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Charter Eviction: Litigating Out of House and Home

MARGOT YOUNG*

La décision *Tanudjaja c Procureur général (Canada)* aborde, de façon nouvelle et complexe, la question des droits relatifs au logement en vertu de la *Charte canadienne des droits et libertés*. L'action et l'inaction gouvernementale que l'on caractérise de violations constitutionnelles et les vastes demandes de recours qui s'y retrouvent, reflètent l'aspect « pixelisé » des préoccupations actuelles relatives au logement, un aspect essentiel à la compréhension de la crise de sécurité du logement au Canada. En rejetant la contestation à un stade préliminaire, les cours supérieure et d'appel de l'Ontario risquent de rejeter la *Charte* comme instrument pouvant jouer un rôle relativement aux préoccupations profondes de notre pays en matière de justice sociale. Plus particulièrement, l'invocation judiciaire, sous forme de formule stricte, de préoccupations relatives aux droits positifs et à la justiciabilité, laisse les plus vulnérables d'entre nous sans aucun recours constitutionnel, et ce, plus particulièrement lorsque des questions de justice complexes sont en jeu.

The case of *Tanudjaja v Attorney General (Canada)* takes up the cause of housing rights under the *Canadian Charter of Rights and Freedoms* in a novel and complex way. The government actions and inactions cited as constitutional breaches and the broad remedial requests reflect the “pixelated” picture of housing concerns necessary to understanding Canada's housing security crisis. In dismissing the challenge at a preliminary stage, the Ontario Superior and Appeal Courts risk rendering the *Charter* irrelevant to the deep social justice concerns that cross our country. More specifically, formulaic judicial invocation of concerns about positive rights and justiciability leave the most vulnerable among us constitutionally outside in the cold, particularly when the issues of justice at stake are complex.

THE RECENT STRUGGLE TO ACCESS constitutional justice in the Ontario case of *Tanudjaja v Attorney General (Canada)*¹ marks well the current unsettled state of Canadian constitutional protection for those without adequate housing. The case, along with its novel remedial request, also illustrates the faceted character of housing as a social justice concern. Indeed, the complex nature of housing rights underscores the importance of this case and the applicants' specific and layered remedial request. Yet, before any substantive consideration could be given to the issues raised, the case has foundered: the challenge vacated at the urging of the governments² by a trial

*Professor, Faculty of Law, University of British Columbia. Many thanks to the editors of this journal and to the anonymous reviewers for their thoughtful comments. Funding for the project was received from the Peter Wall Solutions Initiative at the University of British Columbia. I am grateful also to my very capable research assistants Rochelle Collette, Tannis Baradziej, and Malcolm Funt.

¹ *Tanudjaja v Canada (AG)*, 2013 ONSC 5410, 116 OR (3d) 574 Lederer J [*Tanudjaja*].

² See, for example, the Notice of Motion by the Attorney-General of Canada (11 June 2012), online: <<http://www.acto.ca/assets/files/cases/Notice%20of%20Motion%20to%20Strike%20-%20R2H.pdf>>.

court and an appeal court,³ each overly bound to restrictive constitutional narratives. While application for leave to appeal to the Supreme Court of Canada pends, the issues catalyzing the challenge thicken and worsen.⁴

The task this comment takes up is to critique the “eviction” to date of this case from the realm of justiciable constitutional claims. It is my argument that, unless socio-economic rights cases are allowed to proceed on the bases on which this case rests, we will largely confirm the irrelevance of constitutional protection for the most vulnerable in our society. The challenge’s target of a wide range of government action and inaction, and the call for a constitutionally imposed obligation to develop appropriately complex and nuanced ways to respond to the housing crisis, may best lend effective and coherent force to the rights at issue. The casting out of the *Tanudjaja* challenge on preliminary grounds related to remedy and cause of action threatens to expand significantly the uselessness of the *Charter* as a means of addressing some of the most pressing and pervasive social justice concerns of our time. The evidence the applicants bring will be left unconsidered and the governments will face no constitutional pressure to respond to a human rights calamity. Thus, my argument in this paper is specific to the kind of preliminary challenge *Tanudjaja* faces. Without recognition of the legitimacy of challenges of this sort, the key issues raised by housing rights will have no home within *Charter* justice. Early criticisms of the *Charter* as a document stuck in nineteenth century liberalism, blind to material inequality, and thus with no promise of meaningful rights for the economically marginalized, will be confirmed.⁵

I. HOUSING IN CANADA

To state the obvious, “[t]he provision of affordable housing is a basic pillar of a civilized society.”⁶ Among basic needs, housing is clearly front and centre. The case for housing as a key determinant of health, life chances, social inclusion, and well-being has been fully and convincingly made.⁷ From the South African post-Apartheid context, Judge Albie Sachs, when

³ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*, ONCA]. The appeal was argued May 26–27, 2014 at the Ontario Court of Appeal.

⁴ For example, the latest homelessness count in Vancouver shows an increase in unsheltered homelessness in 2014 from 2011. 2014 *Metro Vancouver Homeless Count Preliminary Report*, online: Stop Homelessness <http://stophomelessness.ca/wp-content/uploads/2008/09/Preliminary_release_report_final_April_23_14_to_be_posted.pdf>. See *infra*, text at note 5.

⁵ For an illustration of progressive critiques of constitutionally enshrined rights, see: Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Joel Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” (1991) 70:2 *Can L Rev* 307; Alan C Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38:2 *UTLJ* 278; Andrew Petter, *The Politics of the Charter: The Liberal Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

⁶ William Strange, “The Unintended Consequences of Housing Policy” (2003), online: CD Howe Institute Backgrounder <http://www.cdhowe.org/pdf/backgrounder_75.pdf>.

⁷ The literature making these points is vast. See, for example, this selection of recent reports: Lorna Fox O’Mahony, “The Meaning of Home: From Theory to Practice” (2009) 5:2 *IJLBE* 156 at 157; Margaret Haworth-Brockman & Lissa Donner, “Housing and Health: A Sex and Gender-based Analysis from Manitoba” in Barbara Clow et al, eds, *Rising to the Challenge: Sex and Gender-Based Analysis for Health Planning, Policy and Research in Canada* (Atlantic Centre of Excellence for Women’s Health, 2009) 110; Michael Shapcott, “Housing in Canada” (2010), online: Wellesley Institute <<http://www.wellesleyinstitute.com/publications/new-report-precarious-housing-in-canada-2010/>> [Shapcott, *Precarious*]; Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in*

on that county's Constitutional Court, wrote that those without minimally adequate housing live lives "spent in systematized insecurity on the fringes of organized society."⁸ The Indian Supreme Court links access to housing with full human personhood.⁹ And, in Canada, too, it is acknowledged that it is difficult to do well on any measure of human flourishing without access to housing. The British Columbia Court of Appeal in *Victoria (City) v Adams* referred to the need for shelter for the homeless as involving "the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter."¹⁰ A fixed address is a practical necessity for the realization of citizenship rights.¹¹ The persistence of housing insecurity in the face of such indisputable argument is shameful.

Distinctions between shelter and a "home" are also important pieces of the conversation about housing provision and inadequacy. There is considerable literature on this too.¹² Such an observation signals why adequate housing matters so much and why mere shelter provision is not enough. As Fox O'Mahony states, it is the relationship between the person and her or his home, that "marks 'home' out as different from other types of property."¹³ The "social, psychological and cultural factors which a physical structure acquires through use as a home" stand out.¹⁴ Adequate policy discussion of this issue will note "the intangible and uncommodifiable aspects of housing, most importantly the concept of home."¹⁵ Housing policy that meets our human rights commitments must take this into account.

II. THE RIGHT TO HOUSING

International human rights treaties recognize access to adequate housing as a fundamental human right, prioritizing recognition of housing as a basic requirement of personhood. Thus, the *Universal Declaration of Human Rights* lists housing as a feature of the entitlement to a standard of living adequate for health and well-being.¹⁶ Similarly, Article 11 of the United Nations

Canada: 2014 (Toronto: The Homeless Hub Press, 2014) [Gaetz et al, *Homelessness*]; Stephen Gaetz, *The Real Cost of Homelessness: Can we save money by doing the right thing?* (Toronto: Canadian Homelessness Research Network Press, 2012).

⁸ *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and others* (CCT 22/08) [2009] ZACC 16 (10 June 2009), Sachs J at para 177, as cited in Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford and Portland, Oregon: Hart Publishing, 2013) at 96.

⁹ Hohmann, *supra* note 8 at 176. Hohmann references for example, *Chameli Singh and other state of Uttar Pradesh and others* (1996) 2 SCC 549 (Supreme Court of India).

¹⁰ *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [Adams].

¹¹ Hohmann, *supra* note 8 at 174.

¹² See, for example, Hohmann, *supra* note 8 at 169-177; Lorna Fox, "The Meaning of Home: A Chimerical Concept Or A Legal Challenge?" (2002) 29 JL & Soc'y 580; Jerome Tognolic, "Residential Environments" in Daniel Stokols & Irwin Altman, eds, *Handbook of Environmental Psychology* (New York, John Wiley & Sons, 1987).

¹³ Fox O'Mahony, *supra* note 7 at 157.

¹⁴ Fox, *supra* note 12 at 590.

¹⁵ Hohmann, *supra* note 8 at 169.

¹⁶ This idea has been under development since the latter part of the twentieth century following the World Habitat conferences in Vancouver (1976) and Istanbul (1996). These two international gatherings demonstrated international political recognition that housing is a human right.

The full text of this section of the *Universal Declaration* reads:

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and

International Covenant on Economic, Social and Cultural Rights is understood to guarantee adequate housing.¹⁷ Women's equal right to housing is also protected in Article 14(h) of the *Convention on the Elimination of All Forms of Discrimination against Women*.¹⁸

Considerable guidance is available from international and national commentary on what adequate housing entails. *General Comment No. 4* from the Committee on Economic, Social and Cultural Rights develops what is meant by "adequate" housing. In particular, seven features fill out the concept of adequacy: security of tenure for all forms of housing occupation; provision of basic services, materials and infrastructure; affordability as reflected in percentage of average income level; habitability such that housing provides protection and enough space; accessibility for those with barriers to access; location that is safe, and proximate; and, cultural adequacy reflecting cultural identities.¹⁹ This list is useful to thinking about the requirements of adequacy, indeed, it is necessary to taking seriously the subtleties of the shelter/home connection. But, the United Nations catalogue is a starting place only. As Westendorp points out, these criteria are phrased in a gender-neutral manner. Each, she argues, needs to be more nuanced to take account of the situations women face in procuring adequate housing. For example, Westendorp would expand the list, adding to it the aspects of safety and dignity at home, reflecting concerns about the widespread domestic abuse experienced by women.²⁰

The current housing situation in Canada is information that is neither new nor generally unknown. The argument that there is a made-in-Canada housing emergency has been repeatedly articulated by both domestic and international actors. Report after report documents from a domestic Canadian perspective the range and degree of housing inadequacy that faces too large a number of those resident in Canada.²¹ For example, a 2010 report from the Wellesley Institute states that: "Deep and persistent housing insecurity and homelessness are truly nationwide

the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (10 December 1948) 71 at Article 25.

¹⁷ Article 11(1) states: "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, recognizing to this effect the essential importance of international co-operation based on free consent." *United Nations International Covenant on Economic, Social, and Cultural Rights*, General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> [CESCR].

¹⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249. It is worth noting that this convention protects women's equality rights in the area of housing. It does not establish a free standing right to housing specific to women.

¹⁹ *CESCR General Comment No. 4: The Right to Adequate Housing*, Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

²⁰ Ingrid Westendorp, "What is the Matter with the International Norm?" in Kam-Wah Chan & Patricia Kennett, eds, *Women and Housing: An International Analysis* (Oxon: Routledge, 2011) at 11.

²¹ See for example, CEDAW, Concluding observations, 7 November 2008, CEDAW/C/CAN/CO/7; ICCPR Human Rights Committee, Concluding observations 20 April 2006, CCPR/C/CAN/CO/5; CESCR, Concluding observations, 22 May 2006, E/C.12/CAN/CO/4 - E/C.12/CAN/CO/5; Michael Shapcott, "Homes For All: Social Housing In Toronto And Canada" (2014), online: Wellesley Institute <<http://www.wellesleyinstitute.com/housing/homes-for-all-social-housing-in-toronto-and-canada/>>.

issues—from Iqaluit in the north to St. John’s in the east to Victoria in the west.”²² At the international level, experts have weighed in. The recent report by the then United Nations Special Rapporteur for Adequate Housing referred to a “crisis of homelessness and inadequate housing” in Canada.²³ In a country as wealthy, and with such a high general standard of living as Canada, one is rightly appalled that our governments allow this degree of homelessness and housing insecurity to continue. We should feel a principled impatience for change.

Canada has no national, fixed definition of homelessness. The Canadian Mortgage and Housing Corporation (CMHC), Canada’s national housing agency, defines housing affordability as spending less than 30 percent of before-tax household income on housing costs.²⁴ This definition thus identifies households in “Core Housing Need” as households where more than 30 per cent of pre-tax income is spent on shelter costs.²⁵ In 2010 the incidence of Core Housing Need was 13.2 per cent for urban households, up from 12.3 per cent in 2007.²⁶ Over the six year period from 2005 – 2010, 17.5 per cent of urban individuals spent at least one year in Core Housing Need (one quarter of whom were in Core Housing Need for four out of those six years.)²⁷ Lone-parent households and one-person senior female households are the household types with the highest Core Housing Need. For these and other low income households, the private rental housing market typically requires considerably more than 30 per cent of income. There are too few private and public rental units that are affordable and adequate. The “dominos fall” such that those with the fewest resources scramble for a shrinking supply of affordable, cheap housing.²⁸

Individuals respond to housing insecurity in a range of ways. Many households react to the high and unreachable cost of housing by consuming bad housing.²⁹ Women, in particular, may be unable to leave abusive domestic situations.³⁰ Younger women will trade sex for shelter.³¹ Families live in spaces that are too small, with mould or infestations. Households in

²² Shapcott, *Precarious*, *supra* note 7.

²³ 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, Addendum, *Mission to Canada*, 9 to 22 October 2007, A/HRC/10/7/Add.3 17 February 2009 at para 32.

²⁴ For more information about the CMHC, see online: CMHC <<https://www03.cmhc-schl.gc.ca/catalog/productList.cfm?cat=123&lang=en&fr=1407434152545>>.

²⁵ This definition itself is subject to some critical discussion. The significance, or impact, of 30 per cent of household income spent on housing costs will vary given overall household income and specific needs certain households may have. For example, very high household incomes can accommodate proportionally high housing costs in ways low or medium incomes cannot. And, very low income households with other sorts of special needs expenses may find an output of, say, 20 per cent of household income on housing to be unaffordable.

²⁶ CMHC, “Executive Summary”, *Canadian Housing Observer 2013* at 1-10, online: CMHC <<https://www03.cmhc-schl.gc.ca/catalog/productDetail.cfm?cat=122&itm=25&lang=en&fr=1407464767702>> [*Canadian Housing Observer 2013*].

²⁷ *Canadian Housing Observer 2013*, *supra* note 26 at 6–4.

²⁸ Penny Gurstein & Margot Young, “Just Housing Provision: Contested Urban Space and Resource Distribution.” Draft paper on file with author.

²⁹ Strange, *supra* note 6 at 1.

³⁰ For a discussion of this in relation to residential tenancy law, see West Coast Legal Education and Action Fund, *Briefing Note: Amending the Residential Tenancy Act to Protect Victims of Domestic Violence*, online: LEAF <[http://www.westcoastleaf.org/userfiles/file/Amending%20the%20RTA%20to%20Protect%20Victims%20of%20Violence%20-%20Briefing%20Note%20\(Apr%202014\).pdf](http://www.westcoastleaf.org/userfiles/file/Amending%20the%20RTA%20to%20Protect%20Victims%20of%20Violence%20-%20Briefing%20Note%20(Apr%202014).pdf)>.

³¹ Shyanne Reid, Helene Berman & Cheryl Forchuk, “Living on the Streets in Canada: A Feminist Narrative Study of Girls and Young Women” (2005) 28:4 *Issues in Comprehensive Pediatric Nursing* 237.

core housing need are likely to compromise full and dignified involvement in Canadian society in exchange for maintaining some form of housing. And some, simply, go homeless.

Vancouver serves as a good example of the range of Canadian urban housing circumstances at its most extreme. Clearly, Vancouver has a homelessness problem. This is often discussed; in many neighbourhoods of Vancouver it is hard to miss. The latest Homelessness Count took place in the spring of 2014 and showed that Vancouver currently has the highest homeless population since records have been kept. A total of 1,803 people identified as homeless, with 536 living on the street and 1,267 in shelters.³² More generally in Vancouver, the incidence of Core Housing Need is 20.1 per cent, the highest in urban Canada.³³

Accompanying this situation as it plays out across Canada is a general absence of effective governmental strategy to reduce homelessness and housing insecurity at the federal and provincial levels.³⁴ In 2004, two Canadian housing scholars wrote that, “Canada’s housing system is now the most private-sector, market-based of any Western nation, including the United States.”³⁵ The Canadian policy profile that shapes this picture from a decade ago certainly has not changed. Indeed, the path forward has been even more so one of sustained federal government withdrawal from the business of housing provision.³⁶ In 2006, international human rights expert members of the United Nations Committee on Economic, Social and Cultural Rights called for Canada to,

implement a national strategy for reduction of homelessness that includes measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with ICESCR standards.³⁷

Efforts have been made to advance such a national strategy in Parliament, one that reflects the human rights focus of the Committee’s recommendation. Twice, a private member’s bill has been introduced into the House of Commons that would obligate the government to develop a national strategy. And, twice, the private member bill in question has been effectively vanquished.³⁸ In the current Conservative Party majority controlled Parliament, a third attempt would be equally futile. The “political willingness and boldness at all levels of government” to implement a fix to the failed system are nowhere in evidence.³⁹

³² Greater Vancouver Regional Committee on Homelessness (2014), “Results of the 2014 Homeless Count in the Metro Vancouver Region,” online: <<http://vancouver.ca/files/cov/Results-of-the-2014-Metro-Vancouver-Homeless-Count-July-31-2014.pdf>>.

³³ Toronto is 17.9 per cent and Halifax is 14.7 per cent. See *Canadian Housing Observer 2013*, *supra* note 26.

³⁴ One province, Alberta, has implemented a strategic plan called “A Plan for Alberta: Ending Homelessness in 10 Years”, online: <http://humanservices.alberta.ca/documents/PlanForAB_Secretariat_final.pdf>. For an overview of government action and inaction see the affidavit of Michael Shapcott, Director, Wellesley Institute, online: <<http://www.wellesleyinstitute.com/wp-content/uploads/2012/05/Afd.-of-MICHAEL-SHAPCOTT-Director-Affordable-Housing-and-Social-Innovation-Wellesley-Institute-FINAL.pdf>>.

³⁵ David Hulchanski & Michael Shapcott, *Finding Room: Options for a Canadian Rental Housing Strategy* (Toronto: Centre for Urban and Community Studies, 2004) at 6.

³⁶ Gaetz et al, *Homelessness*, *supra* note 7.

³⁷ CESCR, Concluding observations, 22 May 2006, E/C.12/CAN/CO/4 - E/C.12/CAN/CO/5, at para 62.

³⁸ The first attempt died on the order paper when a general election was called. The second attempt was defeated at second reading by the coordinated governmental member vote against it.

³⁹ Strange, *supra* note 6 at 1.

Government default cannot be justified by reference to the difficulty of the issue. Certainly, the affordability gap so many groups encounter does not permit easy resolution. Is housing too expensive or is income too low?⁴⁰ Solutions will not be cheap and simple. But, options abound as to policy choices that could address the housing crisis. For example, changes to either housing costs or to individual income and purchasing power generate two sets of different policies, each from different ends of the supply/demand model, aiming at the same outcome, increased housing affordability. Some argue for supply-based approaches of construction subsidies and social housing; others for more demand-based policies, such as shelter subsidies and income transfer programmes.⁴¹ A wide range of potential policy solutions beckons. And, while what is best and at what level of government—federal, provincial, or municipal or some combination of all three—it should be implemented, are complex and open questions,⁴² none of this difficulty justifies government inaction or neglect.

This observation about multiple policy options (and the earlier discussion of what “adequate” might mean in the context of housing) foreshadows my next point: desired housing outcomes must be appropriately and variously nuanced to the populations most vulnerable to housing insecurity. The groups experiencing housing inadequacy in Canada are diverse. Housing insecurity, and the forms it takes, vary. While street homelessness is a visible and stark reminder of this injustice, other experiences of housing insecurity—crowded shelter, insecurity of tenure, unhealthy housing, “couch-surfing”—are also concerning, deserving significant policy attention. Thus, homelessness counts give a picture of part of the problem. They not only undercount the sheltered and unsheltered homeless, but, by definition, ignore a fuller range of housing insecurity. And, variety is also reflected by the diversity of groups in Canadian society that disproportionately face housing and shelter crises. Housing insecurity as Indigenous peoples experience it on reserve needs specific analysis. Persons with disabilities, similarly, have particular, unique concerns. Youth, new immigrants, families, lone-parent families add to this list of socio-economically configured interface with Canada’s housing market and supply. It is clear that a minimum number of considerations may pertain to what constitutes adequate housing but these features will be achieved in different ways for different groups of individuals. Indeed, the list generated by CESCR, as already mentioned, may need expansion in reference to many groups’ specific socio-economic features. Ensuring effective and adequate housing provision requires a prismatic approach: “the general picture [must] be fractured into distinct images of housing as the various marginalized and disadvantaged groups in Canada experience it.”⁴³ The multiplicity of housing needs and of responses to housing insecurity requires a full, creative, and coordinated range of policy responses.

Capturing exactly how Canada’s housing crisis is compounded by the diversity of Canadian society goes beyond the scope of this paper. But, because this observation is critical to the argument of this paper, I do want to provide one example of how housing policy must be responsive to particular groups’ needs, experiences, and situations. The illustration I use looks to gender and how this identity feature configures housing analysis.

⁴⁰ See the discussion in Strange, *supra* note 6 at 4.

⁴¹ Strange, *supra* note 6 at 4.

⁴² Strange, *supra* note 6 at 7.

⁴³ Gurstein & Young, *supra* note 28 at 8.

Without doubt, the disadvantages and harms of inadequate housing are, like much else in society, gendered.⁴⁴ How women are affected and how they cope with inadequate housing reflect the options, limitations, and structures that inflect patriarchy in 21st century Canada. Two scholars recently wrote: “[h]ousing systems and opportunities are embedded within structured and institutionalised relations of power which are gendered.”⁴⁵ These gendered relations of power shape policy, standardize institutions, and configure social programmes. Thus, in 2009, the United Nations Special Rapporteur on Adequate Housing heard evidence from Canadian groups that: “The lack of adequate and secure housing particularly impacts women who are disproportionately affected by poverty, homelessness, housing affordability problems, violence and discrimination in the private rental market.”⁴⁶ More generally, feminist scholars detail “concerns about women’s place in the contemporary post-industrial city.”⁴⁷ The “gendered social geographies”⁴⁸ that shape and are shaped by housing options are critically essential to the effective setting and assessment of housing policy.

Statistics tell this gendered tale about housing. Some examples follow. Sexual abuse and domestic violence are major causes and consequences of homelessness among women.⁴⁹ One study found that one in five homeless women interviewed reported having been sexually assaulted while on the streets or homeless.⁵⁰ A recent Toronto study found that 37 per cent of the homeless women interviewed had been physically assaulted in the prior year and 21 per cent had been sexually assaulted or raped one or more times in the same time period. Homeless women were ten times more likely to be sexually assaulted than homeless men, more likely to have serious physical health problems, and twice as likely to have received a mental health diagnosis.⁵¹ Similarly, in her study of homeless women in Ottawa, Halifax and Vancouver, Neal found that a significant number had experienced violence while living on the street: “they have been clubbed, raped, molested, and taken advantage of while seeking protection from harm.”⁵² Women disproportionately experience discrimination in the rental market, discrimination based on poverty, receipt of social assistance, race, marital status, and intimate violence.

The affordability gap is a huge motor for housing insecurity. Here, again gender tells. Men earn more than women; women are disproportionately among the poorest of the poor. While women’s involvement in the paid labour force steadily rises, making a significant contribution to Canada’s economic growth, this involvement, nonetheless, is at lower wages than

⁴⁴ Ingrid Westendorp, *Women and Housing: Gender Makes A Difference* (Cambridge: Intersentia Publishers, 2007).

⁴⁵ Kam-Wah Chan & Patricia Kennett, “Introduction: Women and Housing Systems” in Kam-Wah Chan & Patricia Kennett, eds, *Women and Housing: An International Analysis* (Oxon: Routledge, 2011) at 1 [Chan & Kennett, *Introduction*].

⁴⁶ Women’s Housing Equality Network, Submission for the Universal Periodic Review of Canada, September 2008.

⁴⁷ Leslie Kern, *Sex and the Revitalized City: Gender, Condominium Development, and Urban Citizenship* (Vancouver; University of British Columbia Press, 2010) at 1.

⁴⁸ *Ibid* at 5.

⁴⁹ Rusty Neal, “Voices: Women, Poverty and Homelessness in Canada” (2004) at 31, online: National Anti-Poverty Organization <http://ywccanada.ca/data/research_docs/00000275.pdf>.

⁵⁰ Erika Khandor & Kate Mason, “The Street Health Report 2007” (2007), online: Street Health <<http://www.streethealth.ca/downloads/the-street-health-report-2007.pdf>>.

⁵¹ The Street Health Report 2007, “Women & Homelessness, Research Bulletin #2” (2007) at 3, 5, online: Street Health <http://ywccanada.ca/data/research_docs/00000019.pdf>. See also Emily Paradis et al, *Better Off In A Shelter?: A Year of Homelessness & Housing Among Status Immigrant, Non-Status Migrant, & Canadian-Born Families* (Toronto: University of Toronto Centre for Urban and Community Studies, 2008).

⁵² Neal, *supra* note 49 at 10.

those paid men. Women are, as a recent study looking at employment in Canadian cities notes, three times as likely to work in part-time jobs, and nearly twice as likely to work for minimum wages compared to men.⁵³ Sole female parents and elderly women register in higher numbers in this group.⁵⁴ Not surprisingly, then, these groups also rank, as already noted, as in high Core Housing Need.⁵⁵

Other scholars, more conceptually, point to how women's gendered position in society has also meant that women, as disproportionately the "keepers of the hearth," have "long understood the meaning of housing beyond provision of shelter—that [housing] has unique economic, psychological, and symbolic significance with profound impacts on a family's well-being and quality of life."⁵⁶ And, because of women's social location, the concrete issues of safety, adequacy, proximity to work/child care, transportation, affordability all reflect social orders structured by gender and by women's unique placement ideologically in public and private orderings of space.

Kam-Wah Chan and Patricia Kennett, the two scholars referred to above, identify three dominant discourses about gender and housing. Each discourse captures an important element of the import of gender in this area and, consequently, each deserves a quick review. The first discourse comes out of the urban planning tradition where feminist planners, concerned how housing design and the lived environment impact women, have argued since the nineteenth century that improved housing and urban design could free women from many aspects of their daily subordination.⁵⁷ Today, this perspective has matured and now looks more complexly at the relationships between gender, space, and housing in important ways. Susan Fainstein and Lisa Servon, theorists cited by Chan and Kennett, look to social transformation in power relations from within "a planning/social policy context [to] lay the groundwork for the creation of 'non-sexist' cities."⁵⁸

The "housing welfare discourse," a second approach, is located by Chan and Kennett as an offshoot of the "welfare feminism" of the 1970s and the 1980s with its focus on social welfare as the "mechanism to achieve gender equality."⁵⁹ Availability of women-specific housing resources and increasing housing-related services for women are policy objectives of this strand. The literature from this perspective thus identifies a number of special housing needs for women. Representative proponent, Roberta Woods, argued in 1994 about the need for research about

⁵³ Kate McInturff, "The Best and Worst Place to be a Woman in Canada: An Index of Gender Equality in Canada's Twenty Largest Metropolitan Areas" (2014) at 7–8, online: Canadian Centre for Policy Alternatives <https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/04/the_best_and_worst_place_to_be_a_woman_in_canada.pdf>.

⁵⁴ Vancouver, in many ways, represents a useful snapshot of women's equality issues in a large Canadian city. Roughly equivalent to the national average, Vancouver's employment rates show 66 percent of men and 58 percent of women employed. Around 42 percent of working women hold full-time jobs. The wage gap between women and men, however, is among the biggest in Canada's urban centres: women earn 30 percent less than their male peers. Data taken from McInturff, *supra* note 53 at 43.

⁵⁵ See note 25.

⁵⁶ Elizabeth A Mulroy, "Women and Housing Affordability in the United States," in Chan & Kennett, *supra* note 20 at 52.

⁵⁷ Chan & Kennett, *Introduction*, *supra* note 45 at 2. Chan & Kennett tell of Melusina Peirce who, in 1870, proposed neighbourhood kitchens surrounded by kitchenless housing to facilitate housework cooperatives with the goal of reducing women's household burdens and confinement in the home.

⁵⁸ Susan S Fainstein & Lisa J Servon, "Introduction," in Susan S Fainstein & Lisa J Servon, eds, *Gender and Planning: A Reader* (New Jersey: Rutgers University Press, 2005) at 7.

⁵⁹ Chan & Kennett, *Introduction*, *supra* note 45 at 3.

women in relation to the delivery and management of housing services, ensuring a gender specific perspective on “housing provision, production and management.”⁶⁰

The last approach is the one favoured by Chan and Kennett: the social constructionist discourse. An offspring of neo-Marxism, critical theory and postmodernism, this approach looks at how gender inequality is constructed (a term deployed both metaphorically and practically) in the housing system.⁶¹ Critique focuses on gender-blind assumptions central to housing policies, making the basic theoretical observation that housing is never merely “bricks and mortar.”⁶² Homeless women or lone parent women, for example, are disadvantaged by and unreflected in policy as dominant conceptions of the problem remain gender blind at the centre. Marginal tinkering to add on to mainstream policy or projects some accommodation⁶³ for women’s “special needs” fails to undo the central gender hegemony of the housing system.⁶⁴ For an illustrative argument, Leslie Kern writes that,

[w]omen’s housing needs, whether as heads of households or members of a two-adult household, have been subsumed into what is largely a heteronormative family policy, wherein women’s housing needs were considered merely a corollary of the male breadwinner’s needs. Women’s concentration in low-end rental and other types of alternative tenure was viewed as a transitional phase in women’s housing careers rather than a genuine social and economic pattern that deserved policy consideration.⁶⁵

More generally, and not with gender specificity, housing scholar Jessie Hohmann writes that: “...the way identity is recognised, socially and legally, is often mediated through relationships with the house and home, both as a physical, material thing, and as an ideological construct.”⁶⁶ Hohmann reinforces this contention at another point of her argument when she argues that housing policies can be “tools of social reorganization, even social engineering.”⁶⁷

Hohmann’s book, *The Right to Housing: Law, Concepts, Possibilities*, has been a useful reference. The book contains an interesting discussion highlighting how adequate housing provision for women is complicated by the specific ideological framing of women as homemakers. She notes that, even when housed, women can be practically homeless. The household’s association with the nuclear family, and women’s role in that family form, accord women a version of “privacy...more akin to privation than refuge.”⁶⁸ Linked then to this observation are the reams of feminist research showing how our legal and social systems’ traditional understandings of the home as sanctuary, definitionally shielded from public scrutiny, have contributed to significant violence and deprivation for women within the home. Hohmann’s discussion thus illustrates just how complexly and profoundly gendered are our dominant notions

⁶⁰ Roberta Woods, “Introduction” in Rose Gilroy & Roberta Woods, eds, *Housing Women* (London: Routledge, 1994) at 7.

⁶¹ Chan & Kennett, *Introduction*, *supra* note 45 at 3.

⁶² *Ibid.*

⁶³ Pun intended.

⁶⁴ Chan & Kennett, *Introduction*, *supra* note 45 at 4.

⁶⁵ Kern, *supra* note 47 at 66.

⁶⁶ Hohmann, *supra* note 8 at 167.

⁶⁷ *Ibid* at 183.

⁶⁸ *Ibid* at 185.

of housing arrangements. This type of social constructionist argument casts critical light on traditional notions of adequacy. It also, Hohmann would argue, makes the case for framing women's housing issues in terms of a right to adequate housing: the individualistic frame of that entitlement claim pulls women's needs out from within the private reaches of the "family," thus, she argues, challenging the traditional and "cellular form" of society.⁶⁹ We can, through such a political claim, "interrogate" the linkage of "woman" and "home" and thus radically recast women's housing concerns from private demands to public obligations.⁷⁰ This is, she argues, part of a strategy for equal social citizenship for women.

Interestingly, this conversation has elements consonant with the notion of substantive equality, as that notion has been developed by feminist legal scholars in Canada.⁷¹ The housing analysis advocated here is sensitive to how difference and diversity are manifested and how each are or are not reflected and engrained in social policy and law. This conceptualization allows for greater diversity than gender alone can signify, recognizing that women are also identified by race, ability, culture, and class, for example. Chan and Kennett thus argue that the social constructionist approach can be sensitive not merely to cultural meaning but also to material deprivation and outcome: "housing design, access to housing resources, and housing ideology are all part and parcel of the social construction process."⁷² Urban theorist Leslie Kern in a marvelous book on marketing condominiums to women writes in a similar vein about neo-liberal urbanism's reinscription through a city's built spaces of "particular identities and subject positions."⁷³ Like Hohmann, Kern sees the ways in which housing provision, and the ideological assumptions underlying it, shape in particular ways women's opportunities for equal inclusion, or gendered exclusion, in the city.

The discussion about gender, and how it matters in relation to housing provision and policy, shows us that housing provision necessarily engages rights of gender equality as captured by both section 7 and section 15 of the *Charter*. One author, to this end, writes that "two decades of quantitative and qualitative research into women's position in the housing market have produced a picture of entrenched, systemic disadvantage."⁷⁴ And, we know that the specific vulnerabilities attached to being female in our society are amplified, exacerbated, and made more intransigent by the lack of adequate housing documented across the country. It also means that any remedial response to this problem must be sensitively and variously configured to take into account such evidence of intersectionality and diversity in vulnerability and need. Any plan or solution to women's housing insecurity must take into account the particularities of women's experiences across a wide range of diverse circumstances

⁶⁹ *Ibid* at 187, quoting Frederick Engels, "The Origin of the Family, Private Property, and the State" in Robert C. Tucker, ed, *The Marx-Engels Reader*, 2nd ed (New York: Norton and Company, 1978) at 744.

⁷⁰ Hohmann, *supra* note 8, at 188–89.

⁷¹ See, for example, Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 Sup Ct L Rev (2d) 183; Margot Young, "Blissed Out: Section 15 at Twenty" (2006) 33 Sup Ct L Rev (2d) 45; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006); Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v British Columbia (Attorney General)*" (2004) 16 Can J Women & L 165.

⁷² Chan & Kennett, *Introduction*, *supra* note 45 at 5.

⁷³ Kern, *supra* note 47 at 4.

⁷⁴ Kern, *supra* note 47 at 65.

The simple conclusion for wider policy? Housing insecurity at large—its causes, manifestations, and potential solutions—is a necessarily “pixelated” picture. A general concern about and broad characterization of the housing issue are possible but these must rest on and devolve actively into recognition of complexity and diversity. No simple, single policy solution is desirable, or possible. Housing provision has long been cited as a “wicked problem.”⁷⁵ Solutions to the problem at large are necessarily multi-faceted and require nuanced calibration across a number of economic, social, and cultural fronts. Addressing housing concerns for one demographic may ignore, complicate, even frustrate, solutions required for other groups. And judicial orders, unless nuanced to this reality and reflective of a moving, shifting picture, rather than simple snapshots, will not fix the problems. Absent this sort of fractured, multiple, and inclusive lens, one risks the “decontextualized and abstract interpretations of the right [to housing] that currently exist in the majority of legal interpretations of the right.”⁷⁶ Or, as Hohmann puts it, housing provision too simply understood might provide a “floor...but [also] a ceiling” to equality and inclusive social citizenship.⁷⁷ This conclusion to the first half of the paper takes us nicely to consideration of the *Tanudjaja* case.

III. TANUDJAJA V ATTORNEY GENERAL (CANADA)

The first parts of this paper have touched on key points of the context out of which the constitutional challenge of the *Tanudjaja* case arose. More specifically, the argument has been made that housing policy that effectively addresses Canada’s housing crisis will necessarily be complex and complicated, orchestrated with different groups in mind, and involving a range of programmes, fiscal measures, and levels of governments. With this initial discussion in mind, I move now to discuss briefly the challenge the *Tanudjaja* applicants brought and the bases on which the preliminary motions to dismiss the challenge were successful at the Ontario Superior Court of Justice and, subsequently, at the Ontario Court of Appeal. This conversation sets up my final contention that the trial judgement, if left standing, leaves very little space for our most serious, and thus large and complex, social justice failures to have adequate constitutional register. My goal is not to canvas and critique fully the trial court judgment. Rather, the slice offered is one that focuses on the key dangers of the trial judgment, and the Court of Appeal’s support of that judgment’s conclusion on justiciability, to progressive *Charter* development in the area of social justice and rights.

The *Tanudjaja* case was brought by four individual applicants, all of whom are in circumstances of significant housing insecurity. Their experiences reflect the range of groups most vulnerable to housing inadequacy: sole female parents, the disabled, low-income families, and the very poor.⁷⁸ These individuals were joined in the application by an Ontario based non-

⁷⁵ Gurstein & Young, *supra* note 28, at 6.

⁷⁶ Hohmann, *supra* note 8 at 197. On the complexity of capturing fairness concerns in social justice resolution see, Natasha Affolder, “Transnational Conservation Contracts,” (2012) 25 *Leiden J of International L* 443 at 455.

⁷⁷ *Ibid* at 217.

⁷⁸ 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 and uncomfortable start to the judgment. *Tanudjaja*, *supra* note 1 at para 13.

profit housing advocacy organization, the Centre for Equality Rights in Accommodation.⁷⁹ Several groups successfully sought intervener status for the hearing of the preliminary motion (and, subsequently, for the appeal to the Court of Appeal).⁸⁰ All argued in favour of the case proceeding and such extensive intervener activity at this preliminary stage signals the importance social justice rights groups across Canada have assigned the challenge.

The initiating application was issued 26 May 2010. The claim can be simply summarized: the *Canadian Charter of Rights and Freedoms*⁸¹ must be read to impose an obligation on the governments of Canada and Ontario each to have in place policies and strategies ensuring affordable, adequate, and accessible housing for all.⁸² Yet, the Applicants stated, the governments have created and sustained conditions that lead to, support, and sustain homelessness and inadequate housing. As such, these governments are in breach of section 7 and section 15 of the *Charter*.

Three important and interconnected components make up the rights claims. First, the Applicants argue that the governments have instituted changes to existing legislation, policies, programs, and services that have resulted in homelessness and inadequate housing. Second, it is claimed that new policies were implemented without adequate and constitutionally required efforts to address impacts on housing access and on vulnerable group's access, in particular, to adequate housing. Consequent negative effects on homelessness and housing insecurity have gone unaddressed or unameliorated. Third, and finally, the argument maintains that neither government has undertaken appropriate strategic coordination to ensure that government programmes protect the homeless or those most at risk of homelessness.⁸³ This mix of action and inaction imperils life, liberty, and security of the person for those without adequate housing in a fundamentally unjust manner, and, as well, infringes the right to substantive equality for these same individuals. The individual applicants' various circumstance and histories illustrate these negative, rights-infringing outcomes.

The remedial order requested reflects the tripartite nature of the constitutional wrongs claimed and itself has three distinct elements. First, and most direct, was the request that the court issue a series of declarations detailing how the governments are in breach of their constitutional obligations under sections 7 and 15, including by creating conditions of housing insecurity and failing to implement effective strategies aimed at reducing and eliminating housing insecurity. Second, the Applicants sought judicial orders that housing strategies be developed and implemented according to a range of conditions and policy parameters. These considerations involve such things as consultation with affected groups and various accountability measures⁸⁴ key to effective rights implementation. Third, the Applicants asked

⁷⁹ 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 online: <<http://www.equalityrights.org/cera/>>.

⁸⁰ These groups were: Amnesty Canada, ESCR-Net Coalition, David Asper Centre for Constitutional Rights, Charter Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, and Justice for Girls.

⁸¹ *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.

⁸² This was also the opinion of international human rights experts with respect to Canada's international human rights commitments. *Ibid.*, text at XX.

⁸³ *Tanudjaja*, *supra* note 1 at para 16 [*Applicant's Amended Application*].

⁸⁴ Timetable, reporting and monitoring regimes, outcome measurements and complaints mechanisms.

that the court retain supervisory jurisdiction, that is, the court administer the judicial orders and oversee government compliance in light of declared constitutional obligations.⁸⁵

The response of the Attorneys General of Canada and Ontario was to bring motions to dismiss the application. Both governments argued that, among other things, it was “plain and obvious” that no reasonable cause of action was disclosed and the issues raised were not justiciable. On the basis of the motions, the court dismissed the application.⁸⁶

Justice Lederer wrote the decision on the preliminary motions, employing a number of recurring themes determinative of the dismissal: breadth of considerations relevant to the policies and strategies challenged by the Applicants; no precedent for rights to housing; radical change requested in *Charter* law; imposition on the public purse; and institutional boundaries. Two themes stand out: no protection for positive rights and the non-justiciability of the challenge. The motion judge’s handling of each shows a failure to appreciate the nature of rights—conceptually and jurisprudentially.⁸⁷ The judgment also ignores the wise caution that the approach to *Charter* rights must be a large and liberal one; it is presumptively problematic to foreclose discussion at a preliminary stage.⁸⁸ There is, by the way, some irony to this judgment. Dismissal requires that it is “plain and obvious” that there is no cause of action. The judgment is 56 pages long: a lengthy argument on the merits to show there is no argument on the merits.

IV. NEGATIVE AND POSITIVE RIGHTS

Lederer J’s judgment engages considerably with case law in reference to both section 7 and section 15. But, common across these two discussions is the insistence that under neither right are positive government obligations located: “No positive obligation has, in general, been recognized as having been imposed by the *Charter* requiring the state to act to protect the rights it provides for.”⁸⁹ That is, to paraphrase the Judge, to the extent that the Applicants are citing government failure to act as a *Charter* infringement, their arguments must be unsuccessful.

The distinction between positive and negative rights has been written about extensively and is a common referent in Canadian and American case law. Academic commentary notes that the distinction captures no clear division with respect to rights characterization.⁹⁰ Most rights,

⁸⁵ *Applicant’s Amended Application*, *supra* note 82 at 3–4.

⁸⁶ For the full text of each motion, and other relevant documentation in the litigation, see online: <<http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness.html>>.

⁸⁷ This point is explored in more detail in the text that follows.

⁸⁸ Also imperilled, as the appeal factum for the Women’s Legal Education and Action Fund’s intervention at the Court of Appeal level states, is the principle of constitutionalism as articulated by the Supreme Court in the *Secession Reference*. Every state action must accord with the Constitution and there must be reasonable opportunity for full assessment through judicial review. As Cromwell J wrote in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 31, on public interest standing: “state action should conform to the *Constitution* and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada.”

⁸⁹ *Tanudjaja*, *supra* note 1 at para 103.

⁹⁰ Stephen Holmes & Cass B Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton & Company, 1999); Martha Jackman, “Charter Remedies for Socio-Economic Rights Violations: Sleeping under a Box?” in Justice Robert J Sharpe & Kent Roach, ed, *Taking Remedies Seriously* (Montreal: Les Editions Yvon Blais, 2009); *Vienna Declaration and Programme of Action*, UN Doc A/CONF 157/23 (12 July 1993); *Montreal*

even some of the most classical civil and political rights long enforced by our courts, require a mix of government forbearance and government action. The right to vote, say, requires not merely the absence of barriers to voting but proactive (and costly) establishment of electoral infrastructure—setting up electoral commissions, polling stations, hiring electoral officials, and so on. All of these have considerable impact on government resources, involving complex government programmes and legislation. So, while some analytical usefulness attaches to thinking about what type of government responses a particular right requires, it is a mistake to fail to acknowledge that most rights require a bundle of both government withdrawal and government provision. Thus, Louis Arbour, when United Nations High Commissioner of Human Rights, urged moving away from such “simplistic or categorical distinctions.”⁹¹

Too many Canadian judges (but not all⁹²) miss this point. Those who give too much credence to the distinction, using it to provide a rigid typology of rights that can or cannot be subject to judicial enforcement, miss important insights about rights protections. They “short sheet” *Charter* claimants without any sound analytic basis. This is because they fail to realize that so many rights that are standard fare for judicial enforcement are no less political or “positive” than those socio-economic rights currently under dispute. The older, more classic, rights have simply, through the accretion of tradition, been lifted above “the fray of contestation.”⁹³

Most critically for the applicants’ case and for this comment, Lederer J’s use of the distinction between positive and negative rights sets up an understanding of *Charter* rights protection that ensures little constitutional space for social justice struggles. Policy solutions for resolution of Canada’s housing emergency widely require government programmes and spending. No housing advocates call for more government pull-out in the area of housing provision. Absent judicial willingness to recognize positive *Charter* obligations, our *Charter* will be mostly mute on the injustices of widespread homelessness and inadequate housing.

V. JUSTICIABILITY

Justiciability issues focus on the institutional appropriateness of a claim for judicial review. With the advent of the *Charter*, and its increasing invocation by social activists frustrated by political blind alleys, the issue of justiciability has also been the focus of much judicial and academic commentary.⁹⁴ Lederer J raises his concerns about this issue in relation both to the substantive

Principles on Women’s Economic, Social and Cultural Rights (December 2002), online: International Federation for Human Rights <http://www.escr-net.org/sites/default/files/Montreal_Principles_-_ENGLISH_0.doc>.

⁹¹ Louise Arbour, “Freedom From Want: From Charity to Entitlement” (LaFontaine-Baldwin Lecture, delivered at the Capitoile de Québec, 4 March 2005), online: UN Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E>>.

⁹² See, for example, the following passage from the dissent of Justice Bastarache in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at para 218: “The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions.”

⁹³ Hohmann, *supra* note 8 at 237.

⁹⁴ See, e.g., Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge: Oxford, 2012); David Wiseman, “Taking Competence Seriously” in Margot Young et al,

rights claims about section 7 and section 15 and to the character of remedy requested. His conclusion, in both regards, is that,

... the application is misconceived. There is an inherent tension between, [sic] the “institutional boundaries” that, on one hand, define the authority of the Legislature and, on the other hand, determine the responsibility of the courts to protect the substantive entitlements the *Charter* provides...⁹⁵

The argument appears to have two components. First, Lederer J states that the *Charter* does not empower courts to “decide upon the appropriateness of policies underlying legislative enactments.”⁹⁶ What he means, exactly, by this is not clear. But Lederer J would have done well to attend to what the Supreme Court wrote in *Canada (Attorney General) v PHS Community Services Society*:

Finally, the issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. While it is for the relevant governments to make criminal and health policy, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*. The issue is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use, but whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.⁹⁷

Policy decisions are not immune from Charter review. True, PHS had concrete state action at issue—the statute and the Minister’s refusal of exemption—but as the Court said in that case the question is the impact on claimant rights by the government. The concern in either case is not about challenging policy per se, in the abstract.

The second element of Lederer J’s argument is about the breadth and number of policies at issue under section 7 and section 15 and over which remedial supervision is requested. Lederer J seems confounded by the fact that no single government programme or law fronts the challenge. He concludes that the challenge points to so many programmes that what the Applicants require is, baldly, “consideration of how our society distributes and redistributes wealth.”⁹⁸ This is, he continues, an important set of questions “but the courtroom is not the place for their review.”⁹⁹

One might think that concerns about judicial activism and inappropriate judicial meddling with legislative prerogatives would be assuaged somewhat by the open ended and

eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) at 263; Holmes & Sunstein: *supra* note 90; Jill Cottrell & Yash Ghai, “The Role of Courts in the Protection of Economic, Social and Cultural Rights” in Yash Ghai & Jill Cottrell, eds, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) at 58; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 UBC L Rev 539.

⁹⁵ *Tanudjaja, supra* note 1 at para 83.

⁹⁶ *Ibid* at para 84.

⁹⁷ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 336 DLR (4th) 385, headnote [PHS].

⁹⁸ *Tanudjaja, supra* note 1 at para 120.

⁹⁹ *Ibid* at para 120.

indeterminate nature of the order requested. No specific concrete measures are requested, simply that the two governments put their institutional minds to the development and adoption of some strategy to reduce and eliminate housing insecurity, in a framework that prioritizes the needs of vulnerable groups. But the motions judge rejects an understanding of the remedial request as retaining significant government discretion, instead the remedial request is castigated as “the offering up of a Trojan horse.”¹⁰⁰

Lederer J is correct in the first assertion—rights are ultimately about wealth distribution. Rights are costly and require trade-offs.¹⁰¹ But, the decision to incur such costs was made with the *Charter*’s enactment, and the task of ensuring that these costs are engaged assigned to the judiciary. Two American academics make this point: “In practice, judges defer much less in fiscal matters than they appear to, simply because the rights that judges help protect have costs.”¹⁰² Moreover, complexity and gravity cannot be reasons for *Charter* immunity. Challenges that, like the Trojan horse (or a can of worms), are “packed” reflect the unavoidable complexity of the modern state. Breadth of problem here signifies depth of problem. And problems that significantly engage serious and numerous aspects of governance should not, thereby, be presumptively free of *Charter* oversight. That would be perverse. Lederer J is perceptive about the importance of housing rights and the scope of government action needed—he simply runs in the wrong direction with these observations. These points ought to make *Charter* applicability all the more compelling, not frightening.

General concerns about justiciability continue to stalk *Charter* litigation.¹⁰³ Other jurisdictions too grapple with the question.¹⁰⁴ The British scholar Hohmann notes: “Courts have made determination on the right to housing without bringing the economics of states to their knees or marginalising the elected branch of government to the point of pointlessness ... practical concerns can be overcome.”¹⁰⁵ Hohmann also notes quite rightly that the two arguments—negative versus positive rights and justiciability—are importantly connected. Recognition of the inevitable costs of even negative rights takes that sting away from so-called positive rights and from much of the justiciability concern: “the suggestion that the right to housing is uniquely problematic fades away.”

Two other jurisdictions have enshrined “high profile”¹⁰⁶ rights to housing, albeit through somewhat different pathways, in their respective constitutional law. This paper does not allow the opportunity to explore this in detail. But, it bears noting that both South Africa and India have seen considerable political struggle around adequate housing provision “leveraged” through constitutional litigation. While neither provides a resounding triumph for housing claims, both examples show that there is space in constitutionalism for a rights based argument about housing insecurity. This (too) brief mention is included to point out, more substantively, that denial of constitutional recognition of a right to housing ought not to be the foregone conclusion the

¹⁰⁰ *Ibid.*, at para 65.

¹⁰¹ Holmes & Sunstein, *supra* note 90 at 51–52.

¹⁰² *Ibid.* at 29.

¹⁰³ See Malcolm Langford, “The Justiciability of Social Rights, From Practice to Theory” in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

¹⁰⁴ See, for example, the discussions that follow on South African and Indian case law. For more elaboration, generally, see Hohmann, *supra* note 8.

¹⁰⁵ Hohmann, *supra* note 8 at 234.

¹⁰⁶ *Ibid.* at 94.

motions judge appeared to assume. At least, that ought not to be a conclusion reached, at this stage of Canadian jurisprudence, in a preliminary motion to dismiss

Nonetheless, the motion judge's arguments withstood review at the Court of Appeal. Two of the three justices hearing the appeal, Pardu and Strathy JJA, upheld the decision of the motions judge to dismiss the action. The third Justice, Feldman JA, would have allowed the appeal, returning the application to the lower court for adjudication on the merits.

The reasons for the majority dismissal of the appeal focus on the question of justiciability. Pardu JA is author of these reasons and summarized this concern as involving: "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."¹⁰⁷ That is, more simply put, the concern circles on whether or not this is a question purely of the political realm or one with sufficient legal aspect to engage judicial contemplation. Thus, at stake for these justices is the distinction between legal and political questions and the relevance of that distinction to determination of judicial institutional capacity.¹⁰⁸ Sufficient legal content is required for adequate judicial competency over the question.¹⁰⁹ The majority's conclusion is that there is insufficient legal content to this claim to engage a court's decision making capacity.

The majority reaches this outcome by re-framing the application as, in essence, the assertion "that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing."¹¹⁰ This reduces the claim to a more simple and purely policy challenge, one that, to paraphrase the Supreme Court of Canada in *Canada (Attorney General) v PHS Community Services Society*, focuses on government policy that has not been translated into law or state action.¹¹¹ So understood, the challenge appears to ask the Court to engage in the kind of policy assessment and divination best left to the legislative branch. The sticking point for the majority at the Court of Appeal is that no specific law or government action is singled out by the challenge. A specific focus on one law is, the majority argues, "an archetypal feature of *Charter* challenges under section 7 and section 15."¹¹² Here, there is no such focus and the claim is dismissible, it is thus argued, on the grounds of non-justiciability.¹¹³

Two aspects of the majority argument bear critical examination. First, the recasting of the challenge as simply to policy alone is incorrect. The challenge is not to policy, hovering in some realm separate from government action and from practical effect (if that were possible). The pleadings establish that the applicants' claim is much more complex and faceted. Targeted, as already noted, is a broad range of government actions and inactions—all of which, the applicants claim, have significant rights-destructive effects in Canadian society. Second, justiciability as the majority understands and deploys the notion, connects to two issues the majority (incorrectly)

¹⁰⁷ *Tanudjaja*, ONCA, *supra* note 3 at para 19, quoting from *Canada (Auditor-General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49, 61 DLR (4th) 604 at paras 90–91.

¹⁰⁸ *Tanudjaja*, ONCA, *supra* note 3 at para 21.

¹⁰⁹ *Ibid* at para 35.

¹¹⁰ *Ibid* at para 19.

¹¹¹ *PHS*, *supra* note 97 at para 105.

¹¹² *Tanudjaja*, ONCA, *supra* note 3 at para 22.

¹¹³ This is also the avenue by which the Ontario Court of Appeal majority distinguished this case from the Supreme Court of Canada decisions in *PHS*, *supra* note 110, and in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 85, [2005] 1 SCR 791. The majority attempted to keep alive the possibility of *Charter* scrutiny of a network of government programmes, but only where, it appears, there is more certainty of a specific rights infringement (*Tanudjaja*, ONCA, *supra* note 3 at para 32).

states it is leaving alone: the issues of positive versus negative obligations and of novel claim making under the *Charter*. It is from the perspectives of these two issues that the dissenting judgment sets up its opposition to the majority opinion.

To repeat the first issue connected to the finding of non-justiciability, the key concern of the majority is really the question of whether both state action and inaction are subject to *Charter* scrutiny. The argument that policy, absent translation into government action, is immune from *Charter* standards relies upon the idea that unless the government positively acts, a policy decision to not act is untouchable. A claim asserting a general right to housing under section 7, is, thus, the majority asserts, a “doubtful proposition.”¹¹⁴ Yet, this contention about what is or isn't protected under the *Charter* is not certain law, as the majority choice of language itself indicates. At the stage of preliminary review on a motion to dismiss, best guesses as to legal outcomes as yet undecided are unsound reasons for dismissal. Such a question of constitutional rights interpretation, given that it is an open question to date, must be allowed to go to argument on the merits. To collapse it into a finding of non-justiciability is faulty elision of issues.¹¹⁵

The majority compounds this error in its additional reasoning about section 1 and remedial possibilities. There must also be, the Court asserts, an impugned law whose objective can be evaluated under the *Oakes* test of section 1 application.¹¹⁶ Such an opinion would condemn any and all sections of the *Charter* to assertion of negative obligations only. The argument is based on too literal a reading of the *Oakes* test¹¹⁷—the requirement that the features of a “law” be assessed.

Finally, the majority takes issue with the character of the remedial request, arguing that there is no judicially discoverable and manageable standard for assessment of the adequacy of any resulting housing strategy in relation to the conditions the remedial request seeks to impose (adequacy and priority to the most needy).¹¹⁸ But remedial selection can be varied and crafted to suit concerns of institutional competency and appropriateness independently of the terms of the claim on the merits. Justiciability concerns about requested remedy inappropriately determine justiciability on the substantive arguments about rights protection. Remedial requests have no place in the determination of whether or not the challenge can proceed to consideration on its merits. Should an infringement be found, then fuller engagement with the range of jurisprudence showcased, for example, in the intervenor factum of the Asper Centre on remedy, can then be better canvassed.¹¹⁹

The minority judgment, crafted by Feldman JA, would find that it was an error of law to strike this claim at the pleadings stage. Feldman JA's judgment begins with the reminder that the test for striking the application at this stage is whether it is “plain and obvious” that the claim is doomed.¹²⁰ This requires that, as the Supreme Court of Canada notes, the claim is “certain to

¹¹⁴ *Tanudjaja*, ONCA, *supra* note 3 at para 30.

¹¹⁵ This is what the majority does in its concluding claim that it has left unconsidered the question of positive obligations. *Ibid* at para 37.

¹¹⁶ *Tanudjaja*, ONCA, *supra* note 3 at para 32.

¹¹⁷ *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719.

¹¹⁸ *Tanudjaja*, ONCA, *supra* note 3 at para 33.

¹¹⁹ Factum of the Intervener, David Asper Centre for Constitutional Rights, Ontario Court of Appeal, online: <<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Asper+Case+Materials/TanudjajaCAFactum.pdf>>.

¹²⁰ *Tanudjaja*, ONCA, *supra* note 3 at para 43. The test is from *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 74 DLR (4th) 321 [*Hunt*].

fail.”¹²¹ Significantly, the Supreme Court has stated that neither length and complexity of the issue nor novelty alone is reason to strike a claim. Instead, the Supreme Court, through the pen of the Chief Justice, has cautioned that the decision to strike must be carefully deployed: new and novel (and lauded) developments in the law are standard and many result from actions initially deemed hopeless and initially challenged by preliminary motions to strike.¹²² Consequently, “[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.”¹²³ The dissent by Feldman JA emphasizes these refinements of the test for dismissal, issuing the stricture that “[t]he motion to strike should not be used ... as a tool to frustrate potential developments in the law.”¹²⁴

The motions judge comes in for specific criticism in relation to this larger concern. Discussion of the applicants’ section 7 claim was flawed in four specific 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, preventing consideration of the full evidentiary record.¹²⁵ Each of these charges is discussed at some length, with Feldman JA detailing, in particular, the motion judge’s extensive doctrinal interpretations and resolutions of law not yet settled that ill-fit the context of a preliminary motion to dismiss. Most damning, however, for Feldman JA is the result that the motion judge would leave the 16 volumes of evidentiary record submitted by the appellants unexaminable, particularly to the question of whether or not special circumstances exist for inclusion of positive obligations under section 7.¹²⁶ Equally, Feldman JA notes that the motions judge engaged in fact finding, doctrinal exegesis and resolution in his discussion of the applicants’ section 15 claim. In the absence of engagement with the full evidentiary record and in the context of a preliminary motion the motions judge’s conclusions about causal factors and analogous grounds are faulty. Such matters are “not open for decision when the application is not allowed to proceed.”¹²⁷

In her discussion of the justiciability concern, Feldman JA takes on her own Court of Appeal colleagues more directly. Citing a number of academic authorities, she argues that: “to strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate.”¹²⁸ More specifically, while the novel form of the claim raises some tricky procedural and conceptual difficulties for both the *Charter* argument and remedial stage, again Feldman JA reminds her colleagues that novelty alone is not a relevant reason for dismissal and that, as helpfully underlined by one of the intervenors, the question of remedy is distinct and subject to judicial crafting independent of argument pertaining to *Charter* breach.¹²⁹

Feldman JA concludes by reminding her audience that this application represents not only the claims of a broad range of disadvantaged individuals and groups, but is backed by a considerable number of credible intervening institutions with much expertise in *Charter*

¹²¹ *Hunt, ibid* at 980.

¹²² *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42 (CanLII) at para 21, McLachlin CJ [*Imperial Tobacco*].

¹²³ *Imperial Tobacco, ibid* at para 21.

¹²⁴ *Tanudjaja*, ONCA, *supra* note 3 at para 49, Feldman JA in dissent.

¹²⁵ *Ibid* at para 51, Feldman JA in dissent.

¹²⁶ *Ibid* at para 65, Feldman JA in dissent.

¹²⁷ *Tanudjaja*, ONCA, *supra* note 3 at para 74, Feldman JA in dissent.

¹²⁸ *Ibid* at para 81, Feldman JA in dissent.

¹²⁹ *Ibid* at para 85, Feldman JA in dissent.

jurisprudence and analysis. This larger frame adds weight to her opinion that the “housekeeping” measure of dismissal for lack of reasonable cause is improperly wielded by the motions judge.

So, why is such common and convincing conceptual parsing beyond the ken of many of our judges? Clearly, something more ideological is at play. Resort to stale platitudes about positive versus negative rights and “misconceived” challenges may signal an underlying general anxiety about the redistribution of resources, recognition, and participation¹³⁰ activists push through *Charter* litigation. More evocatively, these challenges threaten the “mythology of ... the majestic, enduring and self-sustaining neutrality”¹³¹ of constitutional law. Articulation of rights—of any sort—involves delineation of an imaginary line between public and private regulation and, thus, “to ask the purpose of human rights is always to ask a political question.”¹³² The liberatory potential of rights is the unavoidable flip side of coercive potential, that is, of rights’ power to impose the public values they enshrine on private and personal orderings. The right to housing engages specially with this classical tension between liberty and equality as the right to housing so centrally encompasses that most private sphere—the home.¹³³ Combatting this political reluctance, and its ideological roots, is beyond the reach of doctrinal correction and critique. But it is appropriately targeted by the charge that judges who assert its mythology unquestioningly must be held responsible for ensuring that social justice under the *Charter* will never amount to much.

It is not surprising that the Attorneys General have pushed motions to dismiss. It is a strategic move given the character of the Canadian judiciary. But it is a strategy that will work to consign Canada’s constitutional protection of human rights well behind the leaders of global human rights protection. The argument this paper seeks to advance is that the character of human rights infringements like denial of access to adequate housing does not fit the tidy boxes of traditionally framed legal challenges. This observation flows significantly in part from the early indication of just how complex housing needs across various groups are. If we want to be able to scrutinize the multiple and textured way in which the state is implicated in setting the conditions necessary for this crisis, and for the maintenance and intensification of the crisis, it is important to have within the purview of the court more than singular “snippets” of government action and inaction. Equally, orders that compel governments to coordinate across a range of programmes and actions may be the answer to providing reasonable remedial response to human rights crises of this fractured sort. This is the question the *Tanudjaja* case has handed the courts. It would be a shame if these arguments never get their day in court.

VI. CONCLUSION

So, the *Tanudjaja* application has foundered on the two traditional bogeymen repeatedly thrown up to block socio-economic rights: fears about positive rights and the spectre of non-

¹³⁰ For analysis of why each of these features can be part of rights claiming by marginalized groups, see Nancy Fraser, “Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation”, *The Tanner Lectures on Human Values*, online: <<http://www.intelligenceispower.com/Important%20E-mails%20Sent%20attachments/Social%20Justice%20in%20the%20Age%20of%20Identity%20Politics.pdf>>.

¹³¹ Michael Reisman, “On the Causes of Uncertainty and Volatility in International Law” in Tomer Broude & Yuval Shany, eds, *The Shifting Allocation of Authority in International Law: Essays in Honour of Professor Ruth Lapidoth* (Oxford: Hart Publishing, 2008), as quoted in Hohmann, *supra* note 8 at 235.

¹³² Hohmann, *supra* note 8 at 236.

¹³³ *Ibid.*

justiciability. That these hurdles would appear so powerfully in this application is not surprising—the applicants’ challenge is an extensive condemnation of current, regular government practice. It is a parry against “business as usual.” The claim makes visible and gives voice to the many among us whose basic needs go unmet, while calling the government to account for this dispossession. This is disruptive—as rights at their best are.¹³⁴ Private suffering is rendered public and collective response becomes obligatory.¹³⁵

Consequently, the repeated defeat of this application at the stage of a preliminary motion to dismiss is distressing. *Tanudjaja* raises such important issues. Governments duck and weave when confronted politically with the sight, and plight, of the poorly housed. The most so far that insistence on negative obligations under the Constitution has achieved are the temporary cardboard box overhead shelters of *Victoria (City) v Adams*.¹³⁶ If litigation under the *Charter* is not allowed to present more than narrow pieces of the problem of housing insecurity at any one time, if all the *Charter* can do is stay silent in the face of government inaction, and if courts continue to dodge acknowledgement that rights are always already about redistribution, then the homeless and other marginalized groups in Canadian society are truly constitutionally outside in the cold.

¹³⁴ Hohmann, *supra* note 8 at 244.

¹³⁵ *Ibid* at 7.

¹³⁶ *Adams*, *supra* note 10. For discussion of this case, see Margot Young, “Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v Adams* (BCSC),” (2009) 80 BC Studies 164; Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Sharpe & Roach, *supra* note 90 at 279.