

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

**Applicants
(Appellants)**

-and-

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

**Respondents
(Respondents on Appeal)**

**FACTUM OF THE INTERVENOR INCOME SECURITY COALITION
Income Security Advocacy Centre, ODSP Action Coalition,
Steering Committee on Social Assistance**

Date: April 15, 2014

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PART I – OVERVIEW

1. The Intervenor Income Security Coalition consisting of the Income Security Advocacy Centre, ODSP Action Coalition and the Steering Committee on Social Assistance, represents the interests of social assistance recipients and the community legal clinics which assist them. The Coalition will address government's positive obligations pursuant to section 7 of the *Charter* and the justiciability of income security programs under the *Charter*.
2. The Coalition takes the position that the motion judge erred in his categorical conclusion that there "can be no" positive government obligation to put in place programs to protect rights under section 7 of the *Charter*, a conclusion that he applied to income security programs. The Supreme Court in *Gosselin* explicitly left open the possibility that inadequate social assistance programs could violate section 7. The motion judge's error was compounded by his reliance on *Masse*, an outdated decision of the Ontario Divisional Court, which has been overruled by *Gosselin*. In finding that the "courtroom is not the place" for the review of matters relating to income security programs, the motion judge strayed beyond the case before him, foreclosing the range of *Charter* claims that may arise through the operation of social assistance programs.
3. The sweeping decision made at the preliminary stage of a motion to strike, has a far-reaching and detrimental impact on the ability of social assistance recipients to challenge income security programs under the *Charter* and ultimately significantly curtails their access to justice.

PART II – STATEMENT OF FACTS

4. The Income Security Coalition relies on the facts as plead in the Factum of the Appellants.

PART III – ISSUES AND ARGUMENT

5. The *Charter* application in this appeal raises the issue of government obligations to address homelessness and ensure affordable and accessible housing, with its focus on housing as a necessity of life. However, the motion judge in dismissing the Application made legal findings about social assistance programs, going well beyond the case before it and which had a broad and significant impact on the *Charter* rights of social assistance recipients.

Factum of the Appellants, para. 63
Amended Notice of Application, Appeal Book, Tab 5, paras. 12-14, 20-24

6. The motion judge sweepingly concluded that the law was “established” that there “can be no” positive government obligations to act to put in place programs, including social assistance programs, to protect section 7 rights. He made specific findings about whether inadequate income support programs could be found to violate section 7 of the *Charter* and even whether courts can adjudicate such claims, for example: “The *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any Application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived.”

Reasons of the Ontario Superior Court of Justice, Lederer J., September 6, 2013, Appeal Book, Tab 3, paras. 59, 120, (see also paras. 87, 118, 143, 145) [*Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 (CanLII) (“*Tanudjaja*”)]

7. In this context, the Income Security Coalition will address the following issues:
 - a. Positive obligations on government to protect the right to life, liberty and security of the person, including the right to adequate social assistance;
 - b. The justiciability of income security programs under the *Charter*; and
 - c. The impact of the motions judge's decision on the *Charter* rights of social assistance recipients.

A. Gosselin is the leading authority: Positive obligations and the right to adequate social assistance under section 7

8. The motion judge concluded that “the law was established” that “there can be no positive obligation” on government to act to put in place programs to protect the life, liberty and security of the person under section 7 of the *Charter*, stating that *Gosselin* “does not depart from this view.” This statement represents a fundamental misinterpretation of *Gosselin*, which, contrary to the motion judge's conclusion, found that section 7 may be interpreted to create positive obligations on government to protect such rights, where there was sufficient evidence.

Tanudjaja, supra, Appeal Book, Tab 3, para. 59
Gosselin v. Québec (Attorney General), 2002 SCC 84 (CanLII), paras. 82, 83

9. In *Gosselin*, the applicant challenged Québec's social assistance program, which reduced welfare benefits for singles under 30. Recipients received a minimum amount that could be supplemented through participation in education or work experience programs. The applicant filed a class action on behalf of all welfare recipients under 30, claiming that the failure to provide social assistance benefits at a rate that ensures that recipients meet their basic needs is a violation of section 7.

Gosselin v. Québec (Attorney General), *supra*, paras. 1-3, 75

10. The Supreme Court considered whether section 7 places a positive obligation on the state to ensure the enjoyment of the right to life, liberty and security of the person. Chief Justice McLachlin for the majority concluded that the question of whether section 7 may be interpreted to create positive obligations must be assessed within the context of a case:

The question therefore is not whether s.7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards.

Gosselin v. Québec (Attorney General), *supra*, paras. 81, 82

11. The Court decided there was insufficient evidence in the case before it to support an interpretation of positive obligations under section 7 but left open the possibility that positive obligations may be made out in “special circumstances”. The Court concluded that there were no special circumstances in the case before it because the evidence of “actual hardship” was wanting.

Gosselin v. Québec (Attorney General), *supra*, para. 83

12. Thus the Supreme Court did not find that there “can be no positive obligation” on government to act to protect section 7 rights such as by ensuring social assistance programs can meet basic needs. Rather, positive obligations may be established under section 7 in a case where there is evidence that social assistance rates result in “actual hardship.”

13. The question of whether section 7 includes the right to adequate social assistance was answered in the affirmative by Justice Arbour in *Gosselin*. While she was in dissent, the majority did not disagree with the substance of her decision on whether inadequate social assistance could constitute a violation of section 7 rights requiring positive obligations on government to act. The majority disagreed that there was sufficient evidence in the claim to support her analysis.

Gosselin v. Québec (Attorney General), *supra*, para. 83 (per McLaughlin C.J.), paras. 308, 309 (per Arbour J.)

14. Justice Arbour concluded after conducting a textual, purposive and contextual analysis that section 7 imposes a positive obligation on government to act to protect the life, liberty and security of the person which includes the right to a minimal level of social assistance:

... a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.

Gosselin v. Québec (Attorney General), *supra*, paras. 357, 358 (per Arbour J.)

15. In the context of the motion to strike therefore, the motion judge should have considered the facts as plead in the Application to see if there was evidence (such as actual hardship) which could have supported a positive *Charter* obligation, instead of dismissing the possibility of positive obligations out of hand.

16. To the extent that *Gosselin* could be argued to have set a "test" of special circumstances, it is an evidentiary hurdle and not a legal one. The motion judge, however, interpreted *Gosselin*

as creating a legal test of special circumstances and found that a “right to housing” was not a special circumstance.

Tanudjaja, supra, Appeal Book, Tab 3, paras. 48, 54

17. Even if the motion judge was correct in finding that the Supreme Court had created a “special circumstances” test for establishing positive government obligations under the *Charter*, such a finding is contradictory to his categorical conclusion that the law was “established” that there “can be no positive obligation”.

Tanudjaja, supra, Appeal Book, Tab 3, para. 59

B. Masse: Overruled and outdated

18. The motion judge’s error in interpreting *Gosselin* was based in part upon his reliance on *Masse*, a decision which has been overturned by *Gosselin*, to bolster his conclusion that government has no positive obligation under section 7 of the *Charter*. *Masse*, a 1996 decision of the Ontario Divisional Court, was referred to numerous times by the motion judge and was central to his analysis.

Tanudjaja, supra, Appeal Book, Tab 3, paras. 58, 39, 48-51, 54, 58, 61, 107, 110, 117, 124-126

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 (Div. Ct.)

19. In *Masse* the applicants challenged significant reductions to social assistance benefits brought about by regulation, asserting that the cuts violated their right to security of the person.¹ They claimed that security of the person obligates government to provide economic assistance to

¹ The applicants also challenged the regulations under section 15 of the *Charter*, and as ultra vires the *General Welfare Assistance Act*, R.S.O. 1990, c.G.6 and the *Family Benefits Act*, R.S.O. 1990, c.F.2, and contrary to the purposes of the federal legislation, the Canada Assistance Plan, R.S.C. 1985, c.C-1

meet basic human needs and that the impugned regulation had pushed welfare recipients to below an “irreducible minimum” standard of living. At issue was whether section 7 included “economic rights fundamental to human life and survival” (the language used in the Supreme Court’s section 7 decision in *Irwin Toy*) and whether the *Charter* could impose positive obligations on governments to act. *Masse* concluded that the *Charter* applies only to government action and not inaction and therefore does not impose positive obligations on government. The Court ruled that section 7 does not protect a right to social assistance or a minimum standard of living.

Masse v. Ontario (Ministry of Community and Social Services), *supra*, paras. 170, 220, 221, 222, 224-227, 346, 347, 350-351, 357, 364
Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 1003 (per Dickson C.J.)

20. *Gosselin* considered the same issue, but reached a different conclusion. As in *Masse*, the claim in *Gosselin* was that section 7 included the economic right to a level of social assistance sufficient to meet basic needs, which was deprived by the failure to provide adequate welfare benefits. While *Gosselin* did not specifically refer to *Masse*, by ruling on the same legal issue that was raised in *Masse*, the Supreme Court effectively overturned the Divisional Court’s central finding that there can be no obligation under s. 7 to provide adequate social assistance programs. As noted, *Gosselin* determined that section 7 might be interpreted to include positive obligations on government to act to protect section 7 rights where there was sufficient evidence.

Gosselin v. Québec (Attorney General), *supra*, paras. 75, 82-83

21. The motion judge’s error in interpreting *Gosselin* was compounded by his reliance on *Masse* in considering the “special circumstances test”. The motion judge found that there were no special circumstances because one aspect of the *Charter* violation pled in the application (on

the impact of social assistance on homelessness) had already been considered and rejected in *Masse*. The motion judge referred to the evidence adduced in that case to find that if positive action was not warranted then, he could not “see why it would now”.

Tanudjaja, supra, Appeal Book, Tab 3, paras. 39, 40, 54, 58, 59, 117

22. That the motion judge relied on evidence adduced in another matter to support his decision on a Rule 21 motion to strike where no evidence is allowed, was an improper exercise of his jurisdiction and misapplication of the Rule. The egregiousness of this error is amplified by the fact that the evidence in the *Masse* case related to legislation that has not been in force since 1998.

Rules of Civil Procedure, RRO 1990, Reg 194, Rule 21.02

23. Significant legislative changes subsequent to *Masse* also call into question its continued relevance and the motion judge’s reliance on factual findings from that case. The *Charter* challenge in *Masse* was to regulations under the *General Welfare Assistance Act*, 1990 (GWAA) and the *Family Benefits Act*, 1990 (FBA). In 1998, both of these regimes were replaced by the two social assistance programs that remain in force today: Ontario Works and the Ontario Disability Support Program.

General Welfare Assistance Act, R.S.O. 1990, c.G.6

Family Benefits Act, R.S.O. 1990, c.F.2,

Ontario Works Act, 1997, SO 1997, c 25, Sch A

Ontario Disability Support Program Act, 1997, SO 1997, c 25, Sch B

Falkiner v. Ontario (Minister of Community and Social Services), 2002 CanLII 44902 (ON CA), para. 21

24. These new programs were substantially different from the programs that came before, and each have their own unique and statutorily defined “purposes.” Of particular note is the

Ontario Disability Support Program Act, 1997 (ODSPA), which the Supreme Court described as being “meant to ensure support for disabled applicants, recognizing that the government shares in the responsibility of providing such support.” An express reference to role of the government was absent from the purposes of the GWAA and FBA.

Ontario (Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 (CanLII), para. 23, citing *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, at para. 3

Ontario Disability Support Program Act, 1997, SO 1997, s. 1

Masse v. Ontario (Ministry of Community and Social Services), *supra*, paras.179, 299, 300, 303-305

25. A proper inquiry into the scope of *Charter* protections is one that is purposive and contextual, and takes into account the purpose and scheme of impugned legislation. The role of government explicitly provided for in legislation such as in the ODSPA, would factor into and influence such an analysis. As such, the evidence and legislative context is fundamentally different from the context in which *Masse* was decided.

R. v. Big M Drug Mart Ltd., 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p.344 (per Dickson J.)

Falkiner v. Ontario (Minister of Community and Social Services), *supra*, paras. 54, 65

26. Other aspects of the *Charter* decision in *Masse* have been distinguished, in particular the Divisional Court’s finding that “receipt of social assistance” is not an analogous ground for the purposes of section 15 of the *Charter*. In *Falkiner*, the Court of Appeal recognized receipt of social assistance as a prohibited ground of discrimination, commenting that economic disadvantage often co-exists with other forms of disadvantage; that receipt of social assistance falls within the concept of immutability and is an enumerated ground in human rights codes; and that recognizing this analogous ground would further the protection of human dignity.

Falkiner v. Ontario (Minister of Community and Social Services), *supra*, paras. 84, 88-90, 93

27. The motion judge therefore erred in relying on a decision which has been overruled and has limited if not negligible relevance.

C. Justiciability of income support programs under the *Charter*

28. The motion judge concluded that the question of whether income support programs can violate sections 7 or 15 of the *Charter* is not justiciable. He found that any application claiming the right to a minimum standard of living under the *Charter* "...would require consideration of how our society distributes wealth. General questions that reference, among many other issues, assistance to those in poverty, ... income supplements ... are important, but the courtroom is not the place for their review."

Tanudjaja, supra, Appeal Book, Tab 3, para. 120

29. The motion judge stated that the purpose of social assistance is to "provide assistance, not a basic level of subsistence. It deals with necessities of life, not just housing. ... The issues these programs deal with extend well beyond housing."

Tanudjaja, supra, Appeal Book, Tab 3, para. 118

30. These categorical statements reveal several errors. First, there is no generic "purpose" for social assistance programs. Rather, the purpose of individual social assistance programs are determined by the scheme of their governing legislation. As noted, current social assistance

legislation such as the ODSPA fulfills a distinct purpose that is different than the programs that preceded it.

31. Further, while the motion judge was correct to note that social assistance programs can be complex and meet many needs, this complexity was all the more reason that he ought to have taken care to ensure that its ruling did not stray beyond the case that was before it, to reject in the far reaching manner that he did the justiciability of income support programs. Moreover, *Gosselin* confirms that matters relating to the adequacy of social assistance are justiciable under the *Charter*.

32. Income security programs operate within a myriad of complex rules and regulations designed to meet the diverse needs of recipients. Within this context, the *Charter* rights of recipients may be engaged in a range of ways.

33. The Ontario Disability Support Program, for example, is one of the social assistance programs affected by the motion judge's decision. As referenced above, the program's goal is to ensure support for disabled applicants with recognition of shared government responsibility in providing support. It is designed to meet the long-term needs of people with disabilities and to provide them with "greater opportunities for independence." Because of continuing barriers to the labour market, recipients are often completely dependant upon the state for their survival.

Ontario (Disability Support Program) v. Tranchemontagne, supra, paras. 23-24

34. Section 7 challenges to such a regime could take many forms, including a narrow challenge to a particular rule. The adequacy of social assistance programs, such as ODSP, are

affected by the hundreds of rules and regulations that cover a wide spectrum ranging from how much money each recipient can have in their pocket to what types of relationships are deemed to be spousal (and therefore reducing individual entitlements).

Falkiner v. Ontario (Minister of Community and Social Services), *supra*, paras. 49, 51. The Court of Appeal while allowing the challenge to the “spouse in the house” rule on the basis of section 15, did not decide on the section 7 claim which had been accepted by the tribunal.

35. Adequacy of social assistance rates can affect a variety of interests that may engage section 7 and 15 rights. For example, it may impact upon a mother’s ability to satisfy child welfare regimes that she can provide a safe and secure home for her children and therefore her right to maintain custody, a relationship that the Supreme Court has ruled triggers concerns about the security of the person. It may also raise equality concerns where protected groups are disparately impacted.

New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (SCC), paras. 61, 66 (per Lamer J.); paras. 112-114, 117 (per L’Heureux-Dube J.)

36. The motion judge’s decision affects the ability of recipients to challenge the program – even if they can establish that they are unable to enjoy their right to life, liberty and security of the person – and tells them that the court is “not the place for their review.”

37. The adequacy of various social assistance benefits are matters that courts and tribunals can and are wrestling with through a human rights lens. *Gosselin* is not the only example. Disproportionate social assistance funding that denies access to medically-required food has been found to be discriminatory, as has disproportionate funding for medically-required travel. These cases demonstrate that the adequacy of social assistance rates is justiciable.

Ball v. Ontario (Community and Social Services), 2010 HRTO 360 (CanLII), paras. 4-8
Ontario (Community and Social Services) v WB, 2011 ONSC 288 (CanLII), paras. 11-12

Chipperfield v. British Columbia (Ministry of Social Services) (No. 2), [1997]
B.C.H.R.T.D. No. 20, paras. 24, 30

D. Impact on the *Charter* rights of social assistance recipients

38. The impact of the motion judge's decision goes well beyond the Application that was before the Court by rejecting challenges to the adequacy of income maintenance programs as unjusticiable and pre-supposing that the *Charter* does not impose a positive obligation with respect to such programs.

39. Such important *Charter* questions should be determined in the context of specific cases. While the Application pled the need for adequate income supports, it was as one component required for affordable housing. The constitutionality of social assistance levels was not directly before the Court. In making his findings, the motion judge strayed beyond the subject matter of the case before it, and made findings without the proper and relevant context.

Amended Notice of Application, Appeal Book, Tab 5, paras. 12-14, 20-24

40. By categorically concluding that the *Charter* cannot impose positive obligations and does not include the right to adequate social assistance, the motion judge shut a door that the Supreme Court explicitly left open. His decision represents a significant curtailment of the ability of social assistance recipients to challenge income security programs and to access courts to secure protection of their *Charter* rights. That this occurred at the preliminary stage of a motion to strike, is of added and considerable concern.

PART IV – ORDER SOUGHT

41. The Income Security Coalition respectfully requests the appeal be allowed and the motions to strike be dismissed.

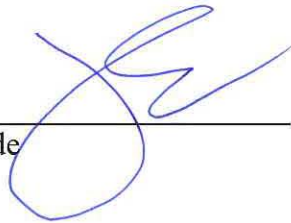
42. The Income Security Coalition seeks no costs and requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 15th day of April, 2014



Marie Chen



Jackie Esmonde

Lawyers for the Intervenor Income Security Coalition

SCHEDULE A: LIST OF AUTHORITIES

1. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 (CanLII)
2. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII)
3. *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Div. Ct.)
4. *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927
5. *Falkiner v. Ontario (Minister of Community and Social Services)*, 2002 CanLII 44902 (ON CA)
6. *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII)
7. *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295
8. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC)
9. *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII)
10. *Ontario (Community and Social Services) v WB*, 2011 ONSC 288 (CanLII)
11. *Chipperfield v. British Columbia (Ministry of Social Services) (No. 2)*, [1997] B.C.H.R.T.D. No. 20

SCHEDULE B: LEGISLATION

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11,

- s. 7 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.
- s. 15(1) 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.

Rules of Civil Procedure, RRO 1990, Reg 194

- 21.01 (1) A party may move before a judge,
- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
 - (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
- and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).
- (2) No evidence is admissible on a motion,
- (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
 - (b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

Ontario Disability Support Program Act, 1997, SO 1997

- s. 1 The purpose of this Act is to establish a program that,
- (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
 - (c) effectively serves persons with disabilities who need assistance; and
 - (d) is accountable to the taxpayers of Ontario. 1997, c. 25, Sched. B, s. 1.

JENNIFER TANUDJAJA, et al.
Applicants (Appellants)

- and - **ATTORNEY GENERAL OF CANADA and**
ATTORNEY GENERAL OF ONTARIO
Respondents (Respondents in Appeal)

Court File No. C57714

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENOR
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