (Canada)*. *Les Cahiers de droit*, *61*(2), 469–493. https://doi.org/10.7202/1070652ar

Résumé de l'article

Si le cas de Tanudjaja c. Attorney-General (Canada) réfère au passé, son héritage demeure malgré tout un danger réel à l'encontre du potentiel qu'a la loi d'évoluer, donnant à cette affaire juridique une importance critique qui continuera de grandir. Dans cette affaire, les demandeurs soulevèrent des arguments détaillés et audacieux, soutenant que l'action et l'inaction gouvernementales étaient responsables de l'évolution et de la perpétuation du problème de logement au Canada. Ce raisonnement fût rejeté de manière préliminaire, le tribunal refusant une audience sur le fond, malgré les preuves et les arguments importants qu'il comportait, par peur de son caractère novateur. Le cas de Tanudjaja est donc une confirmation judiciaire des tendances des tribunaux à refuser d'entendre des réclamations de justice sociale sous la Charte canadienne des droits et libertés. La portée de cette tendance est importante, car elle met en péril d'autres réclamations possibles, telles que les affirmations émergentes de droits environnementaux.

Temerity and Timidity : Lessons from *Tanudjaja* v. *Attorney General (Canada)*

Margot YOUNG*

As the case of Tanudjaja *v.* Attorney-General (Canada) *recedes into the past, its legacy persists as powerful threat to law's potential to evolve, retaining a critical edge of progressive relevance. Tanudjaja brought extensive and bold argument charging that government action and government inaction were responsible for the evolution and perpetuation of Canada's housing failure. The challenge was dismissed ; its substantive arguments and evidence shut out without full hearing by a judiciary spooked by novelty. But, the case stands as judicial confirmation of patterns of dismissal of social justice claims under the* Canadian Charter of Rights and Freedoms. *The significance of these patterns extends broadly—imperilling other claims on the litigation horizon such as emerging assertions of environmental rights.*

Si le cas de Tanudjaja *c.* Attorney-General (Canada) *réfère au passé, son héritage demeure malgré tout un danger réel à l'encontre du potentiel qu'a la loi d'évoluer, donnant à cette affaire juridique une importance critique qui continuera de grandir. Dans cette affaire, les demandeurs soulevèrent des arguments détaillés et audacieux, soutenant que l'action et l'inaction gouvernementales étaient responsables de l'évolution et de la perpétuation du problème de logement au Canada. Ce raisonnement fût rejeté de manière préliminaire, le tribunal refusant une audience sur le fond, malgré les preuves et les arguments importants qu'il comportait,*

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Thanks to Martha Jackson for reliable, smart, and "bang-on" comments.

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Si el caso de Tanudjaja *contra* Attorney-General (Canada) *pertenece al pasado, su legado persiste como una amenaza concreta contra el potencial que tiene la ley para evolucionar, lo que le otorga a este caso jurídico una importancia crítica que seguirá aumentando. En este caso, los demandantes habían planteado argumentos detallados y audaces, argumentando que la acción y la inacción gubernamentales eran responsables de la evolución y de la perpetuación de la problemática habitacional en Canadá. Este razonamiento fue desestimado preliminarmente, pues el tribunal denegó realizar una audiencia sobre el fondo de la cuestión, a pesar de las pruebas y de los argumentos importantes que se trataban, y esto, provocado por el temor a la novedad. El caso Tanudjaja constituye una confirmación judicial de las tendencias por parte de los tribunales del rechazo para oír las reclamaciones de justicia social bajo la Carta Canadiense de los Derechos y las Libertades. El alcance de esta tendencia es importante, pues pone en peligro eventuales demandas como las declaraciones emergentes de derechos medioambientales.*

Access to adequate housing in Canada can be precarious. This is not news. The made-in-Canada housing emergency is commonly condemned by both domestic and international observers[1]. The last ten years have seen "exploding housing prices […] renovictions and demovictions […] working people pushed out of some cities and a real estate investment bonanza[2]". In the reaches of our most destitute communities, the situation is dire. The marginalized struggle to obtain any sort of housing for themselves and their families: homeless populations of Canada's major cities have grown[3]. We see denial of basic human needs amidst prosperity and plenty.

Yet, our political and legal culture is well and long familiar with the notion of adequate housing as a material condition of well-being[4]. In 1976 Canada signed on to the United Nations *International Covenant on Social, Economic and Cultural Rights*, obligating its governments to observation

1. A 2010 report from the Wellesley Institute stated that : "Deep and persistent housing insecurity and homelessness are truly nationwide issues – from Iqaluit in the north to St. John's in the east to Victoria in the west." Wellsley Institute, "Precarious Housing in Canada", 2010, p. 24, [Online], [www.wellesleyinstitute.com/wp-content/uploads/2010/08/Precarious_Housing_In_Canada.pdf] (December 14th, 2019). See also, Michael Shapcott, "Homes For All : Social Housing In Toronto And Canada", *Wellesley Institute*, February 20th, 2014, [Online], [www.wellesleyinstitute.com/housing/homes-for-all-social-housing-in-toronto-and-canada/] (December 14th, 2019). See also, Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Doc. U.N. A/HRC/10/7/Add.3 (February 17th, 2009), par. 32 ; United Nations, Committee on the Elimination of Discrimination against Women, *Concluding observations*, Doc. U.N. CEDAW/C/CAN/CO/7 (November 7th, 2008) ; United Nations, Human Rights Committee under the International Covenant on Civil and Political Rights, *Concluding observations*, Doc. U.N. CCPR/C/CAN/CO/5 (April 20th, 2006) ; United Nations, Committee on Economic, Social and Cultural Rights, *Concluding observations*, Doc. U.N. E/C.12/CAN/CO/4 – E/C.12/CAN/CO/5 (May 22nd, 2006).
2. Housing inequality has skyrocketed : 2016 data from Statistics Canada shows that the top 20 per cent of Canadian households own 63 per cent of Canadian total net worth (assets minus mortgage debt) in real estate ; the bottom 40 per cent own two per cent. Michal Rozworski, "Governments Created the Housing Crisis. Here's How They Can Fix It : The Roots of our Housing Crisis : Austerity, Debt and Extreme Speculation", *The Tyee*, August 1st, 2019, [Online], [thetyee.ca/Analysis/2019/08/01/Gov-Created-Housing-Crisis-Now-Fix/] (December 14th, 2019).
3. The most recent (March 2019) homeless count in Vancouver showed that numbers continue to rise. The survey found 2,223 individuals identified as homeless, over 600 of whom lived on the streets. City of Vancouver, "Vancouver Homeless Count 2019", [Online], [vancouver.ca/files/cov/vancouver-homeless-count-2019-final-report.pdf] (December 14th, 2019).
4. See, for example, Ross J's judgment in *Victoria (City)* v. *Adams*, 2009 BCCA 563, reversing in part *Victoria (City)* v. *Adams*, 2008 BCSC 1363.

of this right[5]. Our constitutional bill of rights, the *Canadian Charter of Rights and Freedoms*[6], protects, among other things, the rights to life and security of the person, as well as substantive equality guarantees[7]. Canadian civil society has been articulate in both describing the problem and calling concretely for solutions to the issues of housing inadequacy[8].

This paper continues analysis of a prominent, and not so recent, legal challenge to government failures to stem this housing crisis. *Tanudjaja* v. *Attorney-General (Canada)*[9] brought extensive argument that both government action and government inaction were responsible for the evolution and perpetuation of Canada's housing failure. And, further, this pattern of state involvement and forbearance collectively infringed key sections of the *Charter*. The housing activists and experts involved in this challenge, too long witness to the suffering caused by housing insecurity and homelessness, had the temerity to take on the problem in its full cast, assembling a challenge that was complex and wide-ranging. However, the challenge was dismissed at a preliminary stage: its substantive arguments

5. Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, December 16th, 1966, 993 U.N.T.S. 3 (entered into force : January 3rd, 1976, accession by Canada : May 19th, 1976) provides that : "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right » (emphasis added).
6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, c. 11 (U.K.) (hereafter "*Charter*").
7. Section 7 provides that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 15 (1) states that, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". *Charter*, *supra*, note 6.
8. See, for example, Colin Bonnycastle *et al.*, "Re-establishing their Lives. Issues Relating to Affordable Housing for Women and their Children Escaping Violent Relationships in Northern Manitoba", August 22nd, 2019, [Online], [www.policyalternatives.ca/publications/reports/re-establishing-their-lives] (December 14th, 2019) ; Marc Lee, "Planning for a Build-Out of Affordable Rental Housing in Metro Vancouver. How many units and how much would it cost ?", December 11th, 2019, [Online], [www.policyalternatives.ca/publications/reports/planning-build-out-affordable-rental-housing-metro-vancouver] (December 14th, 2019) ; Canadian Observatory on Homelessness, "Submission to the National Consultation on a Human Rights-Based Approach to Housing", 2018, [Online], [www.homelesshub.ca/resource/submission-national-consultation-human-rights-based-approach-housing] (December 14th, 2019).
9. *Tanudjaja* v. *Canada (Attorney General)*, 2013 ONSC 5410 (hereafter "*Tanudjaja (SC)*").

and evidence shut out of the courtroom, in decisions forged from judicial timidity and rigidity.

The themes that characterize rejection of socio-economic rights claims by Canadian courts are familiar[10]. But, in *Tanudjaja*, they reach peak expression. In result and argument, the case illustrates key aspects of how constitutional law to date has greeted social and economic issues: the courtroom is an inhospitable space for claims of material injustice and the redistribution of social rights[11]. This paper identified key devices by which government complicity in social and economic misery is insulated from judicial review, and from human rights accountability. These modes of argument ground the judiciary's shut out of social and economic rights claims, effectively forestalling the role *Charter* rights, and our courtrooms, might play in opening up our legal and political conversations to broader contemplation of social injustice.

While *Tanudjaja* was decided some time ago now, the case threatens to be a salient jurisprudential low point for current ongoing and important *Charter* social justice litigation. The cumulative effect of the decisions in the case—the motions judgement, the Court of Appeal decision, and the refusal of leave to appeal by the Supreme Court of Canada—bodes badly for emerging litigation that is, like *Tanudjaja* was, timely and innovative. Thus, it is important at this juncture to keep in mind critical appraisals and, indeed, condemnations of the doctrinal formulations of the *Tanudjaja* judges.

10. See, for illustration and discussion, Martha Jackman, "What's Wrong with Social and Economic Rights?", (2000) 11 *N.J.C.L.* 235; Martha Jackman and Bruce Porter (eds.), *Advancing Social Rights in Canada*, Toronto, Irwin Law, 2014.

11. There has been significant commentary already about this case, including by this author. See, for illustration, Margot Young, "*Charter* Eviction: Litigating Out of House and Home", (2015) 24 *J.L. & Soc. Pol'y* 46; Joshua-Sealy Harrington, "Can the Homeless Find Shelter in the Courts?", *ABlawg.ca*, April 2nd, 2015, [Online], [ablawg.ca/2015/04/02/can-the-homeless-find-shelter-in-the-courts/] (February 4th, 2020); David DesBaillets, "The International Human Right to Housing & the Canadian Charter: A Case Comment on *Tanudjaja* v. *Canada (Attorney General)*", (2015) 32 *Windsor Y.B. Access Just.* 121; Sarah E. Hamill, "Caught Between Deference and Indifference: The Right to Housing in Canada", (2018) 7 *Can. J. Hum. Rts.* 67; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin*", (2019) 39 *N.J.C.L.* 85.

1 Some Background

For too long Canadian governments have given insufficient attention to the issue of adequate housing provision[12]. The last few decades, up until very recently, were marked by federal government neglect of Canadians' housing concerns[13]. Government withdrew from the task of housing provision, leaving the field to the market and developers[14]. The result is that, currently, the vast majority of households in Canada obtain housing through the market[15]. In 2004, two Canadian housing scholars noted that: "Canada's housing system is now the most private-sector market-based of any Western nation, including the United States[16]". This reflects Canadian governments' historical inclination, particularly in the first half of the twentieth century: Governments have been, simply put, "slow to take action in the housing field[17]". As well, the federal government has typically

12. One province, Alberta, has implemented a strategic plan called *A Plan for Alberta. Ending Homelessness in 10 Years*, [Online], [humanservices.alberta.ca/documents/PlanForAB_Secretariat_final.pdf] (December 14th, 2019). For an overview of government action and inaction, see the *Affidavit of Michael Shapcott*, [Online], [www.wellesleyinstitute.com/wp-content/uploads/2012/05/Afd.-of-MICHAEL-SHAPCOTT-Director-Affordable-Housing-and-Social-Innovation-Wellesley-Institute-FINAL.pdf] (December 14th, 2019).
13. In 1993 Brian Mulroney's Progressive Conservative government cut all new federal funding for social housing outside of First Nation reserves, effectively transforming the Canadian Mortgage and Housing Corporation from home builder into mortgage insurer: M. Rozworski, *supra*, note 2.
14. For varied discussion, see e.g., Andrew MacLeod "Minister's Boastful Housing Claims Prove Shaky", *The Tyee*, June 18th, 2015, [Online], [thetyee.ca/News/2015/06/18/Coleman-Shaky-Housing-Claims/] (December 14th, 2019). Jeff Lee, "Robertson says federal politicians must respond to housing crisis. Vancouver mayor criticizes federal decision to sell Jericho, RCMP lands instead of developing them for family housing", *Vancouver Sun*, June 17th, 2015, [Online], [www.canada.com/business/Robertson+says+federal+politicians+must+respond+housing+crisis/11145252/story.html] (December 14th, 2019). Barbara Yaffe, "No real incentive for politicians to act on housing affordability", *Vancouver Sun*, June 15th, 2015, [Online], [www.canada.com/business/Barbara+Yaffe+real+incentive+politicians+housing/11138340/story.html] (December 14th, 2019).
15. J. David Hulchanski, "Rethinking Canada's Housing Affordability Challenge", *Centre for Urban and Community Studies*, 2005, p. 6.
16. J. David Hulchanski and Michael Shapcott (eds.), *Finding Room. Policy Options for a Canadian Rental Housing Strategy*, Toronto, Centre for Urban and Community Studies Press, 2004, p. 4.
17. Richard Harris, a Canadian scholar, notes that, for much of Canada's history, "Canadians have been housed in ways that can only be described as highly individualistic". Richard Harris, "More American than the United States. Housing in Urban Canada in the Twentieth Century", *Journal of Urban History*, vol. 26, nº 4, 2000, p. 456, at pages 457 and 470.

supported private homeownership ahead of social housing[18]. The result? The market has delivered housing in predictably unequal, inadequate, and discriminatory patterns. The financialization of housing that results means that residential property becomes an investment platform, at the expense of its value as a basic and necessary human good.

Some change, perhaps, is afoot. Recently, the federal government has taken up the challenge of housing provision and policy. The Liberal government, newly elected in 2015 and re-elected with a minority in October 2019, announced, in 2018, a national housing plan. This policy, the *National Housing Strategy: A Place To Call Home*[19], marked a welcome shift in attention to the issue[20]. In 2019, legislation implementing key aspects of the policy was enacted[21]. The federal government's plans are far from ideal[22], but their formal articulation marks a reorientation on the part of that level of government to contemplate a role in the housing crisis.

The length of time it took for the federal government to reengage with the housing policy file has been frustrating for Canada's housing advocates. For some time, advocates lobbied for policy change. On two occasions, a private member's bill was introduced into the House of Commons that would have, if passed, required the, then Conservative, government to develop a national housing strategy[23]. Each time, the private member bill was effectively defeated[24]. This previous federal government — under Stephen Harper — was adamant — through action and statement — that

18. S.E. Hamill, *supra*, note 11, 80.
19. Canada, *Canada's National Housing Strategy. A Place to Call Home*, 2018, [Online], [www.placetocallhome.ca/-/media/sf/project/placetocallhome/pdfs/canada-national-housing-strategy.pdf] (December 14th, 2019).
20. While the Liberal government claims this is Canada's first national housing strategy, arguably this is not true.
21. *Budget Implementation Act, 2019, nº 1, National Housing Strategy Act*, Division 19, S.C. 2019, c. 29.
22. See, for example, Margot Young, "Policy Brief : National Housing Strategy", *Broadbent Institute*, September 6th, 2019, [Online], [www.broadbentinstitute.ca/margotyoung/policy_brief_national_housing_strategy] (February 4th, 2020).
23. *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, Bill C-304 (committee reporting the Bill with an Amendment – March 21st, 2011), 3rd sess., 40th parl. (Can.) ; *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, Bill C-400 (introduction and first Reading – February 16th, 2012), 1st sess., 41st parl. (Can.).
24. The first attempt died on the order paper when a general election was called. The second attempt was defeated at second reading by a coordinated government-member vote against it.

housing and homelessness were none of its business[25]. In this stance, it continued the tradition of the John Chrétien's liberal government, in power before Harper's Conservatives[26].

As so often is the case post-1982, the political struggle, this time over housing provision, then switched to a different forum — the courts[27]. More specifically, a coalition of housing advocates and organizations launched a challenge under the *Charter*[28] in an attempt to force adequate government housing policy. The case was the Ontario-based *Tanudjaja* v. *Canada (Attorney General)*[29]. The claim *Tanudjaja* raised was bold — the applicants brought a smart and novel case. As I will discuss, it was a complex claim, paired with an ambitious remedy request. Like other claimants whose temerity has advanced Canadian constitutional law[30], these applicants crafted a constitutional challenge that brought evidence of significant, unaddressed injustice to the courtroom door. The challenge was far-reaching, attempting to forge new territory for overdue recognition of much neglected social and economic rights in Canadian society.

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25. For a summary of that government's neglect of housing issues, see Wellesley Institute, "Universal Periodic Review – Canada – 2013", [Online], [www.wellesleyinstitute.com/wp-content/uploads/2012/10/wellesleyinstituteUPRCanada2013.pdf] (December 14th, 2019).
26. See, generally, Caroline Andrew, "The Urban Legacy of Jean Chrétien", in Lois Harder and Steve Patten (eds.), *The Chrétien Legacy. Politics and Public Policy in Canada*, Montreal, McGill-Queens University Press, 2006, p. 62.
27. For a discussion of the larger politics around social justice struggles in Canada's post-1982 constitutional democracy, see Margot Young, "Why Rights Now? Law and Desperation", in Margot Young *et al.* (eds.), *Poverty Rights, Social Citizenship, Legal Activism*, Vancouver, UBC Press, 2007, p. 317; Martha Jackman and Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada. The *Charter* Framework", in M. Jackman and B. Porter (eds.), *supra*, note 10, p. 65; Bruce Porter, "International Human Rights in Anti-poverty and Housing Strategies. Making the Connection", in M. Jackman and B. Porter (eds.), *supra*, note 10, p. 33.
28. *Charter*, *supra*, note 6.
29. *Tanudjaja (SC)*, *supra*, note 9, affirmed *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 (hereafter "*Tanudjaja (CA)*"), leave to appeal refused, S.C.C., 2015-06-25, 36283. The judgments, Notice of Application, *Facta* of the parties and interveners, Applicant and Expert Witness Affidavits, and other key documents in the *Tanudjaja* case can be found at: Social Rights in Canada, [Online], [socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness-motion-to-strike.html] (March 14th, 2020). For a more detailed discussion of the context of this case, see M. Young, *supra*, note 11.
30. Think, for example, of the now celebrated five women who launched the *Persons Case*. Theirs was a novel and bold claim – and it changed the law in ways that are now unexceptional, obvious, and lauded. *Edwards* v. *Canada (Attorney General)*, [1930] A.C. 124.

One would have hoped that the courts would have engaged with the challenge, leaving behind the judicial reticence that has been so often responsible for sidelining significant distributive and social justice questions[31]. Louise Arbour, after she left the Supreme Court of Canada and while she was High Commissioner of Human Rights for the United Nations, spoke of the problem: "The first two decades of Charter litigation testify to a certain timidity — both on the part of the litigants and the courts — to tackle head on the claims emerging from the right to be free from want[32]". Arbour spoke these words in 2005, but the timidity she called out surfaced in *Tanudjaja*. The case foundered: shut out at the preliminary stage by government motions to dismiss that were successful at the first level and upheld by two of the three judges on appeal. Leave to appeal was refused by the Supreme Court of Canada[33]. The result is that the human rights crisis of housing neglected by politicians was, then, forsaken by judges[34].

2 The Case

Tanudjaja was initiated by four individual applicants. Each of these applicants had experienced, in different ways, significant housing insecurity. Together, the applicants represented distinct perspectives of the complex picture of groups most vulnerable to housing inadequacy. One applicant faced homelessness after being widowed, another after illness left him unable to work. Disability featured in another applicant's story, while the fourth applicant was a single mother on social assistance, paying double the shelter allowance for rent[35]. Three of the applicants were waitlisted for subsidized housing. None was directly at fault for the housing insecurity they faced, challenging dominant notions that blame the poor for their predicament[36]. Supporting the individual applicants in the

31. See e.g., *Gosselin* v. *Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, (hereafter "*Gosselin*"); *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78.
32. Louise Arbour, "'Freedom from want' – from Charity to Entitlement", *Lafontaine-Baldwin Lecture*, March 3rd, 2005, [Online], [newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx ?NewsID=3004&LangID=E] (December 14th, 2019).
33. *Tanudjaja* v. *Canada (Attorney General)*, leave to appeal dismissed without costs, *supra*, note 29.
34. Another commentator frames it thus: "Consequently, those without adequate housing find themselves caught between judicial deference and political indifference", S.E. Hamill, *supra*, note 11, 72.
35. Interestingly, Justice Lederer felt compelled to comment that not all of the applicants were homeless, implying, one worries, that this fact somehow reduced the urgency or credence of their claims. It is an odd, uncomfortable start to the judgment. *Tanudjaja (SC)*, *supra*, note 9, par. 13.
36. S.E. Hamill, *supra*, note 11, 86.

application was an Ontario based non-profit housing advocacy organization, the Centre for Equality Rights in Accommodation[37].

The initiating application was issued May 26, 2010, under section 24 (1) of the *Charter*, and, in essence, asserted that sections 7 and 15 the *Charter*[38] obligate each of the governments of Canada and Ontario to enact a strategy for ensuring affordable, adequate, and accessible housing for all. The application charged that the governments had, instead, created and sustained conditions that resulted in the current, ongoing, crisis situation of homelessness and severely inadequate housing. Thus, the governments were in breach of sections 7 and 15 in a manner unjustifiable under section 1 of the *Charter*[39].

The claim had three dimensions[40]. First, the applicants argued that governments amendments to existing legislation, policies, programs, and services had resulted in homelessness and inadequate housing. Second, such changes were put in place without adequate attention to their impact on access to adequate housing. Third, neither provincial nor federal governments had ensured that programmes in place protected the homeless or those most at risk of homelessness. In sum, the challenge targeted a range of government action and inaction that, it was claimed, undermined, in a fundamentally unjust manner, the life, liberty, and security of the person for those without adequate housing, infringing, as well, the right to substantive equality for these same individuals. The range of circumstances and histories the applicants brought to the challenge were instances of the various negative, rights-infringing outcomes claimed.

37. The Centre for Equality Rights in Accommodation (CERA) is a non-profit agency that advocates for housing rights and that provides services for low-income tenants and the homeless. For more information about this organization, see CERA, [Online], [www.equalityrights.org/cera/] (December 14th, 2019).

38. Section 7 of the *Charter* reads : "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The relevant subsection of section 15 states : "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Charter*, *supra*, note 6.

39. Section 1 states that, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Charter*, *supra*, note 6.

40. *Tanudjaja (SC)*, *Amended Notice of Application*, par. 16, [Online], [socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf] (December 14th, 2019).

Distinctive to this claim was the absence of a simple focus on a single piece of legislation or policy. The range of programmes and policies cited as problematic was considerable — social housing funding, rent subsidy, residential tenancy law, rental conversion, deinstitutionalization, and income assistance, for example[41]. Similarly, as noted, the claim was also about both government action and inaction. Thus, the claim spoke to the overall approaches of the two governments under challenge and to the far-ranging impact of government approaches (both thought out and thoughtless) on housing security issues. Consequently, the claim took a somewhat innovative form. The applicants did not assert that the provision of housing or subsidies for housing were constitutionally mandated. They did not, either, ask that the governments be judicially ordered to offer a specific benefit. Instead, the focus was on government creation and amplification of the conditions that underlie housing insecurity, conjoined with ongoing government failure to address those conditions with the kind of systemic policy such a problem required[42].

The remedy sought reflected this catalogue of cumulative constitutional missteps, paralleling the three-part structure of the substantive claims. First, and most direct, the applicants requested that the court issue a series of declarations detailing how the governments were in breach of their constitutional obligations under sections 7 and 15, including the charge that governments have created conditions of housing insecurity and failed to implement effective strategies aimed at reducing and eliminating housing insecurity. The applicants also asked for an order that obligated the governments in question to implement housing strategies that would reduce and eliminate housing insecurity. Such strategies should be developed in consultation with affected groups and contain a variety of accountability measures ensuring efficacy and transparency. Last, the applicants requested that the Court retain supervisory jurisdiction to ensure proper implementation of the constitutional obligations informing the orders[43].

The choice of remedial requests was purposeful, reflecting the character of Canada's housing crisis. Housing insecurity at large — its causes, manifestations, and potential solutions — is a "pixelated" picture[44]. The many groups experiencing housing crisis often share little in common other than lack of access to adequate, affordable housing. No one policy solution will address all elements of the crisis and cover all groups facing housing insecurity. Too simple or singular a remedial response risks

41. For illustration of this, see the initiating application, *supra*, note 29.
42. See, generally, M. Jackman, *supra*, note 11.
43. For the full text of relevant documentation in the litigation, see Social Rights in Canada, *supra*, note 29.
44. For a more detailed discussion of this, see M. Jackman, *supra*, note 11.

"decontextualised and abstract interpretations of the right [to housing][45]" that, at best, can provide a "floor, but [also] a ceiling" to equality and inclusive social citizenship[46].

In May 2012, two years after the Notice of Application had been filed, the federal and provincial Attorneys General moved for dismissal of the application for failure to disclose a cause of action[47]. The governments asserted that, among other things, it was "plain and obvious" that no reasonable cause of action was disclosed and that the issues raised were not justiciable. Ontario's criticism that the Application was "in effect an effort to constitutionalize a right to housing[48]" captured the tenor of the government objections. A motion to dismiss of this sort is a pre-emptive strike. The case is stopped in its tracks; the substantive arguments of the application are never fully and complexly explored, at least until another, future case manages to get by this hurdle.

2.1 The Ontario Superior Court

In response to the governments' motions, the application was forcefully dismissed by Justice Lederer of the Ontario Superior Court[49]. A number of concerns shaped Lederer J's reasons for dismissal: breadth of considerations relevant to the policies and strategies challenged by the Applicants; no precedent for a right to housing; radical change requested in *Charter* law; imposition on the public purse; and institutional boundaries[50]. Two themes predominate: the absence of established protection for positive rights in relation to either section 7 or section 15 and the claim of non-justifiability. First, Lederer J reads the *Charter* rights in play narrowly and parsimoniously, asserting that the applicants are barred from judicial review largely because of the novelty, ingenuity, and scope of their rights claims. It is, he finds, settled law that neither section 7 nor section 15 speak to the type of claim this challenge advances (of course, the manner in which the motions judge dismisses the application is ironic. Lederer J's

45. Jessie Hohmann, *The Right to Housing. Law, Concepts, Possibilities*, Oxford, Hart Publishing, 2013, p. 197. On the complexity of capturing fairness concerns in social justice resolution, see Natasha Affolder, "Transnational Conservation Contracts", (2012) 25 *Leiden J. Intl. L.* 443, 455.
46. J. Hohmann, *supra*, note 45, p. 217.
47. The motion was brought pursuant to Rules 14.02 and 21.01 (1) b) of the Ontario *Rules of Civil Procedure*, R.R.O 1990, Reg. 194.
48. *Tanudjaja (CA)*, *supra*, note 29 (Factum of the Respondent, the Attorney General of Ontario at par. 2).
49. *Id*.
50. For more detailed discussion of these concerns blocking this case at the preliminary stage, see: M. Young, *supra*, note 11.

judgment is 56 pages long: "a lengthy argument on the merits to show that there is no argument on the merits[51]").

Lederer J is concerned about the breadth and number of policies at issue in the challenge and over which remedial supervision is requested. He sums up the challenge as, effectively, a broadside against "how our society distributes and redistributes wealth[52]". These may be critical questions, he continues, "but the courtroom is not the place for their review[53]". The remedial request too suffers the same fate, condemned as "the offering up of a Trojan horse[54]". The sweep of challenge is too wide—both in what the applicants challenge and in what the applicants want.

2.2 The Ontario Court of Appeal

The applicants turned to the Ontario Court of Appeal to appeal dismissal of their application. That court's decision was released in early December 2014. Two of the justices, Pardu and Strathy JJA, rejected the appeal; Feldman JA, in dissent, would have allowed the appeal and sent the challenge to the lower court for adjudication on the merits.

The majority's dismissal of the appeal turns on the question of justiciability[55]. Pardu JA writes the judgment and describes her conclusions as flowing from: "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity[56]". This is a rather obtuse way of capturing concerns about the separation of powers: the appeal is claimed to hinge on the question of whether or not this is an issue that belongs in the political realm or one with sufficient legal cast to warrant judicial consideration. The focus is on the distinction between legal and political questions, situated within the larger question of judicial institutional capacity[57]. Judicial competency rests on finding sufficient legal content to the question at issue[58].

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51. *Id*., 59.
52. *Tanudjaja (SC)*, *supra*, note 9, par. 120. This is a theoretically naive statement-rights are pretty much always about distribution and redistribution of resources of some sort.
53. *Id*.
54. *Id*., par. 64.
55. In this manner, the Court of Appeal majority reasons claim (unconvincingly) to leave aside the additional conclusion of the motions judge that the issue of positive versus negative obligation was involved.
56. *Tanudjaja (CA)*, *supra*, note 29, par. 20, quoting from *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines & Resources*), [1989] 2 S.C.R. 49, 90 and 91.
57. *Id*., par. 21.
58. *Id*., par. 35.

The majority thus concluded that there was insufficient legal content to engage the court. That is, the questions the challenge raise are not justiciable, as the majority understands and deploys that notion. The majority also claimed that their decision avoids the contested issues of, first, positive versus negative obligations[59] and, second, novel claim making under the *Constitution*, focussing, instead, on justiciability alone. Yet, their consideration of justiciability imports positions on each of these issues. Indeed, it is from the perspectives of these two issues that the dissenting judgement strongly sets up its opposition.

The argument that policy, unrealized in some form of government action, is immune from *Charter* standards rests on the assertion that, unless a government positively acts, a policy decision to not act is beyond *Charter* purview. This rigid separation between positive and negative government action reflects a dubious consensus in Canadian constitutional law. Commentators and judges themselves increasingly question the distinction[60].

A claim counter to this, one that references a general positive right to housing under section 7, is, the majority asserts, a "doubtful proposition[61]". There is, Pardu JA asserts, no freestanding right to housing[62]. But, if the point is not certain law, as the majority's choice of language indicates, then, according to law that is certain[63], the case should precede. Surmises as to legal outcomes as yet undecided, and in response to issues framed in novel ways, are illegitimate bases for preliminary dismissal. An open

59. *Id*., par. 37.
60. See e.g., Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, Oxford, Oxford University Press, 2008; M. Jackman, *supra*, note 10; Martha Jackman, "*Charter* Remedies for Socio-economic Rights Violations: Sleeping Under a Box?", in Robert J. Sharpe and Kent Roach (eds.), *Taking Remedies Seriously*, Montreal, Canadian Institute for the Administration of Justice, 2010, p. 279; Bruce Porter, "Inclusive interpretations: social and economic rights and the Canadian Charter", in Helena Alviar Garcia, Karl Klare and Lucy A. Williams (eds.), *Social and Economic Rights in Theory and Practice. Critical Inquiries*, London, Routledge, 2014, p. 215; Vanessa A. MacDonnell, "The Constitution as Framework For Governance", (2013) 63 *U.T.L.J.* 624; Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights", (2008) 39 *Colum. H.R.L.R.* 351; United Nations, Committee on Economic, Social and Cultural Rights, *General Comment nº 9: The Domestic Application of the Covenant*, Doc. U.N. E/C.12/1998/24 (1998), par. 14.
61. *Tanudjaja (CA)*, *supra*, note 29, par. 30.
62. *Id*., par. 30 and 31.
63. See the test for dismissal from *Hunt* v. *Carey Canada Inc*., [1990] 2 S.C.R. 959 (hereafter "*Hunt*"), discussed below: *infra*, note 81.

question of constitutional rights interpretation must be allowed to go to argument on the merits.

The majority reduces the application claim to, essentially, "that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing[64]". The claim is thus transduced into a simple challenge focusing on government policy untranslated into law or state action. The key point for the majority appears to be that no one law or government action is singled out by the challenge. Such a singular focus, absent from this case, is, the majority argues, "an archetypal feature of *Charter* challenges under s. 7 and s. 15[65]". For these judges, the absence of such a focus leads to the conclusion of non-justiciability[66].

Worth noting, with concern, is that this analysis risks placing beyond the reach of constitutional review any collection or group of government actions. It is an odd logic — it implies that the more government action pulled into critical focus, the more the label of policy divination best left to the legislative branch attaches. More becomes less — to the point of disqualification.

This characterization of the applicant's claim — as simply policy focused — is wrong. The claim is more complex and faceted. It takes up a broad range of government actions and inactions — all with, the applicants claim, significant implications for section 7 and section 15 rights. David Hulchanski, a University of Toronto housing researcher, makes this point differently. He has argued that, in framing the housing problem, it is essential to acknowledge that Canada has a housing system: "each country develops a [relative unique] housing *system* — a method of ensuring (or not) that enough good-quality housing is built, that there is a fair housing allocation system, and that the stock of housing is properly maintained[67]".

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64. *Tanudjaja (CA)*, *supra*, note 29, par. 19.
65. *Id*., par. 22.
66. This is also the avenue by which the Court of Appeal majority in *Tanudjaja* distinguished the case from the Supreme Court of Canada decisions in *Canada (Attorney General)* v. *PHS Community Services Society*, [2011] 3 S.C.R. 134, 2011 SCC 44 (hereafter "*PHS*"), and in *Chaoulli* v. *Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35. In both of these other cases, a similar charge floated by the government was rejected by the court. Here, the Appeal Court majority attempts to keep alive the possibility of *Charter* scrutiny of a network of government programmes, but only where, it appears, as the Appeal Court states, there is more certainty of a specific rights infringement (par. 32). It is challenging to make sense of this distinction.
67. J. David Hulchanski, "What Factors Shape Canadian Housing Policy? The Intergovernmental Role in Canada's Housing System", in Robert Young and Christian Leuprecht (eds.), *Canada: The State of the Federation 2004. Municipal-Federal-Provincial Relations in Canada*, Montreal, Institute of Intergovernmental

Canada's system is the product of the package of actions and inactions that the *Tanudjaja* complaint highlights. The output of this system is the housing inequality and insecurity that lies at the base of, and is documented by, the *Tanudjaja* complaint. Hulchanski's specific point about the housing system resonates with the larger observation that there is no neutral place for governments to occupy in relation to such a central feature of Canadian society. What gets done, and not done, in all of the policy areas that impinge on housing provision, set in place one or another set of conditions for that housing provision. It is a point central to the *Tanudjaja* claim: what governments do and do not do across a broad sweep of policy can congeal into coherent and consequential social outcomes for a particular, central social concern[68]. And, government, thus, will be deeply implicated in this outcome, because of this complex of actions and inactions, despite government lawyers' protestations to the contrary.

Other commentators make equally pertinent observations about the housing system in Canada, and its impact. In an article on *Tanudjaja*, a group of housing experts notes that this sort of human rights harm is "slow violence" by existing institutions and policies[69]. The national housing crisis is "a socially constructed disaster[70]". The harmful actions at issue are "neither spectacular nor instantaneous but instead incremental[71]". It is not a single event but, rather, the product of a series of laws, policies, and omissions — none of which alone accounts for the character and depth of the crisis[72]. The different factors coalesce, and the emerging human rights offence is clear. This reflects the complexities of modern administrative states and the mode of government that the twenty-first century

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Relations, 2006, p. 221, at page 222. Hulchanski elaborates: "Government plays the central role in creating, sustaining, and changing this system. It establishes and enforces the 'rules of the game' through legislation [defining everything from] banking and mortgage lending practices [to] tax and regulatory measures affecting building materials, professional practices (for example, real estate transactions), subsidy programs, and incentive patterns for average households".

68. "Homeless-making processes are now a part of Canada's housing and social welfare systems. […] Homelessness will continue as long as these processes continue." (J.D. Hulchanski, *supra*, note 15, p. 5.)

69. Tracy Hefferman, Fay Faraday and Peter Rosenthal, "Fighting for the Right to Housing in Canada", (2015) 24 *J.L. & Soc. Pol'y.* 10, 12, citing Rob Nixon, *Slow Violence and the Environmentalism of the Poor*, Cambridge, Harvard University Press, 2011.

70. T. Hefferman, F. Faraday and P. Rosenthal, *supra*, note 69, 12.

71. *Id*., quoting from Rob Nixon, "Slow Violence: Literary and Postcolonial Studies Have Ignored the Environmentalism That Often Only the Poor Can See", *The Chronicle of Higher Education*, June 2nd, 2011.

72. T. Hefferman, F. Faraday and P. Rosenthal, *supra*, note 69, 12.

demands. *Charter* law ought not to put this reality beyond the scope of judicial review. Yet, this is what the motion to dismiss here does.

The issue of how to (or whether to) prune a thicket of state action and inaction under *Charter* analysis has come up before. As Robert Leckey notes, assessing complex legislative schemes under the *Charter* is a tricky question of legal craft[73]. Leckey's analysis looks at the equality family law case of *Quebec* v. *A*.[74]. From that context, Leckey argues that "perspectival issues — forest or trees […] — matter[75]". While his purpose in that discussion varies from mine here, both of us would have a court engage more forthrightly with the issue of scale[76]. Shifting the judicial lens from close up analysis of a specific piece of government action to a wider view of a collection of government action and inaction can change the constitutional harms brought into focus. Moreover, courts need consistency across the implications of scale or focus. If, as was the case in *Withler* v. *Canada (Attorney General)*[77], the Supreme Court can disentitle an individual complainant on the basis that her rights claim had too narrow a frame — because the claim ignored other legal elements that modify or compensate for the harm cited — then surely it cannot also be the case that a court can turn away, on preliminary motion moreover, a challenge because the issue is framed as one targeting a systemic and collective understanding of governmental impact[78].

When the *Tanudjaja* Court of Appeal majority mischaracterizes the nature of the claim the applicants make as one focused simply on the absence of policy, the judges fail to appreciate the range of scales at which *Charter* analysis has and must occur. The claim simply asked the court to recognize that the basis for the breach of constitutional obligations by the governments cannot always, and thus must not need to be, construed as a single government action. On occasion, probably even often, it is the interrelated and systemic effects[79] of a whole course of government actions and inactions that construct the crisis.

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73. Robert Leckey, "Strange Bedfellows", (2014) 64 *U. of T. L.J.* 641.
74. *Quebec (Attorney General)* v. *A*., [2013] 1 S.C.R. 61, 2013 SCC 5.
75. R. Leckey, *supra*, note 73, 667.
76. Professor Leckey analysis is concerned with the question of whether or not the regime of laws pertaining to spousal rights and duties in Quebec stand or fall constitutionally as an ensemble or whether individual laws can be picked off constitutionally in isolation from judicial consideration of other legal elements : *Id.*
77. *Withler* v. *Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12.
78. In *Withler*, the Supreme Court stated : "a central consideration is the purpose of the impugned provision in the context of the broader pension scheme" (par. 71).
79. T. Hefferman, F. Faraday and P. Rosenthal, *supra*, note 69, 12.

Finally, the Court of Appeal majority takes issue with remedial request[80]. But, surely, this is not a reason to dismiss a challenge. Choice of remedy is a distinctive stage and allows judges to attend to concerns of institutional competency and appropriateness separately as the last stage. Requested remedy is an inappropriate basis on which to determine justiciability of substantive arguments about rights protection.

Feldman JA wrote the minority judgment and would have found that it was an error of law to strike this claim at the pleadings stage. She reminded us that the test for striking the application is whether it is "plain and obvious" that the claim is doomed[81]. Is the claim "certain to fail?[82]" Feldman JA adopts established law in emphasizing that "[t]he motion to strike should not be used, […] as a tool to frustrate potential developments in the law[83]". And, in relation to the motions judge's reasoning, Feldman JA found that the lower court's discussion of the section 7 claim was flawed in four ways: misstatement of the appellants' claim; misstatement of section 7 jurisprudence; definition of section 7 jurisprudence inappropriate to decision-making in a motion to strike; and, prevention of consideration of the full evidentiary record[84]. At fault was the motion judge's extensive doctrinal interpretations and resolutions of law not yet settled, particularly in reference to the fact the Supreme Court has left as an open, future question, the issue of positive obligations under section 7 of the *Charter*[85]. This is, she asserted, inappropriate in a preliminary motion to dismiss. She references the 16 volumes of evidentiary record left unexaminable, volumes that focus, in part, on whether or not special circumstances exist for inclusion of positive obligations under section 7[86]. The appeal judge was similarly critical of the motion judge's handling of the section 15 claims[87].

In her discussion of the justiciability concern, Feldman JA argued that: "to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate[88]". Indeed, she emphasized that striking a *Charter* claim will seldom be appropriate. A novel form of the claim may raise tough procedural and conceptual challenges for both

80. *Tanudjaja (CA)*, *supra*, note 29, par. 33.
81. *Id*., par. 43. The test is from *Hunt*, *supra*, note 63.
82. *Hunt*, *supra*, note 63, 980.
83. *Tanudjaja (CA)*, *supra*, note 29, par. 49, Feldman JA in dissent.
84. *Id*., par. 51, Feldman JA in dissent.
85. *Id*., par. 56, Feldman JA in dissent.
86. *Id*., par. 65, Feldman JA in dissent.
87. *Id*., par. 74, Feldman JA in dissent.
88. *Id*., par. 81, Feldman JA in dissent.

rights and remedial argument but novelty alone cannot justify dismissal[89]. Feldman JA concluded that the "housekeeping" measure of dismissal for lack of reasonable cause was improperly wielded by the motions judge and unwisely upheld by her Court of Appeal colleagues.

Commentators on the Court of Appeal result elaborate the issues Feldman JA raised[90]. This case was initiated by a notion of application, not a statement of claim. A notion of application does not detail the material facts to the claim, instead simply setting out general legal grounds for the claims. The material facts are determined through the affidavits that are the evidentiary record of a motion of application. But, no evidence can be before the court on a motion to strike and thus the judge in such motions operates in a kind of factual vacuum. This makes judicial restraint in relation to these motions all the more essential.

Confounding these concerns, of course, is the Supreme Court of Canada's refusal to grant leave to appeal from the Court of Appeal judgment[91]. We are left with a sharp "door closing" on the rights at issue here—a slam, really, given that this is a preliminary motion[92]. Feldman JA's dissenting opinion captures the problems with dismissal, but the Supreme Court's refusal to engage with the case is rebuke to that opinion.

I want to return to the idea that *Tanudjaja* is not simply a case that, on its own terms, is disappointing. As a new round of litigation emerges, cases that also push against the boundaries of *Charter* rights traditionally conceived, the lessons of the numerous critiques of *Tanudjaja* must be learned. Three themes emerge to watch out for: hostility to novel challenges; rigid formulas of justiciability; and pretences of progressive change. I discuss each of these in what follows.

3 A Novel Claim

The idea of *Tanudjaja* as a novel claim featured largely: explicitly in the motions court and, I would argue, implicitly in the majority judgment at the Court of Appeal. The label of novelty informed the conclusion that no

89. *Id*., par. 85, Feldman JA in dissent.
90. T. Hefferman, F. Faraday and P. Rosenthal, *supra*, note 69, 25.
91. This motion can be found at: [Online], [socialrightscura.ca/documents/R2HSCC/notice%20of%20motion%20scc.pdf] (December 14th, 2019).
92. Refusal of leave to appeal is frequent when the case seeking leave involves challenges of some sort to income and other material forms of inequality. Sanda Rogers, "Getting Heard: Leave to Appeal, Intervenors and Procedural Barriers to Social Justice in the Supreme Court of Canada", in Sanda Rogers and Sheila McIntyre (eds.), *The Supreme Court of Canada and Social Justice. Commitment, Retrenchment or Retreat*, Markham, LexisNexis Canada, 2011, p. 1.

cause of action — no basis in law — was present in the claim. The motions to dismiss, to repeat, were successful in their argument that it was "plain and obvious" no reasonable cause of action was disclosed and that the issues raised were not justiciable.

Reference to "plain and obvious" in the governments' motions came from current jurisprudence on the issue of dismissal for failure to disclose cause of action. In the leading Supreme Court of Canada case on this issue, *Hunt* v. *Carey Canada Inc.*[93], Wilson J, writing for the Court, stated the test for dismissal as follows: "[A]ssuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? […] [I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'[94]".

In a later case, through the pen of the Chief Justice, the Court cautioned that the power to strike must be carefully deployed: new and novel developments in the law are standard, and valued. Many such developments result from actions initially deemed hopeless and challenged by preliminary motions to strike[95]. Consequently, the Chief Justice stated, "[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial[96]". To this is added the caution: "Actions that yesterday were deemed hopeless may tomorrow succeed[97]". The paragraph from Wilson J's judgment in *Hunt* quoted above continues: "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[98]".

The clear message from the Supreme Court is that dismissal for failure to disclose a cause of action must be wielded in only specific and clear circumstances. It cannot be determinative that the claim at issue has not yet been recognized at law. Consequently, courts are warned to err on the side of generosity toward novel claims, permitting a novel but arguable claim to proceed[99]. Recourse to a motion to strike may stifle new and important developments in the law[100]. And the commitment to a

93. *Hunt*, *supra*, note 63.
94. *Id*., 980.
95. *R*. v. *Imperial Tobacco Canada Ltd*., [2011] 3 S.C.R. 45, 2011 SCC 42, par. 21, McLachlin CJC (hereafter "*Imperial Tobacco*").
96. *Id*.
97. *Id*.
98. *Hunt*, *supra*, note 63, 980.
99. *Imperial Tobacco*, *supra*, note 95, par. 21.
100. *Tanudjaja (CA)*, *supra*, note 29, par. 49, Feldman JA.

progressive, evolving interpretation of our constitutional documents, long a part of Canadian constitutional law, will be undermined[101].

The result in *Tanudjaja* places at risk the principle of constitutionalism: governments rule under the Constitution and to ensure this there must be reasonable opportunity for full assessment of all aspects of government through judicial review[102]. As Cromwell J wrote in *Canada (Attorney General)* v. *Downtown Eastside Sex Workers United Against Violence Society* in the context of the preliminary issue of standing: "state action should conform to the Constitution and statutory authority and […] there must be practical and effective ways to challenge the legality of state action[103]". Dismissal of novel claims frustrates *Charter* scrutiny. It impedes the evolution of our constitution, risking constitutional law that is irrelevant to pressing justice issues about contemporary, emerging patterns of government.

4 Ali Baba and the White Queen

As mentioned, *Tanudjaja* illustrates two further techniques by which social and economic rights claims are weakened: first, entry conditions to judicial review and, second, progressive promises never delivered.

Successful judicial review cases require conformity with the traditions of entry to the judicial arena: "Legal systems and processes have their own incantations that must be uttered, acts that must be performed, and conditions that must be present, before the doors of the courthouse open[104]". Disclosing a cause of action is one of these conditions, as is standing,

101. Indeed, even well- and long-established legal precedent ought not to be dismissed out of hand at a preliminary stage. As the Court stated in *Carter* v. *Canada (Attorney General)*, [2015] 1 S.C.R. 331, 2015 SCC 5, par. 44 : "*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' (*Canada (Attorney General)* v. *Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, par. 42)". Claims that are novel, and thus unresolved, mandate even more flexibility at the lower court level, doubly so in the context of preliminary motions to dismiss.
102. The fundamental principle of constitutionalism as part of the architecture of the Canadian Constitution is set out in *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217.
103. *Canada (Attorney General)* v. *Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, 2012 SCC 45, par. 31.
104. Melinda Harm Benson, "Rules of Engagement. The Spatiality of Judicial Review", in Irus Braverman *et al.* (eds.), *The Expanding Spaces of Law. A Timely Legal Geography*, Paolo Alto, Stanford University Press, 2014, p. 215.

ripeness, and other preliminary issues. While necessary to structure case load and adjudicative conditions, these conditions too often function to ensure that significant challenges to power structures have a hard time getting in the courtroom door.

In elaboration of this idea, Melinda Harm Benson casts the courtroom as a central space of law, entry to which is policed. There can be material barriers (metal detectors), architectural barriers, performative barriers (security guards) but there are also discursive barriers[105]. The last type of barrier, Harm Benson calls "rules of engagement": the incantations, acts, conditions that determine who enters a particular legal arena. Like Ali Baba, the best-known tale in the collection *One Thousand and One Nights*, successful entrants have key words to utter. This requirement is exclusionary — it polices the space of legitimate legal argument.

Courts are, in the words of Harm Benson, one of the "spaces of law[106]". They are "putatively spaces for finding (legal) truth and rendering justice. Access implies the possibility of making claims, being heard, accomplishing redress[107]". Judges, within that space, are gatekeepers, determining what values, experiences, and arguments are recognized[108]. Consequently, Harm Benson describes judicial review as a "*cascading* world-making enterprise[109]". By this she means that what happens in a court of law will have outcomes in other spaces; it helps shape the world. Judicial review, then, is part of the judiciary's "world-making capacities[110]". In courts, and through judicial decisions, "the force of power is channelled one way rather than another[111]".

In *Tanudjaja*, we see particular "rules of engagement" playing a "dispositive role[112]", shortsheeting litigation that sought to redirect how we understand government responsibility for a large system of injustice. As outsiders, the applicants lacked the legal "Open Sesame" for gaining access to a space that promised authoritative manifestation of their reality. Recall that the motions judgment left a 10,000 page evidentiary record unexamined, with an impressive range of expert testimony in it. Exclusion from judicial review, in this case, reinforced marginalization. And, it

105. *Id*., at page 234.
106. *Id*., at page 215.
107. *Id*., at page 234
108. *Id*.
109. *Id*., at page 232.
110. *Id*., at page 220.
111. David Delaney, *The Spatial, the Legal and the Pragmatics of World-Making. Nomospheric Investigations*, Londres, Routledge, 2010, p. 73.
112. M. Harm Benson, *supra*, note 104, at page 229.

tells us, that judges too quick to dismiss cases that challenge too much the norms and limits of past cases, risk stacking the system of judicial review against those who need it the most.

The second maneuvre reinforced in *Tanudjaja* is one that allows the illusion of progressive constitutional law to persist, in the face of constant denial of progressive change. The jurisprudence has teased substantive and material content to the rights of security of the person and equality. But, at every turn where that possibility presents itself, these claims are defeated. It is generally potentially possible, but concretely, in any specific instance, beyond reach.

Lederman J. took as settled law the proposition that section 7 did not permit positive obligations. But, recall this quote from McLachlin CJ's judgement in *Gosselin*: "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[113]". As well, it bears noting that the types of section 7 harms cited in the *Tanudjaja* claim have all been recognized in other Supreme Court of Canada cases[114]. In addition, we are told repeatedly that the interpretive approach to *Charter* rights must be large and liberal, a "generous" account of what a particular right protects[115].

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113. *Gosselin*, *supra*, note 31, par. 83. Arbour J in a separate judgement from the same case argued the point more strongly : "We must not sidestep a determination of this issue [whether section 7 cannot be implicated absent positive state action] by assuming from the start that s. 7 includes a requirement of affirmative state action. That would be to beg the very question that needs to be answered" (par. 319).

114. As Jackman notes, these cases include *New Brunswick (Minister of Health & Community Services)* v. *G (J.)*, [1999] 3 S.C.R. 46 ; *PHS*, *supra*, note 66. M. Jackman, *supra*, note 11, 113, fn. 185.

115. *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, par. 117. More fully, Dickson J (as he then was) wrote for the majority that,

> The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter's* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

In the circumstances of the preliminary motion to dismiss the *Tanudjaja* application, jurisprudence, as captured in this quote, surely requires attentiveness to the notion of generosity, that is, to allow the possibility of actual substantive argument on broader understandings of the right placed in context.

To quote the White Queen: it has been "jam to-morrow and jam yesterday — but never jam to-day[116]". The promise of positive rights — of a constitutional law sensitive to the social and material realities of Canadian society — remains — but it is a promise whose edges are fraying.

Conclusion

Tanudjaja recedes into the past. Why, one might ask, is continued examination of this case important? This paper, I hope, answers that question. The case reveals important lessons and cautions. It is a "perfect storm" of how badly courts can handle social and economic rights claims. And it stands in the way of new attempts to forge progressive constitutional law.

On October 25, 2019, a new *Charter* challenge was filed in the British Columbia Supreme Court. That case, *La Rose* v. *Her Majesty the Queen*, takes on the federal government's failure to restore and ensure a stable climate system[117]. This too is a novel claim. The fifteen claimants are all youth, suffering in various ways the effects of our planet's climate crisis. Like the claimants in *Tanudjaja*, these individuals represent full range of the crisis the Court is asked to appraise. The *La Rose* claimants also name a range of government actions and inactions as the causes of the harms they suffer. Further, the remedial request is that the governments "be required to develop and implement an enforceable plan […] necessary to achieve GHG emissions reductions consistent with the protection of public trust resources subject to federal jurisdiction and the plaintiffs' constitutional rights[118]".

The Government's response to this new challenge is dishearteningly familiar. As in *Tanudjaja*, the government asks, among other things, that the court find the claims non-justiciable and hold that neither section 7 nor section 15 creates positive obligations[119]. The case threatens a simple rerun of *Tanudjaja*. Yet, once again, the issue at the heart of the challenge is large and important.

116. Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, 1993, originally published in 1871, p. 97.

117. The statement of claim in the case is at : [Online], [davidsuzuki.org/wp-content/uploads/2019/10/Statement-of-Claim-2019-10-25-FILED.pdf] (February 4th, 2020).

118. *Id*., par. 9.

119. The Statement of Defence can be found at : [Online], [blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200207_T-1750-19_reply.pdf] (March 4th, 2020).

I have elsewhere ruminated on why the lack of success of social and economic rights claims is not surprising[120]. Judicial reluctance to step outside the bounds of "liberal or neo-liberal conceptions of property and negative freedom[121]" runs strong. As commentators, we must be clear that judges who assert the mythology of law as apolitical and rights as ideally non-distributive and negative are responsible for ensuring that social justice under the *Charter* will never amount to much.

But, in this comment, the animating themes at play are applicant courage and judicial reticence. The applicants' claim in *Tanudjaja* is bold and of a novel cast. But, its focus is on a fundamental justice issue—the denial of housing—and its formulation is necessary to reflect the nuance and complexity of the circumstances that shape and determine this injustice. That courts would shut down consideration of the claim—with the extent of evidentiary and intervenership support the claim had—signals a judiciary spooked by its own *Charter* shadow. More pragmatically, dismissal of this case—and the manner that dismissal took—illustrates well the substantive dangers of preliminary motions to constitutionalism and to the purposive, progressive evolution of the Constitution. Entry conditions to judicial review must not determine that a whole range of substantive social justice issues are barred from one of the spaces of law where "truths" are made and channel out to shape the world. And, at some point, the courts have to deliver on promises made to open up those "truths" to reflect the realities of all Canadians. It will take novel claims, recognized and acted upon, to disrupt the status quo. There is much at stake in debunking the arguments that ease judicial dismissal of the social and economic claims that ask government to address the deep problems of our society and world.

120. M. Young, *supra*, note 27 ; Margot Young, "The Right to Life, Liberty and Security of the Person", in Peter Oliver, Patrick Macklem and Nathalie des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution*, Oxford, Oxford University Press, 2017, chap. 37.

121. R. Leckey, *supra*, note 73, 665.