Strategic Litigation and Advancing the Right to Housing in Canada

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A Major Paper submitted to the Faculty of Environmental Studies
in partial fulfillment of the requirements for the degree of Master in Environmental Studies

York University,
Toronto, Ontario, Canada

March 29, 2019

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Abstract

Strategic litigation in the context of promoting human rights requires the identification of legal cases that have the capacity to set precedents for long term social justice objectives. Strategic litigation is typically done in conjunction with other forms of mobilizing, as part of a broader strategy aimed at shedding light on pressing social issues. This paper chronicles two case studies involving the Dream Team, a grassroots organization in Ontario, that employed different forms of strategic litigation to advance housing rights for people with disabilities. The first case was a *Charter* challenge, engaging section 7 and section 15 of the *Canadian Charter of Rights and Freedoms*. The second case involved challenging discriminatory municipal urban planning bylaws in four different municipalities at the *Human Rights Tribunal of Ontario*.

While strategic litigation can be a powerful tool for social change, there are recurring political and academic debates about the usefulness and capacity of litigation as a tool to advance rights for marginalized groups. Typically, social and political rights are considered out of scope in Canadian *Charter* jurisprudence. Nevertheless, in the *Charter* context while there is criticism about using the judiciary to usurp the legitimate power of the elected legislatures in Canada, it is recognized that the Charter is still yet evolving, and as it applies to social and economic rights, the door is still left 'ajar' in the aftermath of the Supreme Court's *Gosselin* decision.

This paper will explore those debates around justiciability as it relates to the Charter and judicial review, and the role that strategic litigation can play in advancing housing rights. The paper will also chronicle the usefulness of this tool at the local level, using the *Ontario Human Rights Code* to challenge laws and practices that are advertently discriminatory. The paper will highlight the usefulness of 'storytelling' for grassroots organizations, and the role that storytelling can play in shifting broader discourses around affordable housing, and housing rights. The paper will explore the role of building movements for both lawyers and urban planners seeking to working with marginalized communities in advancing their rights, and make suggestions about the types of competencies necessary to undertake this type of work.

Foreword

For most of my professional life, I have worked alongside people who have experienced precarious housing situations and have ended up homeless. This type of work resonated strongly with me, as from an early age, I witnessed firsthand how the lack of *safe, secure* and *affordable* housing leads to other social harms. Working with the Dream Team for most of my professional life meant that I was able to translate my strength in advocacy and use it for the betterment of some of society's most disenfranchised people – those with disabilities. Although writing about that experience was not my intention, I was encouraged to write this paper by one of my advisors, Professor Dayna Scott after sifting through various different topics that I had interest in. She suggested that I chronicle this experience, and I am quite happy with the outcome of that suggestion.

This major paper is a natural fit to reflect my plan of study and my area of concentration, which was housing rights (including affordable housing). The three components of my area of concentration were: strategic litigation, housing rights and grassroots activism. Through rigorous research into deeper issues of 'justiciability' and understanding Canada's political system, I have a deep appreciation and understanding of the opportunities and limitations of using strategic litigation to propel housing rights and promote affordable housing. The paper has also given me the opportunity to delve into the role storytelling can play in shaping broader discourses in society, and forced me to challenge myself in one day documenting my own story. While I ultimately decided that this was not the right forum to document that story, writing this paper has reinforced my conviction that long-term attitudinal shift can be strengthened by understanding the stories of the 'other.'

Acknowledgements

I want to thank York University and Osgoode Hall Law School for accepting me as a candidate to do this joint program. I am beyond thankful for this opportunity.

A big thank you, to my supervisor, Luisa Sotomayor for taking me on and encouraging me to think critically about concepts.

To my advisors: Dayna Scott – thank you for the constant feedback and support throughout this past year, and for the rigour and candor in how you approach things; you have certainly been inspirational to me. Mark Winfield, who has always been a source of stability, of positivity and encouragement throughout both degrees for the past 4 years.

To my sister, Leela and my brother in law who lovingly care for our mother, which gave me the ability to focus on my school these past few years.

To my amazing mother Shirley, whose life trials and obstacles is one of the reasons why I chose to focus on access to housing, and dedicate my life to promote the public interest. Thank you for your love, your sacrifice, your joyful spirit, and your unwavering faith in me, believing that I can always accomplish anything.

To all of my friends who have journeyed with me through these past few years, in tears, laughter, in prayer, and in just being there. Most notably, Anita, Yinka, Natasha, and the St. Lucia crew.

And last but not certainly not least, my husband Michael, my best friend and my anchor, and the reason why I decided to return to school. You are a constant source of inspiration for me, in the way you lead your life with integrity, honesty, and love. You've encouraged me to persevere through some very difficult times, and I thank you for standing by me. I am beyond blessed to be your wife.

Strategic Litigation and Advancing the Right to Housing in Canada

Introduction

Over the past three decades, the cost of housing has risen all across Canada. This is true for both the ownership of housing, as well as rental housing. The concept of 'housing affordability' has become a common way of summarizing a series of housing difficulty challenges that are present across many nations.[1] Households are said to have housing affordability issues when more than a certain percentage of their household income is consumed in housing costs.[2] With the cost of housing rising all over Canada, precarious housing and homelessness have also risen. Prior to the 1990s, homelessness in Canada was not a national crisis. Rather, active legislative policy choices undertaken by Canada's federal and provincial government's over the past three decades have exacerbated homelessness in the nation. While the rising cost of housing affects all Canadians, this crisis has had a particular effect on the poor, and those who are at heightened risk of homelessness. Increasingly, vulnerable groups such as those who are recipients of social assistance benefits have experienced increased difficulty in finding, and retaining affordable housing across Canada. A significant portion of this group of people who experience precarious housing situations also have disabilities, and depend on various forms of government social assistance programs to help them subsist. The introductions of laws and policies that have removed funding and programming for social assistance recipients have had a particularly adverse affect on this group of people. This interlocking system of laws and policies implemented by various levels of government have created, and sustained the conditions necessary for homelessness, and precarious housing.[3] Consequently**,** grassroots organizations involved in promoting housing access have resorted to using strategic litigation as a tool to advance social justice goals and to promote housing rights when government made policies have had the systematic effect of disenfranchising vulnerable groups. Strategic litigation involves the identification and pursuit of legal cases that, as part of a broader

[1] David Hulchanski, "Rethinking Canada's Housing Affordability Challenge" (2005). Centre for Urban and
[2] The current threshold of what is considered 'affordable' is 30 percent, as suggested by the Canada Housing and Mortgage Corporation (CMHC) *Ibid* at 7.
[3] Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24: 2 J L & Soc Pol'y 10-45 [*Heffernan*].

strategy, can enhance and promote human rights.[4] These types of cases can set important legal precedents, which publicly call to attention injustices in policy, and in practice, and can be a significant tool in advancing long lasting, and far reaching social justice objectives. This Major Paper ("**MP")** will highlight the example of two specific strategic litigation challenges brought about by the Dream Team, a grassroots organization in Ontario that have facilitated access to housing using two different avenues provided for in Canada's justice system. The MP will raise the following research questions:

1) What are the opportunities and limitations for strategic litigation to advance social justice goals in Canada?
2) In particular, how can strategic litigation be more effective to advance housing rights in Canada?
3) What role do grassroots organizations play in articulating housing rights as legal instruments?

This paper consists of 3 chapters.

Chapter 1 will lay the foundation for understanding the precarious housing situation that has arisen in Canada since the end of World War II. The chapter will also highlight the role the state played in Canada in the provision of housing, and chronicle some of the cutbacks that arose in the mid 1980s – 1990s which served to exacerbate homelessness all across Canada, with particular attention paid to vulnerable people in receipt of social assistance in Ontario.

Chapter 2 will recount two cases studies the Dream Team were involved in, which employed strategic litigation to advance housing rights for people with disabilities. The first was a *Charter* challenge, engaging section 7 (life, and security of the person) and section 15 (equality) interests of the *Canadian Charter of Rights and Freedoms*. The second challenge involved four Ontario municipalities who had enacted discriminatory urban planning bylaws which where in breach of the *Ontario Human Rights Code* and discriminated against people with disabilities. This chapter will highlight some of the major wins in each case, as well as explore deeper issues of 'justiciability' and strategic litigation.

[4] Sarah Carvalho & Eduardo Baker. "Strategic Litigation Experiences in the Inter-American Human Rights, System" (2014) Intl JHR at 449.

Chapter 3 will reflect my professional exposure and experience of working as a Coordinator for the Dream Team by taking into account some of my critical reflections learned throughout my employment and throughout the Dream Team's engagement with these strategic litigation challenges. This chapter will also explore the role grassroots organizations can play in the broader housing discourse, with a particular focus on using 'storytelling' as a narrative tool for advancing long term social change.

Chapter 1

Background

> *"Homelessness is not some mysterious affliction visited upon us by unseen forces. It is the tragic, but inevitable outcome of a series of policy decisions. And just as homelessness can be created, so too can it be ended."*
>
> The late Jack Layton, Former leader of the Federal New Democratic Party (NDP)[5]

The national crisis of homelessness in Canada is a fairly recent phenomenon, emerging over the past three decades.[6] Canada has no national, fixed definition of homelessness.[7] For the purpose of this paper, the definition of homelessness being used is the one put forth by the Canadian Observatory on Homelessness ("**COH**") which defines homelessness as*: 'the situation of an individual, family or community without stable, safe, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it*.'[8] According to the COH, homelessness then can be described as being on a continuum – with people without any shelter at one end of the spectrum, and those who are subject to precarious housing at the other end.[9] Along the continuum there are four main categories: unsheltered, emergency sheltered, provisionally accommodated and at risk of homelessness. While there are a range of individual circumstances, experiences and trajectories that contribute to poverty and homelessness, at its core homelessness in Canada is a systemic issue. As the COH definition elaborated in 2017 when the definition was further refined, homelessness "*is the outcome of a broken social contract and the failure of society to ensure that adequate systems, funding and supports are in place to ensure housing stability, so that*

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[5] Jack Layton. *Homelessness: How to End the National Crisis (Revised and Updated)* (Penguin Books: 2008) at xxv [*Layton*].
[6] Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in Canada: 2014* (Toronto: The Homeless Hub Press, 2014), online: <http://www.homelesshub.ca/SOHC2014>.
[7] Margot Young, "Charter Eviction: Litigating out of House and Home" (2015) Allard School of Law at the University of British Columbia. 24. JL of Law and Social Policy 46 [*Young*].
[8] Canadian Observatory of Homelessness. "Canadian Definition of Homelessness" 2012, online: Homeless Hub <https://www.homelesshub.ca/resource/canadian-definition-homelessness> [*COH*].
[9] *Ibid*.

all people, even in crisis situations, have access to housing and the supports they need."[10]

Active legislative and policy decisions undertaken by the federal and provincial governments of Canada over the past few decades have failed to address poverty and homelessness and jeopardized the lives of individuals who depend on various types of social assistance for their livelihood and well being.[12] There are a number of various uncoordinated strategies and programs operated by different levels of government and by a diverse range of non-profit organizations that seek to tackle the housing precariousness and homelessness issue. These strategies involve different levels of government including municipal, provincial and federal government initiatives (along with special strategies targeted to priority groups such as Indigenous people, etc). These strategies are helpful, but a primary problem with the bulk of these strategies is that they tackle the *symptoms* of poverty and homelessness, rather than address its root causes, which requires a structural approach.[13] By and large, the homelessness problem in Canada *"is a manufactured social problem that is the entirely predictable outcome of a series of active legislative and policy choices made by the provincial and federal government"* [14] which have undermined housing security.

In a response to end the rising homelessness problem in Canada, and to rectify the deep housing affordability issues faced by many Canadians, in November 2017 Prime Minister of Canada Justin Trudeau announced the beginning of a human rights-based approach to tackle Canada's affordable housing issue, which would inform the inaugural *National Housing Strategy* ("**NHS**").[15] This strategy commits to recognize

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[10] COH, *supra* note 8. Note - Despite this definition, it is important to note that despite using this definition of 'homelessness' this definition is not without contention, nor is it the widely accepted definition of homelessness. Justice Lederer, the motions judge at the Ontario Superior Court of Justice who decided the *Tanudjaja* case, noted that he did not accept that 3 of the 4 applicants who were described in the case as 'homeless' were actually 'homeless.' He noted that the 3 applicants were in fact housed, albeit housed 'inadequately,' but expressed concern that the applicants asserted they were homeless, rather than precariously housed. See *Tanudjaja v Attorney General (Canada*) (Application) 2013 ONSC 5410 – at para 13 [*Tanudjaja, Motions*].

[12] Layton, *supra* note 5 at xxv.

[13] Stephen Gaetz & Erin. Dej, *A New Direction. A Framework for Homelessness Prevention. Canadian Observatory on Homelessness* (Toronto, 2017).

[14] *Heffernan, supra* note 3 at 2.

[15] Government of Canada. "Report on a Human Rights-Based Approach to Housing Consultation." 2017, online: National Housing Strategy< https://www.placetocallhome.ca/pdfs/NHS-Human-Rights-Approach-to-Housing-Consultation-2018-en.pdf>.

housing as a basic human right, and would endorse Canada's commitments under international law in regards to adequate housing. These commitments stem from the Universal Declaration of Human Rights ("**UDHR**") which states that:
"*everyone has the right to a standard of living adequate for the health and well being of himself [or herself] and of his [or her] family including food, clothing, housing and medical care, and necessary social services…"*[16]

The UDHR itself is not legally binding. Rather, two additional covenants were created to help materialize the UDHR. These two covenants were the *United Nations International Covenant on Economic, Social and Cultural Rights* **("ICESCR")** to which Canada has been a party since 1976,[17] as well as the International Covenant on Civil and Political Rights ("**ICCPR**").[18] Canada has been a signatory to both covenants, however only the latter requires states to implement immediate steps to materialization of the rights outlined in the *ICCPR*.[19] The *ICESCR* in contrast only requires states to '*work progressively'* to achieve the commitments that were laid out in the covenant.[20] Consequently, the *ICESCR* lacks the tools necessary to safeguard the rights outlined in the covenant. Nevertheless, Canada's recent commitment to the creation of a *NHS* is commendable, and ultimately working towards upholding the *ICESCR.* The *NHS* is coming at a time in which homelessness is considered to be at "crisis levels" in the nation.[21] The *NHS* is the start of recognizing the integral role housing plays in any healthy society; housing is essential to life, and adequate housing is instrumental to enable access to other life opportunities.[22] In order for the *NHS* to be effective, a consolidated, coordinated effort at promoting housing affordability and housing security

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[16] *Universal Declaration of Human Rights,* GA Res. 217(III) U.N. GAOR, 3rd Sess., Supp. No. 13 at 71, UN Doc. A/810 (1948) (art. 25.1).
[17] See *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 21 UN GAOR, Supp No. 16 at 49, UN Doc A/6316 (1966), 993 UNTS. 3, entered into force 3 January 1976, Article 2 [*ICESCR*]; See *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp No 16 at 52, UNDoc A/6316 91966), 999 U.N.T.S.171 entered into force 23 March 1976 *[ICCPR].*
[18] *ICCPR, supra* note 17 Part 1, Article 1.
[19] *Ibid.*
[20] *ICESCR, supra* note 17 Part 2, Article 1.1.
[21] David Hulchanski, 2011 Affidavit, T*anudjaja v Attorney General (Canada)* ON SC File No. CV-10-403688, at para 78 – 81. < https://www.acto.ca/production/wp-content/uploads/2017/07/Affidavit_Government-Policy-Housing-and-Homelessness.pdf> [*Hulchanski Affidavit*].
[22] *Heffernan, supra* note 3.

will be necessary to overcome systemic injustices that have been perpetuated by poor government policy choices undertaken over the past three decades by both the federal and provincial government of Canada.

The Dream Team

This paper will chronicle two examples that demonstrate how interconnected laws and policies have continued to intersect and intensified housing precarity for people with disabilities by canvassing the experience of the Dream Team - a group of people with 'lived experience' of mental illness and homelessness who conduct research, education and advocacy around housing issues in Canada.[23] The organization was founded in 1999, and is made up of people with lived experience of mental illness and homelessness. The objective of the organization is to ensure that the voice of those with lived experience is implemented and integrated into all aspects of policy making around issues pertaining to housing precariousness, mental illness and homelessness.[24] The organization employs two full time staff that coordinate and oversee all aspects of the Dream Team's involvement in a plethora of different initiatives ranging from public education, to political advocacy to undertaking innovative research. The Dream Team has conducted a series of various research projects exploring issues such as social assistance reform, as well as urban planning bylaws and its implications on housing security for vulnerable populations. The Dream Team present regularly at most major housing and homelessness conferences including the Ontario Non Profit Housing Association ("**ONPHA**") the Canadian Alliance to End Homelessness ("**CAEH")** among others. The organization has received numerous awards for involvement in promoting affordable housing including the Community Teaching Award from the Faculty of Medicine at the University of Toronto for their regular guest presentations at all major Ontario Colleges and Universities.[25] Some of the organization's research contributions include: *Opening Minds – Results of a Contact Based Anti-Stigma Program* sponsored by the Mental Health Commission of Canada ("**MHCC**") and to date is Canada's largest anti stigma initiative and systematic effort to understand attitudes and behaviours of

[23] *Tanudjaja v Attorney General* (7 March 2014), Toronto, Ontario CA C57714 (motion to intervene, Factum of the Proposed Intervener, the ARCH Coalition); See also The Dream Team. "History of the Dream Team" (2014), online: < http://thedreamteam.ca/about/> [*Dream Team website*].
[24] *Ibid.*
[25] *Ibid.*

Canadians towards issues relating to mental illness.[26] In addition, the organization has also produced *We are Neighbors* - a collaborative report done in conjunction with Wellesley Institute which explores the relationship between affordable, and supportive housing and issues of community safety, social cohesion and the effect affordable housing has on property values.[27] The organization has also co-written *What Stops Us from Working*, a research report produced in collaboration with the University of Toronto and Wellesley Institute which chronicles the challenges recipients of social assistance face when trying to integrate into the workforce, citing stigma as the biggest challenge to overcome.[28] In addition to their research contributions, the organization has participated in systemic advocacy efforts aimed at enhancing housing access, and housing rights for vulnerable, low-income people. The legal challenges described below are two such examples, and will be explored in depth in chapter 2.

Legal Challenges

The Dream Team was involved in two separate precedent-setting strategic litigation challenges against the governments for enacting policies that violated the rights of people who live in poverty, and people with disabilities.[29] There is no constitutional entrenchment of housing rights in Canada, and the first legal challenge involving the Dream Team sought to ameliorate this absence by challenging the Federal government of Canada and the Provincial government of Ontario in court in the *Tanudjaja v. Canada (Attorney General) ("***Tanudjaja***")* which also referred to as *'Right to Housing' ("***R2H***")* case.[30] This case was a *Charter* challenge, which engaged section 7 (life, and security

[26] Mental Health Commission of Canada, "Opening Minds in High School: Results of a Contact- Based Anti Stigma Intervention, The Dream Team Program" (2013), online <https://www.mentalhealthcommission.ca/sites/default/files/Stigma_Opening_Minds_in_High_School_ENG_0.pdf> [*MHCC*].
[27] Wellesley Institute, the Dream Team & University of Toronto, "We are Neighbours: The Impact of Supportive Housing on Community, Social, Economic and Attitude Changes" (2008), online: <https://www.wellesleyinstitute.com/wp-content/uploads/2011/11/weareneighbours.pdf> [We are Neighbours].
[28] The Dream Team, Houselink & CAMH, "What Stops us From Working: New Ways to Make work pay, by fixing the treatment of earnings under the Ontario Disability Support Program" (2011), online: https://www.camh.ca/-/media/files/pdfs---public-policy-submissions/odsp-report-final-pdf.pdf [What Stops Us from Working]
[29] *The Dream Team website, supra* note 23.
[30] *Tanudjaja Motions, supra note 10; see also Heffernan, supra note 3.*

of the person),[31] and section 15 (equality)[32] of the *Charter of Rights and Freedoms of Canada (*"**the Charter***").* This litigation went through three layers of judicial proceedings, but ultimately did not receive leave to appeal from the Supreme Court of Canada.[33] The *Tanudjaja* case is unique in Canadian jurisprudence in that it is the first time that a *Charter* claim invoking the right to housing has been based on Canada's commitment to international law documents (namely the *ICESCR* which was discussed earlier in this chapter.)[34] The Dream Team intervened in the proceedings as a friend of the court.[35] The primary remedy the applicants sought in the case was the proclamation of a 'rights based' national housing strategy for Canada. Although Canada is in the process of creating the *NHS* announced by Prime Minister Trudeau, ensuring that both federal and provincial laws are in line with the *Charter*, and the *Ontario Human Rights Code* ("**the Code")** will be instrumental in the success of the *NHS*.

The second strategic litigation challenge the Dream Team was involved in was a municipal bylaw case, which battled discriminatory planning bylaws in four Ontario municipalities: Sarnia, Smiths Falls, Kitchener-Waterloo and Toronto. Each municipality had enacted discriminatory planning processes by implementing '*capping*' and '*distancing*' requirements for certain types of homes.[36] While implementing these types of provisions appears facially neutral, the effect of these bylaws is that they end up prohibiting certain types of housing from being built, and effectively end up "people zoning."[37] Since these types of provisions limit the building of various kinds of housing (ie:/ group homes, supportive housing, homeless shelters, etc.), the provisions limit the

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[31] *See* section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*The Charter*].
[32] *Ibid,* section 15.
[33] Not all cases have an automatic right to appeal. Rather, in some instances, as was in the case with Tanudjaja, the party seeking to appeal a decision must first obtain leave to appeal. In Tanudjaja, the Supreme Court of Canada denied leave to appeal the lower courts decisions. Ultimately, the case was never actually argued in court on substantive issues, but was dismissed on procedural grounds. See *Tanudjaja v Canada (Attorney General*) 2014 ONCA 852 [*Tanudjaja ONCA*].
[34] David, DesBailet. "The International Human Right to Housing & the Canadian Charter: A Case Comment on Tanudjaja v. Canada (Attorney General)" (2015) 32 Windsor YB Access Journal.
[35] Party standing confers the highest level of participatory rights in Canada. Interveners can receive standing as a party, or as a friend of the court. Standing as an intervener is discretionary and courts may grant standing if they are persuaded that the proposed intervener has unique interests and submissions to make or will bring a different perspective to the litigation.
[36] 'Capping' and 'distancing' requirements are land use planning tools that regulate developments. These tools will be discussed more in detail in Chapter 2.
[37] Jessica Simone Roher. "Zoning Out Discrimination: Working Towards Hosing Equality in Ontario." J L & & Soc Pol'y (2016) 25 at 26 - 53 [*Roher*] .

availability of housing for the people who depend on these forms of affordable housing. Often group homes, supportive housing and homeless shelters are the only form of housing that people with disabilities can afford to rent and live in. Similar to the *Tanudjaja* case, recipients of social assistance face tremendous challenges to find and retain affordable housing, which is primarily due to their disability status and limited income. These types of urban planning bylaws end up restricting the 'affordable' housing stock. Time and again, the lack of affordable housing is recognized as the number one factor contributing to homelessness in Canada.[38] Through the planning processes, municipalities have contributed to adversely affect the lives of people with disabilities by discriminating on *Cod*e prohibited grounds. Consequently, the municipalities were in breach of the *Code* on enumerated grounds (disability).[39] The Dream Team launched challenges at the Human Rights Tribunal of Ontario ("**the Tribunal**") and experienced relative success with each challenge.

Each strategic litigation challenge demonstrated that government action were responsible for poor policies choices that were implemented federally, provincially and locally and had the aggregate effect of limiting housing affordability and housing availability for these already marginalized groups. In order to understand the context that arose from both strategic litigation challenges, it is essential to understand the background of state intervention in the provision of housing programs and services in Canada, and how recent negligent policy decisions contributed to exacerbating the rise in homelessness across the nation. Later sections will outline the specifics of each case in more detail.

Context – Housing and Homelessness

Since the end of World War II, Canada and Ontario has recognized the importance of prioritizing housing security in their government policies.[40] Since the

[38] Prashan Ranasinghe & Mariana Valverde," The Toronto Shelter Zoning –Bylaw: Municipal Limits in Addressing Homelessness in Finding Home: Policy Options for Addressing Homelessness in Canada" (2009) [*Ranasinghe & Valverde] at* ch.1.4 citing "Taking Responsibility: An Action Plan for Toronto" 1999 (Mayors Task Force Report); See also *Hulchanski Affidavit*, supra note 21.

[39] The Code prohibits discrimination on the basis of specific areas known as 'enumerated' or 'protected' grounds listed in the *Human Rights Code*, R.S.O. 1990, c. H.19.

[40] Note – "affordable housing" includes a broad array of various types of housing that were considered "affordable" when measured against an individual or family's income. "Affordability" has evolved over time,

1940s onwards, the government of Canada, and the government of Ontario took an active, purposeful role in investing in affordable housing.[41] This was done in a variety of different ways at both the federal and provincial level. At the federal level, housing security was prioritized by the federal government of Canada through subsidies such as tax expenditures, tax credits, backing loans through *Canada Mortgage and Housing Corporation* ("**CMHC**") insurance, and investments into the affordable housing stock much of which originated in the post World War II era.[42] In 1959, the *National Housing Act* ("**NHA**") introduced mortgage insurance for new rental apartments through *CMHC*. *CMHC* financing to the private sector encouraged the building of rental units to meet population demand which increased the supply of housing available; federal tax law during this period was also particularly favorable towards the building of new rental units leading to an increase in the overall supply of housing availability.[43] The cumulative effect of these initiatives helped to rapidly accelerate the production of housing supply, and ensure that housing demand was met.[44]

At the provincial level, post-war housing security was characterized by direct funding to affordable housing programs, provincial tax subsidies that enabled the building of more affordable housing, along with specific legislative protections such as rent control.[45] While the postwar era in Canada brought about many opportunities, it also brought many challenges. Europe and Asia struggled with rebuilding nations that were ravaged by the war; Canada on the other hand, experienced other issues. During

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and includes different metrics, which measure what was considered affordable during different time periods. Forms of affordable housing included both public and private housing dwellings which received federal and provincial subsidies that enabled their affordability. See *Hulchanski, Affordability*.

[41] Note - The government of Canada and Ontario have historically been involved providing various incentives that encourage the building and ownership of housing since Canada's inception. These various different types of programs include rebates and preferential land pricing schemes – much of this is out of the scope of this paper and will not be discussed, but what is important to note is that this paper will chronicle the systematic investment into affordable housing in Canada's post welfare state, and will not be studying earlier government programs. See Greg Suttor, *Still Renovating: A History of Canadian Social Housing Policy* (McGill-Queens University press, 2016) at 25 - 45. See p. 30 for specific information about federal subsides [*Suttor*].

[42] *Ibid*. *See* also Michael Shapcott (2012). "Federal affordable housing investments: Critical to national social and economic investment plans. Pre-budget 2012 submission to House of Commons Standing Committee on Finance" Toronto, ON: The Wellesley Institute. Retrieved October 12 2016.

[43] *Suttor*, *supra* note 41 at 30.

[44] *Ibid* at 30.

[45] *Ibid* at 30. Rent control refers to a series of legislative choices that are aimed at producing and sustaining affordable rents. There are different forms of rent control across the nation and among the provinces.

the 1940s, Canada became a primarily urban nation; many cities experienced unprecedented growth. For example, in Ontario alone, the City of Toronto grew by 38 percent from its pre wartime population (second only to New York City)[46] while the neighboring city of Hamilton grew by some 60 to 67 percent.[47] The population growth (including a baby boom, and increased immigration) combined with Canada's manufacturing success (much of which was attributed to wartime productions of munitions and arms manufactured and sold by Canadian companies throughout the war), port employment, and steady economic growth created a housing shortage in many parts of Canada, which was especially acute across Ontario.[48] Both the federal and provincial governments sought to address these housing pressures by prioritizing the rapid, large-scale building of housing supply to meet the increased demand. About half of all Canada's postwar growth was in the rental-housing sector, which sought to quickly accommodate the rise in population, and the pressures of urbanization.[49] An active part of the policy choices of the federal and provincial governments following the war promulgated affordable housing as an integral part of what was Canada's newly formed welfare state. The leading period of housing production increase was from the mid 1960s – the mid 1990s in which about 60 percent of Canada's entire rental housing stock (both social and private rentals) was constructed.[50]

However, starting in the 1980s, Reagan-Thatcher neoliberalism had extended to Canada, and both levels of government began to scale back investments in affordable housing, which effectively curtailed the amount of affordable housing stock that was available. A series of deliberate government policy decisions undertaken in the late 1980s – mid 1990s had the effect of increasing housing precariousness, exacerbating homelessness and disproportionately impacted the poor, and had an especially adverse affect on disabled recipients on social assistance.[51] Prior to the governments implementation of these measures, homelessness in Canada and Ontario was not considered a national crisis. Tracing the roots of the homelessness crisis in Canada is

[46] Richard Harris, *Unplanned Suburbs. Toronto's American Tragedy. 1900 – 1950* (John Hopkins University, 1996).
[47] *Suttor, supra* note 41 at 28 – 29.
[48] *Ibid.*
[49] *Suttor, supra* note 41 at 30.
[50] *Ibid at* 1.
[51] *Heffernan, supra* note 3.

directly tied to the cutbacks to various types of government programming and funding. It is beyond the scope of this paper to produce an extensive list of all of the programs that were affected. Rather, the paper will outline *some* of the government policies that were removed and explain how that removal contributed to increasing housing precarity and homelessness in Canada. It was the cumulative effect of a series of government policy choices, which eroded access to affordable housing, and was challenged in the *R2H* case.[52]

Government Cuts

In 1990 – 93, Canada experienced the most pronounced economic downturn since the Depression of the 1930s.[53] This resulted in the loss of industrial and manufacturing jobs to lower wage countries in Asia, and significant adjustments in national fiscal policy. Canada faced the threat of a credit rating downgrade, which would significantly affect interest rates, and worsen Canada's deficit, which in 1993 federal public debt was 72 percent of Gross Domestic Product ("**GDP**").[54] Consequently, the mid-1990s was characterized as a time of restructuring and the government became deeply antagonistic to programming that had an enduring expenditure cost. [55] Both levels of government, whose impetus was to pay down Canada's debt, took significant fiscal restraints during this time. Federal cutbacks and cost sharing removals with the provinces ultimately reduced funding for social spending at the provincial level, which ultimately affected the amount of affordable housing stock that was available to the provinces, and in Ontario.[56]

Social Assistance

The 1995 Mike Harris government in Ontario campaigned on the neoliberal platform infamously known as the "Common Sense Revolution"[57] and one of Harris's campaign promises was to get the government "out of the housing business."[58] Harris did succeed in delivering on this campaign promise; just days after he won the election,

[52] *Tanudjaja ONCA*, *supra* note 33 at 9 – 14.
[53] Phillip Cross, "How did the 2008 – 2010 Recession and Recovery Compare with Previous Cycles?" (2011) *Canadian Economic Observer* 24 No 1.
[54] *Suttor, supra* note 41 at 126.
[55] *Ibid.*
[56] *Ibid.*
[57] See John Ibbitson, *Promised Land: Inside the Mike Harris Revolution* (Scarborough: Prentice Hall, 1997).
[58] *Ibid*.

the Ontario government cancelled all spending on new social housing.[59] The Harris government was elected to serve two terms in Ontario. For a period of eight years, the Ontario provincial government introduced some of the most draconian cuts to social spending the province ever witnessed. The impact these cuts had on the poor, and on disabled recipients are well documented into today and include the notorious cuts to social assistance rates in 1995 by an astounding 21 percent, along with downloading considerable portions of the rental housing stock to the municipalities. These actions were irresponsible and short sighted since municipalities simply lacked the tax base and tools to support these programs,[60] and the inevitable outcome of these changes would be to heighten housing precarity. The ramifications of reducing social assistance programming which the Harris government championed are examples of how careless government action actually intersected to impact the life, and security of the person interests guaranteed in section 7 of the *Charter.* To illustrate the impact government policy choices had on social assistance recipients, it is necessary to understand the relationship between these government cuts, and housing precariousness contributing to homelessness. In 1994 the maximum shelter allowance for a single parent with 2 children receiving Ontario Works ("**OW**") was capped at $707; the average 2-bedroom apartment rental was $784, leaving a gap of $77 dollars. By 2012, social assistance rates still stagnated well below inflation, with the shelter allowance capped at $641, while the average 2-bedroom rental apartment had soared to upwards of $1,183, leaving a shortfall of $542.[61] The difference between scenario 1 and scenario 2 is clear; social assistance recipients fared much better before the Harris era cuts in Ontario. After those cuts, social assistance recipients struggled to both find, and retain affordable housing. Eviction rates following the Harris cuts in Ontario soared; for example by 2013, of the 75,069 eviction applications that were filed at the Landlord and Tenant Board of Ontario, an approximate 80 percent of applications were due to rent arrears, which is indicative of the impact soaring rents have had on homelessness.[62] The ultimate consequences of

[59] *Ibid.*
[60] Michael Shapcott, 2011, Affidavit. "Precarious Housing Iceberg" chart at p 9, Tanudjaja v Attorney General of Canada and Attorney General of Ontario, ON SC File No. CV-10-403688. [*Shapcott, Affidavit*].
[61] *Heffernan, supra* note 3.
[62] Natalie Mehra, *Falling Behind. We are Ontario. 2012* (Rep.). Canada without Poverty. online <:https://www.cwpcsp.ca/resources/sites/default/files/resources/Falling_Behind.pdf> [*Mehra*].

these cuts posed significant financial challenges for recipients who depended on social assistance for their lives. This situation meant social assistance recipients who were housed and living on fixed income had to absorb a severe reduction in their already low incomes, and many of them struggled significantly to keep their housing. The effect of these cuts lead to a massive documented increase in evictions for these individuals, forcing many out on the street; for those who managed to retain their housing they had to sacrifice other essentials of life such as food, or transit to afford their rent and shelter costs.[63] Cutting social assistance rates, along with downloading the provincial responsibility for housing to the municipalities created enormous pressure on the housing market, and destabilized the lives of thousands of Ontarians.

Removal of Rent Control and Public Subsidies

In 1998 the Ontario government removed most rent control legislation, which caused the cost of rent to skyrocket without legislative protections; housing precariousness increased; evictions increased, and the number of homeless people in Ontario rapidly increased.[64] By the mid 1990s, virtually all investments into affordable housing were removed in Ontario.[65] By 2014, Dr. Stephen Gaetz, Director of the *COH* and Professor in the Faculty of Education at York University noted that there were an estimated 235,000 homeless people in Canada, who experience 'visible' homelessness, while another 1 in 5 people experience severe 'affordability' issues.[66] An approximate 450,000 – 900,000 people in Canada experience 'invisible' homelessness,[67] causing the Canadian situation to be referred to as a 'national crisis' in 2007 by Miloon Kotari, the United Nations Special Rapporteur on Housing.[68] The removal of public subsidies for affordable housing had historically been a key determinant in ensuring that local housing stocks were affordable; without those supports, homelessness exacerbated in the mid 1990s, and into the 2000s.[69] Many Ontarians who were particularly disadvantaged by these policy changes already belonged to marginalized groups whether through poverty

[63] *Ibid*.
[64] *Hulchanski Affidavit, supra* note 21 at paras 9 – 25.
[65] *Suttor, supra* note 41 at 1.
[66] *Gaetz 2014, supra* note 6 at 4 – 6.
[67] *Shapcott Affidavit*, supra note 60 at 9.
[68] Milloon Khotari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right of non discrimination in this context, Mission to Canada (October 2007), UN Human Rights Council, 10th Session, U.N. Doc. A/H.R.C./10/7 Add.3, (2009).
[69] *Hulchanski Affidavit, supra* note 21 at paras 32 – 54.

or due to disability status.[70] The end result of these government policy choices was to remove, and restrict housing affordability, and availability for a group of people who already faced tremendous disadvantage in Canadian society.

The Supreme Court of Canada's Justice Rosalie Abella stresses that it is important to focus on the 'results' of a system rather than tackling each issue on a case-by-case basis; she observes the importance of formulating remedies aimed at responding to the systemic roots of social issues.[71] It was the systemic nature of the homelessness crisis that prompted the inception of the litigation strategies that were adopted by the Dream Team in both legal challenges. Using the judicial system to target and promote social justice goals, and to enhance housing rights was the ultimate objective of the litigation strategies. However, there are ideological and practical considerations that both expand and limit the effectiveness of strategic litigation as a tool for affecting social justice goals in Canada. Law offers an imperative source for realizing social change; yet it is not the sole source for legal change, and using the judicial system to affect social justice goals can produce effects that are both complimentary and 'contradictory.'[72] On one hand, litigation can lead to revolutionary changes in the way we structure our laws, policies and legislation.[73] But on the other hand, substantive questions regarding social and economic rights are often said to be 'out of scope' in *Charter* litigation.[74] There is a concern that strategic litigation can be co-opted and take issues out of the hands of litigants,[75] and there is also the strong apprehension that strategic litigation itself undermines democracy by challenging the legitimate authority of elected government legislatures to set policies in accordance with their mandates.[76] In section 7 and section 15 *Charter* claims, concerns of 'justiciability' are at the forefront of

[70] Individuals who receive both OW and ODSP are under the low-income cut of line, also referred to as the 'poverty line' in Ontario.
[71] Ottawa, Minister of Supply and Services Canada, *Equality in Employment: A Royal Commission Report* by Rosalie Silberman Abella, (Ottawa: Canadian Government Publishing Centre, 1984) at 8.
[72] Amy Bartholomew & Susan Boyd, "Towards a Political Economy of Law" in W. Clement and G. Williams, eds, *The New Political Economy* (Kingston: McGill-Queeb's Press, 1988) at 233.
[73] *Sossin* et al. *Towards a Two-Tier Constitution. The Poverty of Health Rights* in Colleen Flood, Ken Raoch & Lorne Sossin, eds, *Access to Care, Access to Justice. 2005. The Legal Debate Over Private Health Insurance in Canada* [*Sossin et al 2005*].
[74] Vasuda *Sinha, Lorne Sossin & Jenna Meguid. "*Charter Litigation and Social and Economic Rights and Civil Procedure" (2017) J L& Soc Pol'y 43. [*Sinha et al*].
[75] *Heffernan, supra* at note 3.
[76] Michael Mandel, *The Charter of Rights and the Legal Litigation of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 311 [*Mande*l].

the friction between the role of elected legislatures and the conflict that is confronted when judges make law.[77] The *Tanudjaja* case itself was subject to much discussion about the role of the judiciary in making determinations about an area of law, which according to the Ontario Superior Court of Justice ("**Trial Court**"), and the majority at the Ontario Court of Appeal ("**Appeal Court**") said was not subject judicial scrutiny. Chapter 2 will focus more on justiciability and the *Tanudjaja* decision.

Methods

The methods used to conduct research on this paper are two fold. The first method included using basic legal, policy and documentary research[78] including reading and analyzing literature and case law, including theoretical literature in critical legal studies[79] about the relationship between strategic litigation and social change. Through canvassing legal databases and reviewing publicly available background documents about the two case studies in this paper, I was able to gain an in depth understanding of each challenge, and glean the important debates around litigation and social change.

Secondly, I have been employed with the Dream Team as a Coordinator of the program, and have been personally involved in a number of the initiatives referred to in this paper. Thus, a supplemental method for writing this paper was to chronicle my own professional experience working with the Dream Team and provide critical reflection based on that personal and professional experience on how strategic litigation can be useful to advance housing rights in Canada. These methodologies provide a balanced, evidence-based critique of the two separate case studies, which employed different forms of strategic litigation to advocate for social change.

My own experience provides a unique lens from which this MRP is written as it exposes a depth of intimate knowledge gained from this professional exposure to the Dream Team throughout the past few years. However, using this method also poses

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[77] *Sossin et al 2005, supra* note 73 – Chapter 2 will deal more with substantial issues of 'justiciability' and the role of strategic litigation to enact social justice goals such as housing rights.

[78] This type of research involves categorizing, investigating, interpreting and identifying limitations of sources available through written documents, both in the private and public domain. See Geoff Payne & Judy Payne, *Key Concepts in Research,* (London: Sage Publications: 2004).

[79] CLS attempts to develop a succinct critique of conventional legal thought, by challenging conventional legal beliefs about the law, and the balancing of competing interests at play. The movement seeks to 'demystify' legal discourse by unmasking assumptions of traditional legal doctrine, and open up struggles over legal doctrine to broader sociological analysis. See Mark Kelman*, A Guide to Critical Legal Studies* (Harvard University Press, 1987).

some significant challenges and restrictions which are inherent in using personal experiences to chronicle working with grassroots organizations.[80] I will explore some of these issues in the reflective section of this paper, which includes concerns such as confidentiality.

[80] Emily Paradis " Do Us Proud: Poor Women Claiming Adjudicative Space at the CESR" (2015) J L & Soc Pol'y 24. 109 – 134 [*Paradis*].

Chapter 2

This chapter will elaborate on the two strategic litigation challenges the Dream Team was involved in, which sought to advance housing rights in Canada. The chapter will follow the judicial history of *Tanudjaja* and discuss some of the concerns that were raised about the decision by both the Trial court, and the Appeal court. Additionally, the chapter will chronicle the Dream Team's involvement with challenging four municipalities in Ontario for implementing planning bylaws, which contravened the *Code*. These bylaws were subsequently amended because of the Dream Team's involvement in launching of this strategic litigation challenge.

Summary of Judicial History of Tanudjaja

In 2010, the *R2H* Coalition launched a section 7, and section 15 *Charter* challenge alleging that the government of Ontario, and the government of Canada through the introduction of poor policies that exacerbated homelessness and precarious housing, breached the *Charter* rights of vulnerable people.[81] The claim was novel in that it "*consciously map[ped] out the system and the interrelated systemic effects*"[82] that contributed to homelessness in Canada by examining the scope of state action involved in these poor policy decisions, and sought to impose positive obligations on the government.[83] The government responded to the applicants claim by launching a 'motion to strike.'[84] The motions judge, Justice Lederer at Ontario Superior Court of Justice allowed the motion to strike. Justice Lederer ruled that the claim was 'non justiciable' and the courtroom was not a proper forum to decide on issues that in Justice Lederer's opinion were 'political in nature.'[85] The applicants appealed the case to the Ontario Court of Appeal.

The majority at the Court of Appeal as per Justice Pardu upheld Justice Lederer's decision and confirmed that appellants' claim was political and consequently was not justiciable.[86] Justice Pardu observed that section 7 of the *Charter* does not create a "freestanding" right to housing in Canada, nor is there an imposition of positive rights on

[81] *Tanudjaja ONCA*, supra note 33.
[82] *Heffernan, supra* note 3.
[83] *Ibid.*
[84] More on a motion to strike will be discussed below.
[85] *Tanudjaja Motions, supra* note 10 – Justice Lederer reasons.
[86] *Tanudjaja ONCA, supra* note 33.

the government.[87] Justice Feldman disagreed with the majority in a spirited and thought provoking dissent on the motion to strike, and concluded that the applicants at least should 'have their day in court.'[88] She accepted that *Tanudjaja* proposed a novel approach to the *Charter,* and noted that this approach 'might yet be successful' and that *Charter* litigation in Canada is still evolving.[89] Justice Feldman disagreed with the motion judge about the parameters of a section 7 *Charter* claim and noted that positive obligations on the state in Canadian jurisprudence is not yet settled; she also noted the she believed the motions judge misunderstood the applicants claim.[90] Justice Feldman raised concerns about cases such as *Tanudjaja* which may be an improper case in which a motion to strike succeeds.[91] She noted that motions to strike are intended to strike out pleadings that are '*hopeless*' and bear no prospect of success, and noted that the *Tanudjaja* application was '*not the type of hopeless claim'* for which a motion to strike should succeed on.[92] The applicants lost on the motion to strike, and subsequently applied to the Supreme Court to Canada for leave to appeal the motion. Leave was not granted. Consequently, the applicants in *Tanudjaja* never did have the 'day in court' to argue the case on substantive grounds. Rather, the case was dismissed with the government winning their motion to strike, which ended this legal challenge.[93] Neither Court addressed the stipulations put forth by the applicants in *Tanudjaja* with regards to international commitments to uphold the *ICESCR*. Specific details about the case will be discussed further in this chapter, where the legal proceedings will be elaborated on, while explaining in detail the arguments and instruments that were proposed, and major concerns that were flagged by both the Trial and Appeal Court.

Background of R2H

Tanudjaja from the outset was a community-propelled strategic litigation initiative.[94] The legal challenge had its roots in 2008, when four poverty rights advocates hosted a workshop and asked some significant questions about tackling the intensifying

[87] *Ibid*. Justice Pardu reasons at 30 – 39.
[88] *Tanudjaja ONCA, supra* note 33 Justice Feldman reasons at 46 – 88.
[89] *Ibid.*
[90] *Ibid.*
[91] *Tanudjaja ONCA, supra* note 33 at 88.
[92] *Ibid.* More on motions to strike and Rule 21 of the Rules of Civil Procedure will be chronicled in the latter half of this chapter.
[93] *Ibid.*
[94] *Heffernan, supra* note 3.

homelessness issue that was escalading all across Canada. The workshop consisted of people with 'lived experience' of homelessness, community activists, lawyers, students, and those with an interest in resolving the homelessness situation.[95] '*How do we address the growing crisis of homelessness?'* and *'Can the right to housing be realized in Canada?*' were the key questions that were put forth for debate.[96] The workshop kick started the beginning of a vigorous period of discussion and community organizing around materializing the right to housing in Canada. The workshop sparked interest in launching the R2H Coalition, which was hosted by the Advocacy Centre for Tenants of Ontario ("**ACTO**"), and still continues on in present day. The *R2H* Coalition brought together a comprehensive range of individuals, and community groups who built on the discussions that were inspired at the initial workshop. The Dream Team had been involved since the inception of the legal challenge and itself was one of the founding organizations of the *R2H* Coalition.[97] The *R2H* coalition contemplated for a year about whether to launch a strategic litigation challenge that could proclaim that housing rights in Canada was a substantive right, guaranteed by the *Charter*. [98]

Applicants and Interveners

The *R2H* coalition canvassed potential applicants and determined whether the applicants possessed 'standing' to put forth a section 7 and section 15 *Charter* claim. Standing refers to an individual or organizations status to participate in a process – it is the way courts control access to the judicial process.[100] The coalition was successful in obtaining five applicants for this legal challenge. There were four individuals involved in the case: Jennifer Tanudjaja, Ansar Mahmood, Janice Arsenault and Brian DuBourdieu. The experiences of these four individuals represented a range of groups most vulnerable to housing precariousness: the single mother, those with disabilities, low

[95] *Heffernan, supra* note 3.
[96] *Ibid*. The four advocates were: John Fraser from CERA, Jennifer Ramsay from ACTO, Peter Rosenthal, Barrister from Roach and Shwartz, and Tracy Heffernan from Kensington Bellwoods Legal Clinic.
[97] Other founding organizations of the R2H Coalition included: Holland Bloorview Rehabilitation Hospital, The Centre for Equality Rights and Accommodation, Sistering, the June Callwood Centre for Young Women, the Social Rights Advocacy Centre, the Toronto Disaster Relief Committee and the Children's Aid Society. This list does not include all the organizations that have been involved in the case since inception, and at various junctures in the case history.
[98] *Heffernan, supra* note 3.
[100] There are 3 types of standing; party, intervener and friend of the court. Party standing confers the highest level of participatory rights and is the most desired type of standing. For a Charter challenge, applicants must possess personal or public interest standing to bring forth a claim.

income families and the very poor.[101] The fifth applicant was the Centre for Equality Rights and Accommodation ("**CERA**"), an Ontario based non-profit organization that tackles housing and human rights issues by working directly with communities in providing services, advice and public education.[102] In addition, a number of different organizations successfully sought intervener status at the preliminary hearing at the Superior Court of Justice, and subsequently at the Ontario Court of Appeal.[103] The Dream Team was granted intervener status as a 'friend of the court" in *Tanudjaja*.''[104]

Applicability of the Charter

Charter challenges are complex. Before a legal claim can be launched it is necessary to identify whether state action is implicated, and whether the *Charter* applies to that state action. It is crucial to understand that the *Canadian Charter of Rights and Freedoms* applies to government agencies and state actors; it does not apply to non-state actors.[105] Determining whether an action is 'state action' requires a scrutiny under Section 32 (1) of the *Charter*, which elaborates that the *Charter* applies to:

a) *The parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon and Northwest Territories; and*
b) *To the legislature and government of each province in respect of all matters within the authority of the Legislative of each province.* [106]

There is a three-step approach outlined in the *Eldridge v. British Columbia* that lays out the framework for applying section 32 of the *Charter*. In *Eldridge* the first step is to identify the precise source of the *Charter* violation; if the source is in legislation or regulation, the *Charter* applies. If the source of the *Charter* violation is an act of an entity, then step two requires making determinations as to whether the entity itself that committed the impugned act is the government, or is under the control of the

[101] *Young, supra* note 7.
[102] *Heffernan, supra* at note 3.
[103] *Ibid.*
[104] Pursuant to the *Rule of Civil Procedure*, Rule 13.02 the onus is on a proposed intervener to demonstrate that the court's ability to make determinations will be enhanced by the intervention. The court must be persuaded that the proposed interveners have unique interests and submissions to make, or they will bring a different perspective to the litigation. Note - The Dream Team's intervention was on the 'motion to strike.'
[105] *Charter of Rights and Freedoms*, s. 32, Part 1 of the Constitution Act , 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[106] *Ibid*.

government. If the answer to the second step is no, there is still an opportunity to engage the *Charter* where the impugned act that was committed is carried out by a private actor nonetheless caught by the *Charter*.[107]

Only the first two steps of *Eldridge* are implicated in the *Tanudjaja* case. There is strong jurisprudence backing the notion that repealing a statute or a law is considered government action that is properly caught by the *Charter*.[108] However, it is important to note the distinction between positive and negative rights in *Charter* jurisprudence in Canada. The *Canadian Charter of Rights and Freedoms* is drafted in the negative, which normally only requires the state to refrain from action that interferes with substantive rights (e.g. freedom *from* state action.)[109] Positive rights on the other hand require government action to *act* (e.g. carrying out the provision of a service.)[110] While it is true that there have been successful *Charter* challenges that have resulted in positive obligations on the government, (this is particularly true in the area of health care and education)[111] it is also true that there has generally been a specific provision or law that was challenged or repealed which was captured under the *Charter*.[112] *Charter* applications can become murky where there is not an isolated government law or policy being challenged.[113] *Tanudjaja* specifically avoided challenging any specific law or policy and both the Trial Court, and Appeal Court noted this was of concern.[114] Rather, the applicants argued that the '*cumulative effect of various laws and policies'* [115] resulted in a breach of section 7, and section 15 of the *Charter*.

The Legal Arguments

There were three primary legal arguments advanced in *Tanudjaja*:

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[107] *Eldridge v British Columbia (Attorney General*), [1997] 3 SCR 624 [*Eldridge*].
[108] *SEIU Local 204 v Ontario*, [1997] OJ No. 3563; Ferrel v Ontario (Attorney General), [1998] OJ No 5074.
[109] Scott McAlpine, "More than Wishful Thinking. Recent developments in Recognizing the Right to Housing under S. 7 of the Charter" (2017) 38:1 Windsor Review of Legal and social Issues [*McAlpine*].
[110] *Ibid.*
[111] Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on Gosselin v. Quebec" (2003) 20:2 SCLR 65 [*Cameron*].
[112] See *Carter v. Canada (Attorney General),* 2015 SCC 5 [*Carte*r].
[113] *Eldridge, supra* note 107.
[114] Gerard Kennedy & Mary Angela Rowe, "Tanudjaja v. Canada (Attorney General) : Distinguishing Injusticiability and Deference on Motions to Strike" (2015) 44 Advoc. Q 391 [*Kennedy & Rowe*].
[115] *Tanudjaja. Motions supra* note 10.

a) Firstly, the applicants argued that both the government of Ontario and Canada introduced changes to policies and programs that had a negative effect on vulnerable people and lead to an increase in homelessness and precarious housing; and
b) Secondly, new policies were implemented without suitable and constitutionally required consideration given to remediate the effect the new policies would have on vulnerable people and in accessing affordable housing; and
c) Finally, there was no strategic coordination between government programs that ameliorated the effects of government action on these vulnerable groups. [116]

Section 7

The case argued that the cumulative effect of these interconnected deliberate, active policy choices undertaken by both levels of government ultimately resulted in a breach of the applicants' section 7 *Charter* rights. Section 7 of the *Canadian Charter of Rights and Freedoms* states:

"*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*." [117]

There are two components that must be satisfied before finding a section 7 violation:[118]

1) There must be a breach of *at least one* of the interests engaged in section 7 (life, liberty or security of the person respectively); and
2) The law responsible for that breach must be done in a manner that contravenes fundamental justice (principles contrary to fundamental justice include, *arbitrariness, overbreadth, unfairness*...)[119]

Despite what seems to be the plain wording of section 7, some immediate concerns about the hypothetical and concrete considerations arise. A major concern is whether section 7 should be interpreted to include positive state obligations. A positive reading in

[116] *Ibid*. See also *Young, supra* note 7 for brief summary of the case.
[117] Charter of Rights and Freedoms, s. 7, Part 1 of the Constitution Act , 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[118] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123, at para. 14.
[119] Where an infringement of a protected Charter right is legitimately found, the government may still have opportunity to justify the infringement using section 1, using the 'reasonable limits provision' is section 1 of the Charter. Charter rights are not 'absolute' and there are times in which governments can, and do limit the rights of citizens in certain circumstances. The test for determining whether the limitation can be justified is the Oakes/Bedford analysis. Oakes is outside of the scope of this paper, so it will not be discussed. See s. 1 of the *Charter*. See also *R v. Oakes,* [1986] 1 SCR 103.

of the rights outlined in the *Charter* would mean that the state has a duty to uphold the right, and insofar as is possible, also provide for the attainment of the right.[120] There is no indication in the language of section 32 that suggests that government action need to be either positive or negative, but rather section 32 is '*worded broadly enough'* that it can capture both positive and negative obligations of the state.[121] The leading case, and the one that the applicants in *Tanudjaja* relied on in advancing their argument that the *Charter* imposes positive obligations on the state to act to address the homelessness issue was *Gosselin v. Quebec (Attorney General*). The *Gosselin* case dealt with Quebec's social assistance rates scheme, which treated people under 30 years old differently than other social assistance recipients in the province. *Gosselin* addresses the scope of section 7 rights, and the extent to which governments are required to act to uphold those obligations. Both the majority and the dissenting judges in *Gosselin* noted that in the *proper* case, it may be appropriate to "*open the possibility that a positive obligation to sustain life, liberty and security of the person may be made out in special circumstances*."[122] Both the majority, and dissenting judges agreed that the *Gosselin* case was not the right case at hand, but the right case could require a 'novel' interpretation of *Charte*r rights - that is to read in section 7 as requiring states to adopt positive rights in certain circumstances.[123] There has been a significant amount of debate and discourse about the implication of positive *Charter* rights post *Gosselin*.

The debate though, is far from settled in Canadian jurisprudence. Jamie Cameron, Professor of Law at Osgoode Hall Law School and one of Canada's premier constitutional law experts, notes that Canadian jurisprudence has consistently been seen to have '*left the door ajar'* since *Gosselin* regarding social rights and positive obligations on the state.[124] Cameron argues the Supreme Court of Canada ("**SCC**") has

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[120] *McAlpine, supra* note 109 at 2.
[121] *Vriend v Alberta,* [1998] 1 SCR 493 [*Vriend*].
[122] *Gosselin v Québec (Attorney General*), 2002 SCC 84 (CanLII), [2002] 4 SCR 429 [*Gosseli*n].
[123] *Ibid*.
[124] See *Cameron, supra* note 111; "See also *Schacter v. Canada, [1992*] 2 S.C.R. 679 (invalidating unemployment benefits which were "underinclusive: because "natural" parents were not given the same benefits as adoptive parents); See also *Eldridge, supra* note 107 (where the SCC declared it was unconstitutional for the province's health care services not to provide sign language interpretation and directed the government to comply with s. 15's requirements); See also Vriend, supra note 121 (where the SCC added "sexual orientation" to the prohibited grounds of discrimination in the province's human rights legislation); See also *New Brunswick (Minister of Health and Community Services) v. G. (J),* [1999] 3 S.C.R. 46 (where the SCC imposed positive obligations on the government ,using section 7 of the

not been 'hesitant' to recognize positive rights and impose positive obligations under the *Charter*.[125] She highlights a series of cases that ultimately lend credibly to the notion that the judiciary has imposed positive obligations on the state (outside of the criminal law context). In *Eldridge* for example, the SCC declared that it was unconstitutional for the province's health care *not* to provide sign language interpreters, and directed the government to comply with section 15 requirements under the *Charter.* This example was a positive obligation, and in doing so*,* Cameron articulates that the SCC infringed on the government's finances.[126] Cameron observes that institutional boundaries play a minor role in whether the judiciary will review a decision or not; rather, she articulates, that it is the 'merits' of the claim, not the legitimacy of the review, which determine the outcome of these types of *Charter* cases.[127] This notion of whether the *Charter* imposes positive obligations is not without contention even among constitutional law experts. In contrast, Canadian constitutional law expert Peter Hogg recognizes that it is conceivable that section 7 could, in theory implicate both positive and negative rights.[128] He observes that section 7 may incorporate two rights; first the 'unqualified' right to life, liberty or security of the person (except as limited by section 1 of the *Charter*), and second a right not to be deprived of life, liberty or security of the person (except in accordance with the principles of fundamental justice).[129] However Hogg goes on to take the position that the 'correct interpretation' of section 7 rights is that it *only* captures negative rights.[130] These concerns regarding positive and negative rights formed a substantial part of the broader concerns that were highlighted in the *Tanudjaja* decision by both the Trial Court and Appeal Court who ultimately made determinations the case was '*not justiciable.*'[131] Since the case was ruled not justiciable, neither court found it necessary to explore the applicants' arguments about the positive obligations on the state. As Justice Pardu at the Appeal Court in *Tanudjaja* observed "*it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on*

Charter to provide government funded counsel, in some circumstances, for proceedings related to child custody).

[125] *Ibid* at para 3.
[126] *Ibid* at para 13.
[127] *Ibid at 3.*
[128] *McAlpine, supra* note 111 at 2.
[129] *Ibid.*
[130] Peter Hogg, *Constitutional Law of Canada*, student ed (Toronto: Carswell, 2016) at 47-3 [*Hogg*].
[131] Justiciability will be discussed more in detail in the remainder of the chapter.

government to remedy violations of the Charter, a door left slightly ajar since Gosselin."[132] Yet, one of the critical roles of the litigation process where *Charter* interests are implicated is to develop, and define the parametres of *Charter* rights.[133] The Appeal Court, in deciding to uphold the lower court's decision on the motion to strike, determined the issues raised by the applicants were ones of policy and that the legislature was the proper forum to address these issues. Sinha, Sossin & Meguid (2017) observe that this determination was made, notwithstanding the fact that a core issue raised by the applicants was the court's role in holding government accountable to their *Charter* obligations for successive, and interrelated policy decisions.[134] By upholding the lower court's decision, the court was timid so as to avoid any risk of being seen as moving from constitutional law territory towards public policy.[135] However, as Sinha, Sossin & Meguid (2017) note, that line must be considered as "*one that is drawn in the sand – there can be no doubt that there is an interactive relationship between constitutional law and public policy*."[136] Consequently, for now, the court's decision not to hear the case on its merits leaves much to be desired with regards to the positive state obligations, and the scope of the judicial role where *Charter* interests are raised. Canadian constitutional law is still evolving where *Charter* interests are concerned, and while *Tanudjaja* provided an opportunity to delve into the territory of positive obligations on the state with regards to social and economic rights, both the Trial Court, as well as the Appeal Court's decision not to hear the applicants case, is telling about the current state of the judiciary in entering unchartered waters.

Section 15

In 1984, Justice Rosalie Abella issued the 1984 Royal Commission Report on *Equality in Employment* where 'systemic discrimination' was described. Canada's equality rights case law has consistently recognized that most discrimination is not the outcome of isolated acts motivated by discriminatory intent but rather discrimination operates through the "*persistence of systems and established practices that disproportionately favour dominant groups while disproportionately marginalizing,*

[132] *Tanudjaja ONCA, supra note 33* at 37.
[133] *Sinha et al, supra* note 74 at 50.
[134] *Ibid* at 50.
[135] *Ibid* at 52.
[136] *Ibid* at 53.

disempowering and disadvantaging many groups…"[137] The notion of *'substantive equality'* has been reaffirmed by the Supreme Court of Canada where the court considers that 'identical treatment' may in fact produce inequality.[138] Consequently, there are times where in order to produce substantive equality, there is a requirement that individuals to be treated 'differently' or 'preferentially.'[139] *Tanudjaja* sought to expose the complexity of laws and policies that interconnected with one another to disproportionately impact the lives of individuals who live with disabilities and depend on social assistance for their livelihoods. Section 15 (1) of the *Canadian Charter of Rights and Freedoms States:*

> *"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*[140]

Section 15 applies to government action pursuant to section 32 of the *Charter*. Consequently, laws, policies, legislation and programs controlled by, or under the ambit of government can be properly captured under the *Charter*.[141] Like section 7, it is generally accepted that there are no positive obligations on the government to rectify inequities that persons with disabilities may face in Canada.[142] However, when governments do act, they may not introduce laws or policies in a discriminatory manner.[143] In *Eldridge*, the court elaborates: "*if the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, it is discriminatory."* [144] There are two components that must be satisfied for a finding of a section 15 (1) violation:[145]

1) The law must create a distinction based on an enumerated or analogous ground; and

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[137] *Heffernan, supra* note 3.
[138] *R v Kapp* [2008] 2 SCR 483.
[139] *Ibid.*
[140] *Charter of Rights and Freedoms*, s. 15, Part 1 of the Constitution Act , 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[141] *Eldridge, supra* note 107.
[142] *Anton Guardian v. BC (Attorney General*) 2003 3 SCR.
[143] *Vriend, supra* note 121.
[144] *Eldridge, supra* note 121 at paras 72 – 73.
[145] *Law v R* (1999) 1 SCR 497 [*Law*].

2) The distinction must be discriminatory.

Section 15 is to be interpreted in a purposive and substantive manner.[146] The applicants must demonstrate that the impugned government action, in '*purpose or effect*' is discriminatory,[147] and that it has an adverse disproportionate effect on the applicants.[148] A list of enumerated grounds is identified in section 15 upon which discrimination is prohibited, which include on the basis of disability. However, this list is not exhaustive, and courts are open to find additional grounds referred to as 'analogous' grounds.[149]

Tanudjaja identified four enumerated grounds upon which government action disproportionately discriminated against certain groups: on the grounds of gender, disability, race and reliance on social assistance.[150] The applicants also identified the analogous ground of 'homelessness' and claimed that government action, through changes to laws and policies had a disproportionate effect on those who are at risk of homelessness, this exacerbated their existing "*disadvantages, marginalization, exclusion and deprivation."*[151] The applicants in Tanudjaja argued that homeless individuals are most marginalized in Canadian society, and that the government has historically overlooked their rights and privileges.[152] The motions judge, Justice Lederer determined that there was no law that had *caused* the applicants to become homeless, and in the absence of those specific laws and policies, section 15 was not engaged.[153] He also concluded that even if section 15 were engaged, homelessness and inadequate housing were not analogous grounds.[154] And finally, Justice Lederer held that this claim was also '*not justiciable.'*. In so doing the court made the determination that at the current time, the case is not yet 'ripe' so as to be considered on its merits by the judiciary.[155] What can be said it that the door is not yet shut on *Charter* litigation involving both section 7, and section 15 rights, and while *Tanudjaja* itself was unsuccessful, this litigation was simply one of many different litigation approaches

[146] Lovelace v Ontario [2000] 1 SCR at para 54
[147] *Law, supra* note 145 at para 80.
[148] Eldridge, supra note 121 at 60.
[149] *Andrews v Law Society of British Columbia* [1989]1 SCR 143 at para 6.
[150] *Heffernan, supra* note 3.
[151] *Heffernan, supra* note 3.
[152] *Tanudjaja Motions*, supra note 10.
[153] *Ibid.* Justice Lederer reasons
[154] *Ibid.*
[155] *McAlpine, supra* note 109 at 13.

employed by the applicants and their allies to raise awareness of the housing issues in Canada.[156]

Remedy Sought

Constitutional remedies are issued under section 24 (1), or section 52 of the *Charter*, which allows a court of competence jurisdiction to provide a remedy that is '*appropriate and just in the circumstances*.'[157] Generally, constitutional remedies do not provide for monetary damages. In order to successfully challenge a law or state action, applicants must possess standing, and be affected in the 'right way' by the alleged *Charter* violation. The law of standing regulates who may be an applicant in a *Charter* claim, as well as the circumstances that permit parties already involved in a legal challenge to raise *Charter* issues.[158] Standing in *Charter* applications is directly related to the availability of judicial remedies.[159] The remedies sought in *Tanudjaja* were:

a) Declarations that rights under section 7 and section 15 of the *Charter* were violated by the provincial and federal governments; and
b) An order implementing a national and provincial housing strategy; and
c) Supervisory order from the court to oversee the development of these strategies.

Both the Trial Court and Appeal Court noted that the remedies the applicants sought were "*outside the institutional competence of the court*."[160] The availability of judicial remedies is directly tied to the notion of justiciability, which will be discussed in the rest of the chapter.

Notice of Application & Motion to Strike

This case was launched by way of a Notice of Application.[161] Pursuant to the *Rules of Civil Procedure*, there are two primary ways of launching a legal case: through an action, which produces a Statement of Claim ("**SOC** "), or through an application , which produces a Notice of Application ("**NOA**").[162] Parties proceeding by an action make formal pleadings and receive the benefit of full discovery which leads to a trial with

[156] *Heffernan, supra* note 3 at 1 – 3.
[157] *Nova Scotia (Workers Comp Board) v. Martin* [2003] 2 SCR 504 at paras 1- 14.
[158] Andrew Lokan, Michael Fenrick & Christopher Dassios, *Constitutional Litigation: Cases and Materials* (Toronto : Carswell 2017) at 253 [*Lokan et al*].
[159] I*bid*, at .253 – 254.
[160] *Tanudjaja ONCA, supra* note 33, reasons.
[161] *Rules of Civil Procedure,* RRO 1990, Reg 194, Rule 14 [*Rules of Civil Procedure*].
[162] *Ibid.*

live witnesses; however this procedure is expensive, and often takes years to prepare and conclude.[163]Additionally, in an action, the parties must list all the material facts involved in the case, but not the evidence that will prove those facts.[164] An NOA on the other hand, only sets out the general legal grounds for the claim that will be argued. The NOA consists of affidavits[165] that are formulated and make up part of the evidentiary record.[166] In an NOA, the rules stipulate that no evidence is allowed before the court.[167]This is important because the way in which *Tanudjaja* was eventually struck out was based on the government succeeding on its motion to strike, rather than a substantial hearing of the applicants' case on its merits.[168] In a response to the NOA by the applicants, the respondents in the case, the Ministry of Attorney General - Ontario and Ministry of Attorney General - Canada asked the court to strike out the claim in its entirety, to which the court agreed.

According to the *Rules of Civil Procedure*, Rule 21.01 a motion to strike is a type of legal proceeding that intended to strike out a legal proceeding before the case is considered on its merits. A motion to strike will succeed if it can be demonstrated that there is "*no reasonable cause of action*"[169] and it is "*plain and obvious*" that the case stands "*no chance of success*."[170] The majority of *Charter* challenges in the Ontario Superior Court of Justice are brought forward by way of NOA.[171] Motions to strike are generally used to strike out a SOC.[172] Where *Charter* interests are engaged, a motion to strike can be an inappropriate legal tool used to quash litigation.[173] The *Rules of Civil Procedure* state that on a motion to strike, no evidence should be before the court. In *Tanudjaj*a, the affidavits that were part of the case, made up the evidentiary record. On a motion to strike however, the court cannot 'consider' the evidence put forward, and consequently cannot delve into whether the issue raised deserve the benefit of judicial

[163] *Lokan et al, supra note 156* at 47.
[164] *Ibid* at 50.
[165] Affidavits are sworn documents that provide relevant information about the case at hand.
[166] *Lokan, supra* note 156 at 47. *Tanudjaj*a included over 10,000 pages of affidavit evidence, which made up the case. See *Heffernan, supra* at 25.
[167] See *Lokan et al, supra* note 156; See also *Heffernan, supra* note 3.
[168] *Tandujaja ONCA, supra* note 33.
[169] *Rules of Civil Procedure, supra* note 161, Rule 21.01 (1) (b).
[170] *R v Imperial Tobacco Canada Ltd* [2011] SCC 42 3 SCR 45.
[171] *Lokan, supra* note 156 at 48.
[172] *Heffernan, supra* note 3 at 27.
[173] *Heffernan, supra* note 3 at 25.

oversight or not. The government argued that *Tanudjaja* raised issues that were 'not justiciable' and as a result of that determination, the litigation came to an end by granting the government's motion to strike. The court has an obligation to strike down non justiciable claims where it is 'plain and obvious' that the case stands 'no reasonable chance of success.' [174] Justice Feldman, at the Ontario Court of Appeal dissented strongly with the majority's determination and held that *'…in my view, it was an error or law to strike this application at the pleadings stage… the issues raised are of public importance.*' She concluded that it was '*neither plain, nor obvious that the applicants case would fail.'*[175] Justice Feldman went on to determine that the motion judge erred on four accounts with regards to the applicants' section 7 *Charter* claim in that:[176]

1) the motions judge misunderstood the section 7 claim; and
2) the motions judge erred in concluding that section 7 *Charte*r jurisprudence is settled with regards to positive obligations; and
3) the motions judge purported to define the law in jurisprudence around a motion to strike; and
4) Finally, the motions judge erred in concluding whether the applicants had a section 7 claim without considering the full evidentiary record.

In regards to the section 15 claim, Justice Feldman noted that while weaker than their section 7 claim, the applicants section 15 claim also should not have been struck out at the early stage.[177] She disagreed with the motions judge on his observation that the issue of homelessness was not an 'analogous ground.' Rather, she stipulates that could only be determined upon reviewing of the full evidentiary record of the applicants claim on its merits. Since the application was not allowed to proceed, there was no way for the court to make the determination that the section 15 claim was without merit.[178] The *Rules of Civil Procedure* exists to ensure the effective implementation of a principled, fair and consistent litigation process, and to set the thresholds that claimants must meet certain to benefit from the judicial process.[179] This gatekeeping function of the

[174] *Tanudjaja, Motions, supra note 10*, reasons.
[175] *Ibid* at 43.
[176] *Ibid* at 52 – 53.
[177] *Ibid.* Justice Feldman reasons at 69 – 88.
[178] *Ibid*.
[179] *Sinha et al, supra* note 74 at 56.

rules reflects concern for judicial economy, and upholding the proper role of the courts; however, in the *Charter* context, this gatekeeping function can be an 'awkward' procedural tool as it stifles discourse, and can be inappropriate to use where important *Charter* interests are at stake.[180]Additionally, the purpose of *Charter* litigation is not simply to arrive at appropriate dispute resolution. Rather, *Charter* litigation "*is also about informing our understanding of the interaction between individual rights and government action, and ensuring the constitutionality of government action through the court process.*"[181] Perhaps, in light of *Tanudjaja,* and in light of the difficulty that the strict interpretation of the rules of civil procedure puts on claimants, a relaxation of the rules of civil procedure is necessary in order to avoid the pitfalls of using motions to strike on NOAs.

Justice Feldman's dissenting reasons are notable for understanding that there is a spirited, and lively debate still occurring about justiciability, and its relationship with social and economic rights. Rightly so, Justice Feldman noted that the law is 'not settled' and in fact while determining questions of justiciability are difficult to ascertain with precision, Canadian *Charter* jurisprudence is still quite young; as the *Charter* continues to evolve, perhaps there the judiciary will be less timid about adjudicating claims that have historically been considered 'out of scope' in *Charter* litigation.

Concerns about Strategic Litigation

As *Tanudjaja* has demonstrated, and will be discussed in detail at the end of this chapter there is a recurring political and academic debate about the capacity of litigation to advance the rights of those who experience marginalization.[182] Concerns about the utility of litigation as a mechanism to advance social change are advanced and the potential pitfalls of placing undue reliance on the court system to rectify deep societal power disparities are often invoked in the discussion.[183] There is an apprehension that strategic litigation is vulnerable to co-option, and has the potential to take litigation out of

[180] *Heffernan, supra* note 3 at 25.
[181] *Sinha et al, supra* note 74 at 57.
[182] Judy Fudge, "What Do We Mean by Law and Social Transformation?" *Canadian Journal of Law and Society* 5 (1990): 47-70.
[183] *Heffernan, supra* note 3.

the hands of litigants.[184] This concern is inherent in rights discourses, particularly as it reveals deeply entrenched inequities of the court system, and shortcomings of the *Charter.*[185] Despite this apprehension, there is also strong acknowledgement from the academic and legal community that strategic litigation can be used as a tool to lead to revolutionary changes in the way we structure our laws, legislations and policies.[186] Determining '*justiciability*' stands at the forefront of the debate about the usefulness of strategic litigation.

Justiciability

Justiciability refers to a common law set of doctrines that address circumstances under which the judiciary may decline jurisdiction over a dispute.[187] Justiciability arises where there is a claim that a dispute is not "legal" in nature, and the claim is "purely political" [188] or the claim is said to rest on determinations that are not subject to proof in a judicial process (e.g., religious beliefs or convictions that cannot be proven through the adversarial process).[189] Justiciability concerns may also arise where a dispute is moot, or not yet developed, or are hypothetical, abstract or academic in nature.[190] The latter areas of justiciability are outside of the scope of this paper. I will only be dealing with justiciability as it was referred to in the *Tanudjaja* decisions, with reference to it being a matter that required the deference of the legislature, as it was a "political" and not a legal issue.[191]

> Justice Laskin, in *Black v. Canada* described justiciability the following way: "*The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision making institutions like Parliament."* [192]

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[184] *Heffernan, supra* note 3. See also Allan Hutchinson, and A Petter, "Rights in Conflict. The Dilemma of Charter Legitimacy." (1989) 23.3 *UBC Law Review* 531-548.
[185] *Mandel, supra* note 76 at 311.
[186] *Sossin et al 2005, supra* note 73.
[187] Lorne Sossin, "The Unfinished Project of Roncarelli v. Duplesis : Justiciability, discretion and the Limits of the Rule of Law" (2010) 55 McGill LJ. 661 [*Sossin, Unfinished*].
[188] See Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) c. 1 [Sossin, Boundaries].
[189] *Sossin, Unfinished, supra* note 187.
[190] *Sossin, Boundaries, supra* note 188.
[191] *Tanudjaja ONCA, supra* note 33 at paras 35- 36.
[192] *Black v Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [*Black*].

Consequently, when courts deem certain subjects to be 'not justiciable' this insulates those subjects from further judicial scrutiny.[193] The doctrine of justiciability is related to, but distinct from judicial deference. Judicial deference refers to when a court is able to make determinations about an issue, but decides not to, and defers to the legislature or another expert body to determine the matter.[194] Justiciability is different than judicial deference in that it is primarily a *jurisdictional* matter; that is, it deals with whether the judiciary *possess* jurisdiction to review certain matters and whether the subject matter is even appropriate for oversight by the court.[195]

Lorne Sossin, former Dean of Osgoode Hall Law School and recently appointed Justice at the of the Ontario Superior Court of Justice, has written extensively on the issues related to justiciability, judicial review and its relationship with social and economic rights. According to Sossin, substantive questions regarding social and economic rights in Canada are often said to be 'out of scope' in *Charter* litigation.[196] Justiciability is concerned with the functional separation of powers among the legislative and judicial branches of government.

> *"[I]n the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role vis-à-vis other branches of government."*[197]

Justiciability in the Charter context

Canada's Constitution outlines three branches of government: the judiciary, the executive, and the legislative branch. Since the enactment of the *Charter* in 1982, Canadian courts have had to face issues of the appropriate role the judiciary plays in the

[193] *Kennedy & Rowe, supra* note 114.
[194] *Ibid*.
[195] *Ibid.*
[196] *Sinha et al, supra* note 74; . See also Sarah Hamill, "Caught between Deference and Indifference: The Right to Housing in Canada." (2018) *Canadian Journal of Human Rights* 67[*Hamil*].
[197] *Doucet- Boudeau v Nova Scotia (Minister of Education)* 2003 SCC 62 at 34.

justice system, and the need to craft doctrines, which maintain an appropriate balance of power between the judicial and other branches of government.[198] The separation of powers doctrine outlines the basic, and appropriate role for each branch of government to play in governing the nation. The legislatures are represented by provincial and federal parliaments who are elected by citizens, and who are responsible for enacting laws that govern the provinces, and the nation, according to their political mandates. The judiciary, particularly since the advent of the *Charter* has had a strong role to play in ensuring that laws, and polices that are enacted by provincial and federal legislatures are consistent with Canada's *Charter*; the courts have judicial authority to nullify laws under section 24 of the *Charter*, and section 52 of the *Constitution Act*, respectively. The Constitution of Canada, which includes the *Charter of Rights and Freedoms*, is the supreme law of Canada, and any laws that are enacted that are not consistent with the provisions of the *Constitution Act*, to the extent of their inconsistency are of no force or effect.[199] In a constitutional democracy like Canada, significant concerns arise when a court, which is composed of a body of unelected judges, are asked to make determinations about the activity of the elected governments.[200] As noted, justiciability concerns arise when there are concerns about the legitimacy of the judiciary in making determinations they may not be appropriately positioned to do.[201] This is an example of the court's limitation of powers. Questions that are said to be 'political in nature' are conventionally considered out of the scope of the courts to judicially review.[202] The court outlines the political questions doctrine in *Operation Dismantle v. The Queen,* where Justice Wilson stipulates there are two primary reasons for the doctrine. The first being, the court should refrain from responding to concerns that are reserved for other branches of government by the Constitution, which respects the separation of powers principle. And the second, being the exercise of judicial prudence, and what Justice Wilson refers to as 'the consideration of the political wisdom of judicial intervention' given the circumstances.[203] Yet despite these concerns, recent Canadian jurisprudence has

[198] *Lokan et al, supra* note 156 at 3.
[199] *Hunter et al v Southam [1984]* 2 S.C.R 145 at 148.
[200] *Lokan et al, supra* note 156 at 4.
[201] *Ibid* at 4.
[202] *Operation Dismantle v The Queen,* [1985] 1 S.C.R. 441.
[203] *Ibid* at paras 467 – 473.

demonstrated that courts are not hesitant to usurp the power of elected bodies and make determinations on issues, which can be caught by the political questions doctrine, governing issues that are not 'legal in nature.'[204] In making judicial determinations about issues that *may* or *may not* be justiciable, the Supreme Court has been criticized for what some label as 'activism' of the high court, and usurping the power of the legislature to make determinations themselves.[205] Professor Jamie Cameron has stated "...*there is a lack of any principle to explain [the Supreme Court's] patterns of activism in the past year … I can't make heads or tails of them from one case to another*."[206]As some recent Canadian jurisprudence has demonstrated, judges have made laws in a number of different areas, some of which had typically been historically been considered areas left for the legislature to determine; examples include the Supreme Court's ruling in 2015 that allows physician assisted suicide which required the reading down of provisions in the *Criminal Code of Canada* which violated the *Charter's* section 7 liberty interests, along with remedying the situation by providing a positive right for access to services.[207] This type of dilemma has been noted in other cases involving spousal support and same sex marriage; where *Charte*r interests have been engaged, particularly section 7 interests, the judiciary have not been timid to read in, or read down laws which they found to be in violation of the *Charter*.[208] While the separation of the judiciary from the legislature was a deliberate, purposeful choice of the nation, as demonstrated courts have been accused of usurping parliamentary power, and do rule on issues that can sometimes fall within the scope of being 'not justiciable.' These issues may be properly considered to be 'political' and not strictly legal issues, as there are legislative frameworks in place to govern some of these issues. These are examples of judicial usurpation of parliamentary power. Judge made laws are especially evident in section 7 *Charter* claims where life, liberty or security of the person claims is directly implicated. [209] Yet, this is not the only area where the judiciary has been found to make determinations

[204] David Muttart, "Dodging the Issue of Activism in the Supreme Court of Canada" (2005) 54 UNBLJ 101.
[205] *Ibid.*
[206] *Ibid* at 3 quoting professor Jamie Cameron.
[207] See *Carter, supra note 112*; See also Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma " (2018) NJCL 38.
[208] *Ibid*; *See* also Chaoulli v. Quebec (Attorney General) 2005 SCC 35; see also Reference Re Same Sex Marriage [2004] 3 SCR 698.
[209] *Ibid.*
[209] *Ibid.*

about justiciability where *Charter* interests have been engaged; this has also been evident in Canada in the area of health care and education.[210] Justice Feldman in *Tanudjaja* picked up on those concerns and relied heavily on the *Chaoulli v. Quebec (Attorney General)* decision which demonstrated that the "*complexity of issues, sensitivity to political issues, potential for significant ramifications flowing from court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability."*[211] Justice Feldman herself noted that the applicants' concerns brought forward in *Tanudjaja* raised significant issues of 'public importance' and that the applicants should *at the very least,* have their day in court, to argue the case on its merits. While she acknowledged the legitimacy question posed about whether the judiciary are properly positioned to review a matter, she also acknowledged that the role of the judiciary as gatekeepers of the *Charter* requires that attention be paid to allegations of rights violations, particularly where *Charter* interests are engaged.[212] Sossin notes that delineating an 'exact' line for judicial review is not possible in Canadian jurisprudence. Rather, Sossin observes regarding justiciability and judicial review that in answering the legitimacy question regarding what issues will, and will not attract judicial review, will require a contextual approach to make those determinations.[214] That contextual approach can sometimes produce inconsistent results in Canadian jurisprudence, attracting judicial scrutiny on some issues, while ignoring others, as was the case in *Tanudjaja*, to which the court made the determination that the issues raised by the applicants were not justiciable.

Canada's constitution itself is also political in that it clearly represents values about the type of society Canadians have chosen to prioritize, and chosen to pursue. The drafting, adoption and implementation of the Constitution required significant competing visions and interests about of the relationship of individuals to the state and those visions must necessarily involve negotiation and compromise between competing interests.[215] As

[210] *Sossin et al 2005, supra* note 73.
[211] *Tanudjaja ONCA, supra* note 33 at para 35.
[212] *Ibid.* Justice Feldman reasons.
[214] *Sossin, Boundaries supra* note 188.
[215] J.A. Manwaring. "Waiting for Democracy – Allan Hutchinson's Programme for Progressive Politics. A Review Essay." (1995) [*Manwaring*].

such, they are clearly and obviously part of "*the activity by which decisions are arrived at and implemented in and for a community*."[216] Thus, the claim that constitutional law itself is political recognizes that the origins of rights, rules, laws and statutes reflects a state of priorities which requires making value determinations about certain issues.[217] Consequently, it is important to understand the law itself is a human construct, which is the by-product of politics, and embodies politics[218] much of which relies heavily on the values which are entrenched in *Constitution*, the *Charter* and the public at large.[219] The metaphor of the "living tree" is often invoked to describe the *Charte*r's ability to evolve, and recognize new rights, as society evolves, and new expectations shift and change with regards to the relationship between the state and individuals.[220] The *Charter* will likely continue to attract criticism on both sides of the political spectrum. On one hand, the *Charter* is criticized for giving an unelected, un accountable group of judges too much power to both interpret and to make laws; while on the other side of the *Charter* criticism is the emphasis the *Charter* puts on negative freedom[221] and it's prioritizing of political rights, over concerns of social and economic rights.[222] How and why judges make the determination as to whether certain issues are justiciable at its core remains an issue that relegates 'value' judgments as to what types of rights 'should' or 'should not' be afforded *Charter* scrutiny, and by default *Charter* protection.[224] It is difficult to ascertain whether the judiciary will hear a case that will require it to make determinations about social and economic rights. This conundrum is likely not to be resolved anytime soon in Canadian jurisprudence, but one thing is encouraging for strategic litigation applicants, until the Supreme Court says otherwise " ...f*or the moment, the justiciability of social and economic rights under the Charter remains an open question."* [225] This is encouraging for grassroots groups such as the Dream Team who intend to reap the benefits of the *Charter* and use strategic litigation to promote a more just, equal society

[216] *Ibid.*
[217] *Ibid* at 392.
[218] Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights*. (Toronto: University of Toronto Press 1995) at164.
[219] *McAlpine, supra* note 109 at 13.
[220] Emmett McFarlane, "Positive Rights and Section 15 of the Charter : Addressing a Dilemma" (2018) National Journal of Constitutional Law at 152 [*McFarlane*]; See also *McAlpine, supra* note 109 at 14.
[221] *Hamil, supra* note 196.
[222] *Ibid.*
[224] *Heffernan, supra* at note 7.
[225] *Sossin, Boundaries, supra* note 188 at paras 242 – 244.

for some of Canada's most marginalized, and vulnerable citizens. *Tanudjaja* did not resolve the issue of whether the judicial system is an appropriate place to deliniate social and economic rights, and the scope of positive obligations on the state. Nevertheless, there is still ample opportunity for strategic litigation cases to be brought forward, to further broaden and refine our understanding of Canadian Charter jurisprudence. While judicial review, and determinations of these issues is paramount to the rights discourses, strategic litigation is but one tool in this discourse.[226] Strategic litigation, in conjunction with other forms of mobilizing including education, public awareness and advocacy around these still poses an incredible opportunity to shift rights discourses in a progressive direction to materialize social and economic rights. Moving slightly in a different direction, the next part of this chapter will explore another forum where strategic litigation was utilized by the Dream Team, and where the organization experienced relative success with employing strategic litigation to advocate for, and advance the right to housing for vulnerable groups.

Municipal Bylaw Challenges

In contrast to the *Tanudjaj*a example, the Dream Team employed another form of strategic litigation, which was a relatively effective mechanism to advance social and economic rights, particularly housing rights at the municipal level. The Dream Team launched a challenge against these four Ontario municipalities at the Human Rights Tribunal of Ontario in 2010 : Sarnia, Smiths Falls, Kitchener-Waterloo and Toronto. The Dream Team experienced success with each case, with either the municipality repealing, withdrawing or amending their bylaws in some form as a result of the Dream Team's application at the Tribunal. Consequently, aspects of the provincial legislation governing land use planning were changed to reflect compliance with the *Code*. This rest of this chapter will outline some of the broad themes that arose in this challenge. The paper will not discuss each of the four challenges in depth, nor explore the plethora of issues that were uncovered in each municipality which are beyond the scope the paper. Rather, the chapter will summarize the nature of each municipal challenge and

[226] *Heffernan, supra* note 3.

chronicle the Dream Team's experience at the Tribunal. and the usefulness of using strategic litigation to propel housing rights.

Background

As *Tanudjaja* identified, much of the housing crisis faced in Canada has systemic roots. Tackling the affordable housing problem across Ontario will require an acknowledgement of how "...*homelessness and inadequate housing continue to be produced and sustained by an interlocking system of laws and policies."*[228] This accurately described the situation the Dream Team encountered with regards to the actual building of 'affordable' [229] and 'supportive housing' [230] units in Ontario.

One of the biggest hindrances to building affordable and supportive housing in Ontario is tied to the way in which urban planning laws and policies, as well as enshrined practices and attitudes interact to curtail the construction of affordable housing.[231] *Tanudjaja* explored the provincial and federal funding issues that can affect *how* money is invested into affordable housing (ie: changes in government regimes, austerity cuts, etc.). Another interrelated issue that affects the construction of affordable housing is the experience that affordable housing providers face when trying to construct different forms of affordable housing. Some forms of municipal urban planning bylaws have had the affect of restricting affordable housing from being built by utilizing land use planning tools such as '*capping*' and '*distancing* ' requirements which are planning mechanisms employed to regulate development and land use, and prevent the over- concentration of particular land uses in defined areas.[232] We can contend that some of the municipal planning bylaws are 'archaic' and are not grounded in human rights, but rather are often influenced by discriminatory attitudes and stigma[233] and what planners often refer to this as 'not in my back yard' syndrome or "**NYMBISM**".[234]

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[228] *Heffernan, supra* note 3.
[229] Note - there is no widely accepted national definition of 'affordable.' The Canada Mortgage and Housing Corporation (CMHC) has proposed 30 percent of pre tax income as the standard for what is considered affordable, but different groups use different metrics for determining affordability. See *Hulchanski – Affordability, supra* note 1.
[230] Supportive housing includes but is not limited to housing that is 'affordable' and combines non-financial supports (such as a social worker) which enable members to live in a community.
[231] *We are Neighbours, supra* note 27.
[232] *Roher, supra* note 37 at 34.
[233] *Ibid.*
[234] S Hill, & K Painosi et al. "Supportive Housing: Neighborhood Fears and Realities. Papers on Planning and Design" (1993). University of Toronto.

NYMBISM was certainly part of the problem that manifested itself in the bylaws of these municipalities in Ontario. But *NYMBISM* was not the only problem that was encountered. Rather, two related but distinct types of discrimination were identified in this strategic litigation challenge. The first is discrimination which was overt and operated through laws and policies; this was easier to do a simple assessment as to whether the impact of these laws and policies were discriminatory and contravened the *Code*.[235] The second and perhaps more pervasive is discrimination that is 'unofficial' but that manifests itself through practice (and attitudes) and is much harder to identify.[236] Similar to the issue of whether courts are adequately equipped to hear certain type of disputes, the municipal bylaw challenge demonstrated that jurisdictional disputes are reflected all throughout the justice system. While the Dream Team managed to succeed at the Tribunal, there was contention about what was the most appropriate forum to bring forth human rights issues, and it was only through the effective networks of community partners and allies that the organization succeeded in bringing forth this challenge.

Law Foundation Grant

In 2008, the Dream Team received a grant from the Law Foundation of Ontario ("**LFO**") to conduct research on the interplay between zoning bylaws and planning practices in municipalities across Ontario and the ways in which various forms of urban planning processes have created hindrances to building diverse forms of affordable housing across the province.[237] The funding provided money for research and public education across Ontario around this issue. The research efforts demonstrated that many of Ontario's municipalities had enacted a series of discriminatory planning bylaws, ranging from restrictions for certain types of affordable housing units, including but not restricted to supportive housing units, and group homes.[238] The research revealed that among other planning tools, many municipalities implemented various types of minimum separation requirements such as '*capping*' or '*distancing.*' On it's face, these types of land use regulations are permitted, and appear to be neutral; however, what often

[235] The Legal Basis of NIMBY. Final Report. 2007. Prepared for Advocacy Centre for Tenants Ontario. GHK. online, < https://www.acto.ca/production/wp-content/uploads/2017/07/ACTOReport_NIMBY_2007.pdf > [*ACTO, NIMBY*].
[236] *ibid*.
[237] The results of the report were reproduced in The Legal Basis of NIMBY, which can be accessed online at ACTO's website, or at the link above.
[238] *Dream Team website, supra* note 23.

occurs with these types of land use regulations is that they end up zoning for "*users of the land*" or "*people zoning*." [239] This amounts to discrimination under the *Code*, since these types of zoning for people effectively determines the social composition of a community through including some groups into that social makeup, while disenfranchising others.[240] Zoning bylaws often do have a legitimate purpose; however, when the effect of bylaws is to have an adverse disproportionate impact on certain distinct groups of people, that effect can be discriminatory.[241] Where zoning provisions are demonstratively justified as being grounded in *sound policy principles* they are often upheld.[242] For example, in 2010, the OMB upheld a bylaw in Toronto that required a 250-metre minimum distance between homeless shelters to avoid the overconcentration of shelters in that particular area, and to ensure that shelters were spread throughout the rest of the city.[243] The OMB also recognized that shelters were not a true form of 'housing' and consequently was not in contravention of the *Code.*[244] Group homes, and other forms of affordable and supportive housing on the other hand, are considered 'legitimate' forms of housing, and where planning bylaws end up restricting these forms of housing from being built, they can contravene the *Code*. Homeowners and resident groups often stipulate that these bylaws are necessary to protect the community, and protect property values against the impact of these forms of social housing in their neighbourhoods.[245] However, a research report undertaken by the Dream Team called *We are Neighbours* studied the impact of supportive housing units in two distinct communities across Ontario and found that contrary to popular belief, the inclusion of these types of housing in a neighborhood actually contributes to the community's vitality, and there was a strong positive correlation with an increase in property values, not a decrease, as generally promulgated.[246] In addition, these types of units have a strong role to play in contributing to the strength of the local neighborhood. Since many of these

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[239] Ian Skelton, *Keeping them at bay: Practices of municipal exclusion* (Winnipeg: Canadian Centre for Policy Alternatives, 2012) at 2, online: <policyalternatives.ca/publications/commentary/keeping-them-at-bay-practises-municiple-exclusion> [permacc/XL29-DEVR]
[240] *Ibid.* See also *Ranasinghe & Mariana Valverde, supra* note 38.
[241] *Roher, supra* note 37 at 30.
[242] *MUC Shelter Corporation v Toronto*, [2004] OMBD PL030313 at 22 -23.
[243] *Ibid.*
[244] *Ibid* at 30.
[245] *We are Neighbours, supra* note 27.
[246] *Ibid.*

residents live on fixed or limited income, and they often don't have access to cars or transit accessibility, they are forced to spend their money in supporting the local neighborhood businesses by purchasing locally.[247] These forms of affordable housing were found to be beneficial for the local community, and did not demonstrate a stronger crime rate than other parts of the city, dispelling the belief that affordable and supportive housing units bring crime to the local area where they are built.[248]

The LFO grant to the organization sparked the beginning of a spirited debate within the Dream Team about what kind of mobilizing should be done to challenge urban planning bylaws and legislative regimes which had the adverse effect of restricting the availability of housing available for poor people, and people with disabilities. The Dream Team undertook primary research, and also hired a number of consultants and experts to assist in determining which municipalities in Ontario had the *worst* restrictive planning bylaws and policies in place. The purpose of the research was not to be conclusive about which municipalities contravened the *Code*, but rather to provide an opportunity to challenge the ones that stood *most* in the way of affordable housing.[249] Group homes were identified as a type of housing which experienced the worst discriminatory restrictions in place in municipalities all throughout Ontario.[250] Expert consultations with were instrumental in the relative success of employing strategic litigation to advance housing rights for those who are most marginalized in Ontario. Though not as complex as the *Charter* litigation launched in *Tanudjaja*, the municipal bylaw challenge at various junctures faced a number of different procedural difficulties. Questions were posed as to whether the Tribunal was the appropriate place to determine 'planning law' issues.[251] It was suggested that the applicants should seek a remedy from the Ontario Municipal Board ("***OMB***" *recently renamed* the Local Planning Appeal Tribunal "**LPAT**"). [252] Nevertheless, with assistance from HomeComing Coalition ("**HomeComing**"), the Human Rights Legal Support Centre ("**HRLSC"),** and ACTO, the Dream Team managed to successfully build a support network of allies in the affordable housing sector who

[247] *Ibid.*
[248] *Ibid.*
[249] *ACTO, NIMBY supra* note 235.
[250] *Ibid.*
[251] *The Dream Team v. City of Toronto* 2011 HRTO 1691. Interim Decision.
[252] *Ibid.*

were insistent on upholding the values of the *Code*, to the benefit of people with disabilities.[253] These networks were extremely helpful for the Dream Team; providing everything from information and referrals, to advice around legal questions, and guidance with navigating what was an extremely confusing process of challenging human rights legislation.

The Dream Team sifted through applications both at the former OMB, and at the Tribunal. The OMB process was no easier than the Tribunal process. Rather, in the Kitchener- Waterloo challenge, the Dream Team went to the OMB, citing human rights violations and contravention of the Code.[254] In 2010 the Supreme Court of Canada decided the *R v. Conway* case, which promulgated that applicants can raise human rights issues at the most convenient forum, which in theory gave the OMB the ability to consider human rights applications should they need to.[255] This evolution in recognizing human rights issues at the most convenient forum was certainly welcome, particularly as it affected the ability to promote access to justice for grassroots organizations such as the Dream Team. Neither the Tribunal, nor the OMB were places that grassroots organizations could successfully bring applications forward to, without considerable support and resources enabling the organization to overcome administrative hurdles and navigate the complex procedures which were experienced at both adjudicative bodies.

Applicability of the Code

The Ontario Human Rights Code came into effect on June 15, 1962 and it was the first of its kind in Canada.[256] The *Code* replaced and consolidated the province's anti-discrimination legislation that had existed before it, which addressed various types of discrimination that were identified under different statutes including discrimination based on race, and gender, among others.[257] Throughout the past few decades, the *Code* has been amended to include 19 *enumerated* grounds (that is 'listed' grounds).[258] The Human Rights Tribunal of Ontario is the administrative, adjudicative body that

[253] *ACTO, NIMBY supra* note 235.
[254] *ACTO, NIMBY supra* note 235.
[255] *R v Conway 2010 SCC 22.*
[256] *Human Rights Code*, RSO 1990, c. H. 19, preamble [*Human Rights Code*].
[257] Ontario human Rights Commission, About the Ontario Human Rights Code < http://www.ohrc.on.ca/en/ontario-human-rights-code>.
[258] *Ibid.*

oversees disputes where *Code* grounds are engaged. It has the power to issue remedies under the *Code*, including the granting of monetary damages.[259]

The *Code* is provincial legislation, and is applicable to provincial and municipal government bodies, as well as private entities operating provincially regulated activities in the province of Ontario. The *Code* does not apply to federally regulated activities such as banking, telecommunications, and aeronautics, which are subject to the *Canada Human Rights Act.*[260]

Pursuant to section 2 (1) of the *Ontario Human Rights Code*:

> "*Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance."*[261]

The purpose of the *Code* is to protect people from discrimination in areas such as jobs, housing, etc. All laws in Ontario that are enacted need to be in compliance with the *Code*. In the Dream Team's view, the protection guaranteed under the *Code* means that all Ontarians :

1) should be able to choose where they want to live, and;
2) should not require the approval of their neighbours to move in, and;
3) individuals, organizations or by-laws that exclude or defame people due to mental illness [*or code protected grounds*] can and should be challenged for failure to uphold the *Code*.[262]

It was the experience of systemic discrimination in housing camouflaged as 'legitimate planning tools', which sparked discourse within the Dream Team about challenging the municipalities based on the enumerated *Code* ground of disability. Since the Dream Team is comprised of people with 'lived experience' of mental illness, and homelessness, many of the members themselves at the inception of the municipal bylaw challenge lived in group homes themselves, and depended on these forms of housing to

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[259] *Human Rights Code*, s. 32.
[260] *Canadian Human Rights Act*, RSC.,1985, c. H-6[*Human Rights Act*].
[261] *Human Rights Code*, s. S 2 (1).
[262] HomeComing Community Choice Coalition, "Yes in my Backyard. A Guide for Ontario's Supportive Housing Providers" 2005 (Toronto: Centre for Addiction and Mental Health).

meet their demand for low income rentals. The nature of these municipal challenges were very personal to some of the members of the Dream Team, which inspired the team to persevere through procedural, and administrative hurdles and setbacks experienced throughout the municipal bylaw challenge. The legal challenges themselves took some six or so years to resolve, from the inception of the project in 2008, to when the last municipality (Toronto) withdrew its discriminatory bylaws in 2014**.** A considerable amount of staff time and member time, along with significant resources, emotional and mental investments went into seeing this litigation challenge through to the end.

Urban Planning & Group Homes

While there is a public interest component to urban planning, historically the purpose of zoning for land uses has been to promote and protect property values, while at the same time segregating against certain "undesirable" uses of land; zoning has not typically been about substantive equality, democracy or justice.[263] In Ontario, municipalities are responsible for enforcing the bulk of rules and legislation that are involved in the planning process. Municipalities set out their *Official Plan* ("**OP**"), which need to be compliant with the Provincial *Planning Act* ("**PA**"), and *Provincial Policy Statement* ("P**PS**").[264] Section 34 (1) of the *Planning Act* grants municipalities the power to pass and enforce zoning bylaws.[265] Zoning is a land use tool that regulates how land is managed, and regulates how communities are developed.[266] In carrying out land use regulation, city councils can determine how certain land plots are utilized, whether an area should be deemed residential or commercial or industrial, and how to restrict certain types of provisions in the area such as for example height and density.[267] While the *Planning Act* confers on local governments the ability to regulate land use through zoning, these policies still need to be in compliance with the *Code*. The Supreme law of Ontario is the *Code,* and where there is a dispute between two different legislations, the

[263] *Ranasinghe & Valverde, supra* note 38.
[264] Ministry of Municipal Affairs and Housing, *Citizens Guide: Zoning By-Laws, No 3.* (Toronto: Ministry of Municipal Affairs and Housing, Provincial Planning Policy Branch, 2010) at 2 [*Citizen's Guide, No 3*].
[265] Planning Act, RSO 1990, c P13, s 34(1) 1 [*Planning Act*].
[266] Prashan Ranasinghe & Mariana Valverde, "Governing Homelessness Through Land Use: A Sociolegal Study of the Toronto Shelter Zoning By-Law" (2006) 31:3 Journal of Sociology 325 at 327 [*Ranasinghe & Valverde, Governing Homelessness*].
[267] *Citizens Guide, No 3 supra* note 205.

Code takes precedence.[268] Consequently, municipalities that enact bylaws that do not conform to the *Code* can be subject to challenge at the Tribunal. The Dream Team brought applications at the Tribunal under section 34 (5) of the *Code* for contravention of the *Code* on the basis of disability for their treatment of various forms of housing, including group homes. Four separate applications were launched at the Tribunal in 2010. Each were similar in that these municipalities had implemented minimum separation requirements of some sort for group homes, supportive housing or other types of affordable housing, which had the aggregate effect of limiting affordable housing for disadvantaged groups.

Group homes are referred to as "*residential facilities in which a small number of unrelated people in need of care, support, or supervision live together. They include correctional group homes, juvenile group homes, residential care facilities, and group foster homes.*" [269] The City of Toronto further defines group homes as "*premises used to provide supervised living accommodation, licensed or funded under the Province of Ontario or Government of Canada legislation, for three to 10 people…living together in a single housekeeping unit because they require a group living arrangement*."[270]Group homes are similar to rooming houses, but are distinct from rooming houses in that the bulk of group homes receive government support for programming that allows residents to live independently in the community with the support provided (such as for example, providing a social worker, and access to community kitchens, and different programs). The emergence of group homes began to gain traction from the 1970s onwards in Ontario. During this period, the province began to move away from the de-institutionalization of people with psychiatric and physical disorders; there was a shift for people to live in the community, with the supports necessary to carry out meaningful lives.[271] Group homes still face an enormous amount of stigma in the local communities where they are built, where pervasive 'indirect' discriminatory attitudes are quite common. Blatant, egregious discriminatory bylaws and laws are fairly straightforward to

[268] *Tranchamontagne v Ontario* [2006] 1 SCR 515 2006 SCC 14 at para 34 {T*ranchemontagne*].
[269] City of Toronto, Bylaw 569-2013, Zoning By-law (May 9, 2012), s 800.50 (325) [*By-law No 569-2013].* See also Sandeep Agrawal, "Balancing Municipal Planning with Human Rights: A Case Study" (2014). Canadian Journal of Urban Research 23:1 at 4 [*Agrawal*].
[270] City of Toronto By-law No 569.
[271] *Agrawal, supra* note 269 at 5.

identify. What is more difficult to identify is the embedded attitudes of prejudice and discrimination which is pervasive, but evades scrutiny due to the inability to pinpoint this form of indirect discrimination with an accurate amount of precision.[272] Both forms of discrimination were experienced in each municipal challenge brought forth by the Dream Team. The Dream Team fought the former type of discrimination at the Tribunal and were successful, but the latter from of discrimination still remains a challenge that is outside the scope of being captured by the Code, and still part of the Dream Team's long term work in reducing stigma by employing storytelling as a tool in their educational, and advocacy initiatives. More on storytelling will be discussed in the last chapter of this paper.

City of Toronto

In 1998, when the City of Toronto amalgamated with six other municipalities, which make up the current City of Toronto, new bylaws were prepared with the intention to enact the consolidated bylaws citywide.[273] In 2010, the Dream Team launched an application challenging the city's proposed bylaws. The Dream Team's legal arguments included contesting the definition of a 'group home' under the city's new proposed bylaws. According to the City, occupants of a group home were identified as "*occupants who by reason of their emotional, mental, social or physical condition or legal status."* [274] In the application against Toronto, The Dream Team alleged that:

1. The City was singling out occupants of group homes, and had enacted these specific sets of bylaws, which only applied to this group of people; and
2. In addition to the City's definition of group home which identified the 'consumers' of group homes within the definition, the city also proposed a 250 minimum separation distance between any group homes in the city.

The crux of the Dream Team's legal argument was that the effect of this bylaw limited the availability of housing options by limiting the location of where group homes could be located within the city's vicinity.[275] The consequence was that, despite the bylaw's seemingly 'neutral' application to prevent an 'overconcentration' of poor people in one

[272] *ACTO, NIMBY supra* note 235.
[273] *Ibid* at 5.
[274] *Dream Team v Toronto*, 2012 HRTO 25 at para 25 - 31 [*Dream Team, 2012*].
[275] *Ibid.*

area, the ultimate outcome was that group homes would end up being prohibited in more places than they would be allowed.[276] The Ontario Human Rights Commission has written on a number of occasions that bylaws regulating group homes which imposed a minimum separation distance between homes further limited the availability of housing options for people with disabilities who depended heavily on these forms of housing to reside[277]Toronto objected to the Tribunal's jurisdiction, and to the Dream Team's argument. Toronto stipulated that the more appropriate forum to bring this dispute was not the Tribunal, but rather the OMB who were more appropriately positioned to determine land use provisions. [278] Counsel for Toronto argued that the Dream Team's case was '*vague, speculative, hypothetical* 'and did not indicate a *prima facie* case of discrimination under the *Code*. [279] The Tribunal determined they had jurisdiction to hear the human rights dispute and the City sought judicial review of the decision, which was reviewed at the Divisional Court, a branch of the Ontario Superior Court of Justice.[280] The Divisional Court determined the Tribunal's initial assessment was correct.[281] After this determination, the City of Toronto contacted the Dream Team, and then consulted with the staff and membership about hiring an independent urban planner with expertise in human rights legislation to research the issue. The Dream Team agreed to this, and Dr. Sandeep Agrawal, a human rights urban planning specialist was hired to research the issue. The report he produced agreed with the Dream Team's assessments about the land use provisions and their potential discriminatory implications on people with disabilities.[282] In 2014, as a result of the Dream Team's challenge at the Tribunal, as well as the independent report produced by Dr. Agrawal, the City of Toronto withdrew its proposed bylaws.[283] Municipal planning staff made a recommendation to city council that

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[276] *Ibid.*
[277] Ontario Human Rights Commission, In the zone: Housing, human rights and municipal planning (Toronto: Ontario Human Rights Commission, 2012) at 6, online: <ohrc.on.ca/en/zone-housing-human-rights-and-municipal-planning. [perma.cc/E95H-TSUE] [*Ontario Human Rights Commission*].
[278] *Ibid.*
[279] *Ibid.*
[280] *City of Toronto v Dream Team,* 2012 ONSC 3904 [*Dream Team, Divisional Court].*
[281] *Ibid.*
[282] Dr. Agrawal produced a confidential staff report to the Solicitor's office at City of Toronto for action on Group Home Zoning Regulations called "Opinion on the Provisions of Group homes in the City-wide Zoning By-Law of the City of Toronto".
[283] Chief Planner and Executive Director of City Planning, Staff Report: Review of Zoning Provisions. Pertaining to Group Homes (Toronto: Planning and Growth Management Committee, 2013) at 2. online<Toronto.ca/legdocs/mmis/2013/pg/bgrd/backgroundfile-62500.pdf> [*Review of Zoning Provisions*].

group homes with up to 10 residents be permitted “as of right” anywhere in the city that allows for high density development [284]The effect of this is that group homes are treated, at least in theory, on par with any other homes in the City of Toronto, without having to undergo additional tests to “prove” they belong in the neighbourhood.

While the intentions of the land use planning tools may have been innocent and a valid legitimate provision to control land use, the bigger issue cited by the Dream Team was that these provisions not only limited the amount of available housing, but it also reinforced stigmatizing attitudes towards people with disabilities.[285] All four applications were filed at the same time in 2010. However, Toronto was the last city to amend its bylaws and bring them in in compliance with the *Code*, which arose directly as a result of the Dream Team’s challenge.[286] If the Dream Team had not launched this challenge, Toronto would still have Toronto ‘people zoning’ bylaws in place, making it extremely difficult for new supportive housing units to be built in the city. As the leader of one of the largest and progressive cities in Canada, as well as one of cities whose most pressing need is to increase the affordable, and supportive housing stock, Toronto should have played a stronger role in upholding and protecting the values enshrined in the *Code* by doing away with discriminatory attitudes and practices that had no basis in urban planning. Although this municipal challenge against the City of Toronto’s urban planning bylaws was the lengthiest and most complex, in the Dream Team’s view, this was a major win for people with disabilities, as it allowed opened the door for just, and equitable planning principles in the City of Toronto. To the extent of where group homes are concerned, the Dream Team’s strategic litigation challenge in Toronto marks a step in the right direction for the city to construct these forms of affordable housing without additional legislative red-tape in place. It is the organization’s hope that the longer-term anti-stigma work being done by the Dream Team and other grassroots organizations like it will help to change the narrative of who deserves access to the city and its resources.

[284] *Ibid.*
[285] Human Rights Legal Support Centre, “Discriminatory zoning removed in four Ontario Municipalities” 2014, online :< http://www.hrlsc.on.ca/en/human-rights-stories/tackling-systemic-discrimination>.
[286] City of Toronto, by-law No 550-2014, Zoning By-law (13 Jun 2014).

Sarnia, Smiths Falls, Kitchener-Waterloo

Though not as exhaustive as the Dream Team's experience battling the City of Toronto's bylaws, the remaining three municipalities had also employed egregious discriminatory planning practices which restricted group homes from being built in their municipalities. Sarnia had minimum separation distances imposed in the municipality, as well as additional restrictions requiring group homes to only be located in certain zones (ie: they were prohibited from being located in suburban residential, and rural residential zones).[287] In the Dream Team's experience, Smiths Falls was possibly the most offensive municipality in contravention of the *Code*. Smiths Falls had both capping and distancing requirements in place for group homes, which was laid out both in the *Official Plan* as well as the zoning by-law.[288] They municipality had enacted mandatory minimum separation distance of 300 metres between group homes, and a maximum number of 36 disabled people who could live in the municipality.[289] Additionally, new land use developments in the region would be subject to impact studies; group homes were required to pay 'special attention to keep with the character of the surrounding area,'[290] which was an additional burden group homes faced that other housing in the municipality did not have to demonstrate. This had the effect of severely restricting group homes in the municipality, and also ensured that no new group homes in that region could ever be considered "as of right." Kitchener employed minimum separation distances of 400 metres between each group home, and also contained provision in their bylaw which stipulated no group home shall be within 100 metres of the city limit of Kitchener.[291] As a result of the Dream Team's application to the Tribunal, Sarnia responded fairly quickly and amended it's bylaws in 2010, which removed all regulations restricting where group homes could be built, and allowed "as of right" zoning is all residential zones.[292] Both Kitchener and Smiths Falls amended their bylaws in 2012.[293] Smiths Falls removed both the minimum distancing, as well as their distasteful capping

[287] *ACTO, NIMBY supra* note 235 at 9.
[288] *Ibid* at 10.
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid* at 11.
[292] *Ibid.*
[293] See *Dream Team website, supra* note 23; See also *Agrawal, supra* note 269 at 17.

requirements which had been in place.[294] Smith Falls still requires new developments to undergo impact assessment studies. The effect of removing these provisions in the three municipalities means that affordable housing providers do not need to go through additional layers of red tape, when trying to construct affordable housing which is a primary form of housing for people with disabilities and vulnerable populations.

As was evidenced throughout the Dream Team's experience in challenging these four municipalities at the Tribunal, two forms of discrimination persisted. That is discrimination which was overt, and operated through the adoption of laws and policies which were discriminatory and could be pinpointed using the *Code*. This type of discrimination was easier to identify and challenge on enumerated grounds.[295] Yet the discrimination that is the most pervasive and hardest to target is discrimination which is invisible and functions through enshrined practices and attitudes, and sometimes manifests itself through forms of *NYMBISM.* Combined together, overt and covert discrimination interact and affectively curtail the affordable housing stock available for people with disabilities by preventing group homes, and other forms of housing from being built which seek to remediate the housing affordability and housing availability situation for poor people, and people with disabilities. In the long run, these discriminatory attitudes and practices halt the building of affordable housing through inadvertently restricting various forms of affordable housing in communities due to discriminatory NIMBY. The long-term result of these interlocking attitudes, combined with enshrined practices, which persist through bylaws and policies effectively contributes to homelessness by barring the availability of housing. Group homes provide irreplaceable value for vulnerable populations who depend on these forms of housing arrangements for them to live in a community. Without an increase in the affordable housing stock in communities dedicated to target the low income population, homelessness will continue to rise, putting the lives of vulnerable people at risk.

Strategic litigation can be a powerful tool to fight the outward discrimination that can be identified under the *Code.* In the Dream Team's experience, employing strategic litigation has been a relatively successful mechanism for propelling housing rights,

[294] Patty Winsa, "Smiths Falls Votes to end group home bylaws," Toronto Star (7 October 2014) , online <thestar.com>.
[295] *ACTO NIMBY, supra* note 235.

particularly where it is easy to identify breaches of the *Code* on enumerated grounds. However, in the absence of specific laws or bylaws, which contravene the *Code,* it is extremely difficult to 'prove' discriminatory attitudes and behaviours. Rather, these attitudes and behaviours cannot be pinpointed with any amount of precision, and this is part of the long-term work of anti stigma education. The historical work of the Dream Team has been to promote anti stigma initiatives through personal storytelling about the ills and intersections of mental illness, housing precarity and homelessness. While strategic litigation has provided a forum to fight injustice, the deeper work lies in the long-term attitudinal shift, to which storytelling provides an enormous opportunity in opening minds and shifting the dialogue about housing. The importance of storytelling and its potential role in advancing social justice goals will be explored in the next chapter.

Chapter 3

Personal and Professional Motivations

For almost a decade, I have been employed in the affordable housing sector and have done significant work engaging vulnerable people around homelessness, housing and other social justice issues. I had the opportunity to work as a Coordinator for the Dream Team for a number of years and was involved in providing leadership and guidance to the Dream Team regarding their strategic litigation challenges. In addition to that, throughout the past few years as I pursued my post graduate studies in urban planning and law, I had the privilege of leveraging those skills at ACTO where I was employed in different capacities undertaking legal work and engaging the community around a number of issues affecting vulnerable populations facing housing precariousness and city planning. A of significant portion of my work with the Dream Team, and ACTO has been focused on challenging the current discourse around affordable housing and homelessness by employing 'storytelling' of people's 'lived experiences'[296] as a vehicle for long term attitudinal shift. Both of these professional experiences have solidified my conviction that the most compelling role grassroots organizations can play in articulating housing rights as legal instruments is to weave their stories into the housing discourse and use storytelling and narratives to 'open minds' which promote long-term attitudinal shift about the intersections of precarious housing, and homelessness.

Storytelling itself is not a new concept; rather it is a way of 'seeing' and 'being' that challenges people to think about issues from the lens of those who have experienced rights infringements themselves, by hearing firsthand their own stories about those struggles.[297] At the societal level, as it relates to housing rights storytelling is about incorporating the voices of those with lived experience into the broader discussion about housing rights, where their stories help shape, and craft policy solutions, which are targeted to these groups. Storytelling is often overlooked as a tool in promoting change.

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[296] This refers to individuals who have gained knowledge and experience through actually 'living through' something. The term has typically been identified with individuals who have experienced marginalization of some form. See *MHCC, supra* note 26.

[297] Andrew Brown, Yiannis Gabriel, and Silvia Gherardi, "Storytelling and Change. An Unfolding Story" (2009) Organization doi, <10.1177/1350508409102298> [*Brown et al*]; See also *Paradis, supra note 80.*

However, it is arguably one of the most powerful ways to challenge normativity,[298] open minds, and if done in conjunction with other forms of mobilizing and advocacy work such as strategic litigation, it can be an incredibly successful vehicle for advocating for a plethora of social justice goals.[299] As Heffernan, Faraday and Rosenthal counsel for the applicants in *Tanudjaja* noted repeatedly in their reflections on the *R2H* case, litigation was but one form of organizing aimed at enhancing social and economic justice for marginalized groups.[300] Before delving into the rest of my experience with the Dream Team, I am going to share a short story about a woman who I knew who struggled immensely with mental illness, poverty and homelessness. It is her story, the story of women like her who continue to inspire my belief in fighting for the right to housing, so that all people, even those without resources can live meaningful lives.

C's story

Born to a poor Indo-Afro Caribbean family, who were the descendants of indentured labourers and slaves, C struggled to fit into her homogenous community where she was often considered an 'outsider'; not quite Indo-Caribbean, but not quite Afro-Caribbean either. What made her upbringing worse was that her family was quite poor; she had 12 siblings, 7 boys and 5 girls. She understood what being a woman meant in that community; it meant that she was not entitled to the benefits of an education, or any of her father's property because it was 'too expensive' to educate women, and because women needed to be cared for by their eventual husbands, which was prevailing status quo of the rural countryside of Trinidad where she grew up. She was never educated beyond primary school. At the age of 14, C left home in search of a job to help her family, and in search of a husband. Her mother suffered from trauma induced schizophrenia and was chronically ill, constantly in and out of the hospital, and C felt compelled to do what she could to make their lives easier. While she was able to find some work at food stands and the like, her managers often abused her. As a young teenager in the big city, she often fell prey to the lure of older men who exploited her youth, naivety and inexperience. She returned home at the age of 16, herself now struggling with paranoid schizophrenia, and pregnant. She gave birth to her first child,

[298] *MHCC, supra note* 26.
[299] *Paradis, supra* note 80.
[300] *Heffernan, supra* note 3.

who she was unable to raise due to her illness. This child was unrecognized by the rest of her family for being 'illegitimate' and born out of wedlock. She herself had no housing security, as her father, disappointed and ashamed of his daughter's 'immorality' and illness often put her through severe emotional, mental and physical abuse. Her daughter was raised by her paternal grandmother, as C's mother herself could not help due to her own mental illness, combined with the fact that her mother also had just given birth to her own baby girl, who she could not raise due to poverty and mental illness. C spent a significant amount of her life in and out of her father's house where she was sometimes welcome, sometimes not. Most of her siblings misunderstood her, and she was the 'black sheep' of her family. From my recollection, C was the most beautiful, fun, vibrant woman I knew, who at times would walk the streets screaming that she was 'Mary, the mother of God.' Everyone laughed; no one lent a hand, and when they did, it was often with conditions that she 'get better' as though C chose to be in the position she was in. Not being able to comply with their demands to 'get better' her family often ended up asking her to leave their houses, and C struggled with chronic homelessness, and the stigma that came from being labeled as 'mentally handicapped.' Having no safety net to turn to, life on the streets was her only way to survive. After years of abuse, homelessness, enduring mental illness, at the tender age of 38, C passed away alone, and still isolated from her family, from a compromised immune system, a likely condition that developed from her numerous assaults while on the streets. C was my sister, and today I understand how her situation was influenced by a myriad of factors, which contributed to her homelessness, the first of which was her inability to ever live in a safe and secure home. It is her story, and stories of people like that continue to influence how I think about access to housing, and that have shaped my understanding of the intersections between precarious housing, poverty and homelessness. It is also that understanding that allows me to situate the grave violations that occurred in her life as the result of 'broken society.' I often think about how different her life would be if she had a safe place to live. It is my hope that no one else has to ever have to end up like C, battling with homelessness. C's story echoes very much the same types of stories many of the Dream Team members have faced in their own lives, and reinforce my conviction that grassroots communities have a significant role to play in using their personal stories

to influence change. The rest of this paper will focus on the role of grassroots communities themselves, and what, in my opinion is the missing link in the affordable housing debate in Canada.

My professional exposure working with the Dream Team is partially what motivated me to pursue both a law, and an urban planning degree. These two fields of study fuse together my interest in working on broad systemic issues that foster social justice for some of Canada's most disenfranchised groups of people. The remaining chapter of this paper will draw from my professional and personal experience working as an advocate in the social justice sector, and in particular my experience working with the Dream Team throughout both strategic litigation challenge. I will chronicle the usefulness of employing storytelling a tool in articulating housing rights as legal instruments, and make recommendations for how these types of stories can be used in the broader legal, and urban planning discourses which affect housing rights. I will also highlight some of the pitfalls that are inherent in using storytelling in order to foster change within the institutional setting.

I have made two interconnected observations in my professional, and academic career about how rights discourses are articulated on the ground with grassroots organizations. Firstly, there is a large disconnect between theorizing about rights discourses and, and working directly in, and with communities who are vulnerable to all kinds of rights infringements (this is not specific to the housing discourse alone, but is a broader concern facing many vulnerable groups). This disconnect is rife in both the study of law and the study of urban planning. Citing the Dream Team's experience, this disconnect is manifested chronically, in the team's day-to-day interactions with experts, academics and others in the housing sector. The Dream Team themselves carefully employ staff to assist and support them with their initiatives, taking into consideration a particular skillset that is useful for the organization which provides support for their movement, while at the same time ensuring the movement is authentically 'theirs.' In addition, the Dream Team also consults with a number of experts, academics, consultants, policy makers, and allies to provide them with advice and feedback on a number of different issues. The Dream Team has been alert to, and aware of, the possibility of having their movement 'co-opted' and their voices stifled. They work

diligently to ensure their work reflects *their priorities*, and reflects *their vision.* They understand that their 'lived experience' perspective is what informs the kinds of priorities they set within the organization, and consequently what informs the kinds of priorities they advocate for outside of the organization. These priorities may not always be in line with what literature, research, or data with regards to what are the 'best solutions' or 'best practices ' to target the homelessness situation in Canada. Rather, they know the value that their perspective brings to the table, and are willing to go against the grain and ensure that those perspectives are heard.

Both the practice and study of law and urban planning can learn a significant about activism and advocacy from these groups. Both the study and practice of law and urban planning also need to be open to be taught by people with lived experience, and ultimately if planners and lawyers are to accurately represent, and reflect the value people with lived experience bring to the homelessness discussion, these professionals will need to employ a very specific sets of skills and competencies to do that. As a professional working with the Dream Team, I have had to carefully, and cautiously self examine to ensure that it was and is in fact the voices of the Team that were contributing to policy discussions. Of course, at times and in some circumstances my own expertise was invaluable and encouraged at the table. However, the challenge in working with a disenfranchised group of people is that there are a number of contentions within these groups with how they view, and regard 'experts', 'academics' and the like, which can be detrimental to building relationships and building the capacity to truly incorporate their collective voices into policy discussions. In the Dream Team's philosophy, gone are the days when academics and policy makers who operate in a world of theory with access to a plethora of knowledge and information determine what is 'best' for everyone is contrary to 'movement' of the Dream Team, and organizations like the Dream Team.[301] This is not to suggest that sound research, which informs evidence-based policy, should not prevail. Rather, informing policy is a multi-faceted challenge, and ensuring that voices of those such as the Dream Team is incorporated in a way that is meaningful and constructive is instrumental to fuel successful policies. One of the very things the Dream

[301] See *Dream Team website, supra* note 23. See also Catherine Porter, "Advocacy of Dream Team wins hearts and minds" Toronto Star, online https://www.thestar.com/news/world/2015/03/04/advocacy-of-dream-team-wins-heart-and-minds-porter.html [*Porter*].

Team, and groups like the Dream Team detest is being told what they should say, or being told what works for them. It is rather difficult, yet extremely rewarding to work alongside a Team that so vehemently understand who they are and what they want, and what works for people like them, and what should be incorporated into the broader housing discussion.

Challenges with Storytelling as a Method

For my first few years of professional employment with the Dream Team, despite my own upbringing of being raised in precarious housing situations for the entirety of my life to which I understood (and still do understand the real struggle to find and retain affordable housing), it still took an enormous amount of time to build solid relationships with the team, and to build trust with the team, to respect their vision and be an 'ally' who promotes their wellbeing, rather than be a 'professional' who has co-opted the movement. The team has always appreciated that I 'understood' them, and that I have been able to thoroughly journey alongside them not simply as a Coordinator or 'paid staff' who is un-invested in the outcome of their work, but rather as a member of the team who firmly believes in promoting access to housing. Emily Paradis, long time ally of the Dream Team, and Senior Researcher Associate at the University of Toronto has documented similar concerns and issues she ran into when working on a feminist participatory action project which involved women who experienced homelessness and poverty in Toronto.[302] She lead the group in articulating their human rights and assisted them with making submissions to present to the United Nations Committee on Economic Social and Cultural Rights ("**CESR**") in Geneva.[303] She echoed her own concerns about co-option of the movement she was a part of, and struggled with ensuring that the movement was authentic and reflected the priorities of the organization to which she had worked alongside with.[304] Along with those concerns, there are a host of institutional concerns which can hamper the effect that storytelling can have on the outside world. Firstly, understanding that organizational culture can play a big role in who, and what stories are told, which at times demonstrates competing interests at play for the staff, the members and the organization. Issues of confidentiality are particularly common as

[302] *Paradis, supra* note 80
[303] *Ibid.*
[304] *Paradis, supra* note 80.

individuals open up and share the most vulnerable parts of their lives with the public. There are issues with members who choose sometimes to document their stories and use it as form of resistance to the broader narrative, and then change their mind later after the stories have been published, displaying the kind of issues that can be persistent with using this kind of tool in educating the public. In addition competing aspirations among members themselves often arise. This kind of conflict often makes it difficult to determine whose testimonies get shared in what forums, and making those determinations can become difficult to navigate. Paradis also highlighted similar issues she faced as she facilitated member sessions where she outlined that sessions could be quite 'chaotic' with members arriving late, leaving early, dozing off, arguing, and the challenge of the committee having 'non uniform voice' in this participatory project. [306] All of those concerns ring true for my experience with the Dream Team, and reveal some of the challenges inherent in using this kind of method to change the discourse about housing rights. Nevertheless, despite those challenges, the benefits of storytelling are transformative to society, and I still believe it is the best way to compliment strategic litigation, and work on long term attitudinal shift.

The study and practice of law and urban planning require a unique set of skills building to ensure that lawyers and planners are competent problem solvers. The study of law is rigorous, and systematic, and trains lawyers to predict the outcome of legal challenges based on case law precedent in the common law world. Likewise, the study of urban planning is also systematic and focuses on resolving tangible, concrete issues that relate to land use development. Both fields of study offer opportunity for critical reflection, and in many ways are involved in advancing public interest work in the greatest sense. Both fields of study offer a remarkable amount of value to the world. However, neither lawyers, nor urban planning practitioners, nor academics or scholars can adequately, and completely paint a picture of the types of narratives that are produced by people with lived experience. We have sound research and evidence about the systemic causes of the roots of the homelessness crisis across Canada (much of which was produced in affidavit form in *Tanudjaja*), along with the acknowledgement of the displacing effect the high cost of housing has on those who live on social

[306] *Paradis, supra note 80* at 113.

assistance, and an understanding that discrimination against social housing can restrict housing options for people with disabilities. Yet, acknowledgement of these harms is not enough to foster social change, and certainly not enough to foster long-term attitudinal shifts in the population.

By far, in my opinion the missing element both from the study and practice of law and urban planning around a plethora of social issues is the '*lived experience'* component of that is employed through storytelling. 'Storytelling' has the capacity to reconstruct, and change the entire narrative of homelessness and affordable housing in Canada, and shape the dialogue in new ways never conceived by policymakers and academics. In an effort to become those 'rigorous, systematic thinkers' that both fields of study promote, there is a 'muting down' of the interpersonal, a dulling of individual subjective experiences of the self, and an attempt to apply universal 'objective truths' which create the popular narratives at play in the study, and practice of law, and planning.

Storytelling – Broader Discourses

Patricia Williams, Professor of Law at Columbia University, and one of the world's pre-imminent scholars in critical legal studies, in her seminal work on rights discourses in America has challenged the notion of the impartiality ideal that is explains the law and conceptions of the law as 'objective' 'neutral' and 'unbiased.' In reference to her writing style Williams explains that her attempt in legal writing is to push the boundaries of what is conventionally accepted as legal scholarship. She explains her style is an attempt to '"*write in a way that reveals the intersubjectivity of legal constructions, that forces the reader to both participate in the construction of meaning and to be conscious of that process."*[308] Williams is not alone in that acknowledgement. Rather, there is a body of support in critical legal scholarship that challenges the dominant discourse that the law is neutral, and unbiased. Williams recognizes what Professor Allan Hutchinson, Professor of Law at Osgoode observes that law is a 'human construct', which is the byproduct of a politic, and itself embodies a certain type of politics.[309] Williams observes that '*much of what is spoken in so-called 'objective unmediated voices' is in fact mired in 'hidden*

[308] Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press: 1991) at 8. [*Williams*]
[309] Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press: 1995) at 164.

subjectivities and unexamined claims'.'[310] Williams is known for paying particular attention to the way in which social identity makes epistemic differences in what is taken into consideration, understood, and thus known.[311] What Williams claims is that everyone holds their subjective biases about the ways in which the world should operate and the ways in which society should operate, which is directly informed by our own social identities. Williams invites us "*think critically about rights in relation to the lingering racial privileges and unearned advantages that pervade social relations, norms, and institutions including the teaching and practice of law*."[312] She is hopeful that the role of the lawyer "*could be one of mutinous agitator – using knowledge, skills, creativity, experience, and when necessary, defiance – to support the causes of those excluded from the equal benefit and protection of the law."*[313] She also encourages us to find our voices, and our stories, and use them in a way which animates the multiplicity of voices and diversity of interests at play, so as to have an acute sense of the ethics at play in the production of that knowledge.[314] In the *Charter* context what this means is that where rights violations are alleged by vulnerable groups, particularly as it relates to section 7 rights, and section 15 this may necessarily mean challenging conventional conceptions of the law, and 'justiciability' doctrine to a certain extent, so that the values which are embodied in our *Charter* have the capacity to fully materialize.

My personal and professional experience echo William's sentiments about the ways in which stories are used to shift long-term attitudinal change in society. The most effective part of the Dream Team's work has been, and continues to be, not the advocacy, nor the research or education endeavors the organization is involved in. Rather, the organization is unique in that a considerable amount of the organizations resources are fuelled into generating storytellers who possess to ability to craft compelling, truth-telling narratives about their own personal lived experiences with homelessness, poverty, mental illness, systemic stigma and discrimination.[315] As

[310] *Williams, supra* 308 at 11.
[311] Linda Martin Alcoff , *Engendering Rationales* (State University of New York Press: 2001) at 64.
[312] Faisal Bhaba. "Islands of Empowerment: Anti Discrimination law and the Question of Racial Emanicipation" (2013) Windsor YB on Access Just at 66.
[313] *Ibid* at 66.
[314] Daniel Mahala & Jody Swilky. "Telling Stories, Speaking Personally: Reconsidering the Place of Lived Experience in Composition" (1996) Journal of Composition Theory 16:3; quoting Williams at 365.
[315] See *Dream Team website, supra* note 23.

Paradis has described storytelling is the fuel that '*anchors theories of the indivisibility of social and civil rights in the complexities of lived experience.*'[316] The organization collects data and evaluates their most useful contributions to academic discussions, and time and again, it is the personal storytelling aspect of the Dream Team's work that motivates, inspires and encourages people to believe that housing should be a substantial right in Canada. It is hearing firsthand about the ills of homelessness and having direct contact with people who have lived through precarious housing and homelessness which changes the discourse from 'should we recognize housing rights' to 'how do we materialize these rights?" The Dream Team regularly guest lectures at all major Ontario colleges and universities, to high schools, to politicians and at housing conferences. Time and again, their stories are heralded as 'inspirational' and 'empowering.' "*Students leave the presentations with their mouths hanging open. They had no idea people could live through so much, survive it, and be so powerful coming out of it,"* [317]says Sarah Harrison, adjunct Professor at Ryerson University, where the Dream Team has guest lectured various different classes for over 10 years. Such reactions are common after the Dream Team's presentations; students regularly seek out ways they can help materialize a substantial right to access housing for vulnerable people after hearing the stories of the Dream Team.[318] Such reactions reflect strong indication about the compelling nature their stories serve in shifting the narrative about the housing and homelessness issue in Canada. In fact, without the storytelling aspect incorporated within the broader discourse of homelessness and housing, the discourse is incomplete and inadequate. This notion of storytelling to fuel policy changes from the bottom up has been recognized as an instrumental component of the broader housing policy discourse in Canada.[319] To reflect on the importance of storytelling in their work, the Mental Health Commission of Canada's Opening Minds project named the Dream Team program as the most successful youth anti-stigma program in Ontario.[320] The Dream Team effectively uses storytelling to influence, and change the dialogue about

[316] *Paradis, supra* note 80 at 116.
[317] *Porter, supra* note 301.
[318] *MHCC, supra* note 26.
[319] *Ibid.*
[320] *Ibid.*

housing and homelessness, and more broadly to change discrimination and stigma against poor people, and people with disabilities. [321]

It is well documented that 'stories' can inspire, motivate and change societal perceptions about a variety of different issues.[322] Our identities are constructed as stories and stories are the ways in which we understand our roles in society. Storytelling can also hinder change, and define what 'constitutes' change.[323] Stories are often "… *aids to memory, and ways of forgetting, diagnostic tools and distractions, means for social control and expressions of liberation, hegemonic and subversive. In all these ways, and others stories are key to our conceptions, theories and research on change*."[324] There is no single perspective about the role stories play in creating our world, but what we do know is that stories do create our world. Stories create every aspect of our world; from what we choose to share, and what we choose to omit. The law itself is a story.[325] Law itself is premised "*on the idea that law is the field of human interaction through which we define ourselves individually and collectively*."[326] But yet the law has chosen to include some dimensions of human interaction as 'justiciable issues' while others are outside the scope of the law. Recall earlier in Chapter 2 as I discussed issues of' justiciability' I observed that issues of 'justiciability' necessarily impute value judgments determining that some areas are 'justiciable' while others are not. There are some precise defined areas of law, which will always attract judicial remedies, and scrutiny from Canadian courts (such as say for example, contract law). However, in determining whether other areas of law such as social and economic rights are within the purview of courts to review, the Canadian legal system has not definitively given an answer. If we use the Supreme Court's *Gosselin* decision, the judiciary has demonstrated that while there may one day come a case that is 'right' to explore what positive obligations on the state may look like in Canada, *Gosselin* was deemed not to

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[321] *Dream Team website, supra* note 23.
[322] See Constance Backhouse "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" (Paper delivered at the First Colloquium on the Legal Profession, October 2003), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>.; See also *Brown et al, supra* note 297.
[323] *Brown et al, supra* note 297.
[324] *Ibid* at 25.
[325] See Robert Gordon, "Unfreezing Legal Reality: Critical Approaches to Law "(1987) 15 FLA ST U.L. Rev 195 at 197 [Unfreezing Legal Theory].
[326] *Manwaring, supra* note 215 at 383 quoting Allan Hutchinson.

be the right case.[327] But what exactly would the 'right case' look like? There is no concrete way to answer that; some judges would explore these issues and then make determinations on them (as Justice Feldman herself noted in the Appeal Courts Tanudjaja decision) while others will determine that such discourses are outside the ambit of the court altogether. This is an indication that these types of determinations are evolutionary in nature, and that law itself, is a concept that is not 'static' in nature. The Supreme Court has not decided conclusively about the state's role in a post *Gosselin* context. In my opinion, leaving this door open is a good first step, but necessarily though, as is evident in Canada's Charter which is part of Canada's Constitution, and is itself the 'supreme law of Canada', these documents are filled with 'value' judgments about what kinds of rights attract Charter protection, and what kind of society we ought to live in. The implementation of international law covenants through the *ICCPR ,* which required states to take immediate steps to implement civil and political rights in their respective countries, was itself a value judgment made by the actors of the covenant.[328] Extending that logic, the decision *not* to require states to adopt the other international law covenant the *ICESCR,* is also a value judgment, rife with complexity. Those two documents have made their way into Canadian law, and have affected how, and why the Charter was drafted the way it was, which was noted by the Supreme Court's Justice Louise Arbour in the dissent in *Gosselin*.[329] In the case of vulnerable people such as those who live in poverty, or those who depend on social assistance in Canada, the prioritizing of the *ICCPR* over the *ICESCR* is an example of a material failure of the law to advance the fight for justice for this group. Justice Arbour challenged the conventional interpretation of the *Charter* which typically excludes the right to an adequate standard of living, and other covenants to which Canada has been a party.[330] Full inclusion into Canadian society requires more than simply guaranteeing 'rights' though majoritarian governments. Rather, true inclusion requires first and foremost that the most basic of human necessities, that is shelter, is accessible to everyone, so as to access other kinds

[327] *Gosselin, supra* note 122.
[328] *Heffernan, supra* note 3.
[329] *Heffernan, supra* note 3 quoting Justice Arbour.
[330] Louise Arbour, "'Freedom from want' – from charity to entitlement Libérer du besoin: de la charité à la justice"(LaFontaine-Baldwin Lecture delivered at the United Nations High Commissioner for Human Rights, 3 March2005) [*unpublished*].

of benefits. [331] Those determinations made by the UN regarding the materialization of the two covenants which prioritized the *ICCPR* over the *ICESCR*, ultimately imputes that certain 'rights' are normative, and thus worthy of protection, while others are not (namely, social and economic rights).[332] There are valid considerations for why putting positive obligations on the state regarding social and economic rights might be unpalatable, and consequently unpopular. There are valid concerns that imputing social and economic rights would raise immense challenges to which a judicial body may not be competent to address, nevermind oversee such an implementation.

I will not be engaging in the lengthy reasons why these apprehensions exist – they are absolutely valid concerns. But this is not to say that because there is a 'concern' about an area of law, that may or may not be subject to the judicial doctrine of justiciability, that these concerns *can not,* and *should not* be caught by the *Charter.* Rather, a better way to understand the prioritizing one forms of rights over another is simply to acknowledge that some stories take precedent over others, and these are the stories our *Charter* has chosen to prioritize. These are the values that our *Charter* has imputed as 'important' and 'worthy' of protection. What is unhelpful, and often neglected throughout the debates about the law is that, in fact laws are not always 'objective' nor 'neutral.' There is a body of scholarship in critical legal studies that have articulated this debate well, and have attempted to demonstrate, how and why the law itself is influenced by our own individual 'subjective' understandings of the world. The role grassroots organizations can play in resisting, contextualizing and changing the narrative of law can be an instrumental tool to advocate for long term social justice goals. However, in order for grassroots organizations to do this effectively, there is also a strong role for professionals and allies to play in journey alongside these groups to help them bring about long-term systemic changes in society. Movement lawyering presents an opportunity for lawyers to respond to some of the concerns raised by organizations like the Dream Team in the fight to advance justice for marginalized populations.

Moving Forward: Movement Building

Working with marginalized populations, both in law, urban planning, and ultimately in any capacity that is focused on empowering the voices of people whose

[331] See *Young, supra* note 7.
[332] *Heffernan, supra* note 3.

voices have typically been ignored in both society and in policy discussions, a unique set of skills, interest and competencies are required. Those skills include, but are not limited to: humility, critical awareness of power imbalances, patience, stamina, and the ability to integrate theory and practice together in a way that promotes continued learning and growth. Professor Fay Faraday of Osgoode Hall Law School, and Tracy Heffernan, counsel on the *Tanudjaja* case along with Helen Luu a community organizer who works at ACTO overseeing the *R2H* Coalition, recently wrote forthcoming publication on the notion of 'movement lawyering' a concept that calls for critical reflection of a practitioners own experience to improve their professional practices.[333] The authors have articulated the importance of integrating these aspects of critical reflection into their practice, and how important that was into ensuring they were adequately representing the needs of their clients, some of the most marginalized members of society. In particular, the authors focused on their own experience working on the *R2H* case and noted "*the R2H case was an exercise in movement lawyering in the fullest sense."* [334] Movement lawyering focuses on "*the mobilization of law through deliberatively planned and interconnected strategies, inside and outside formal law making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define."*[335] While this paper is not about 'movement lawyering' per se, it is critically important for practitioners of any kind to pay particular attention to the role reflective practices plays in their own professional lives.

Having had exposure to Counsel for *Tanudjaja*, as well as Counsel for the Interveners involved in various stages of the legal proceeding in the *R2H* case, one of the common views held by the vast majority of Dream Team membership regarding their input into the *R2H* case was that the input was *theirs.* For other aspects of the litigation challenge, the Dream Team effectively worked through their Coordinators who helped solidify their voices, and navigated and liaised with the applicants and the other

[333] Fay Faraday, Tracy Heffernan and Helen Luu. "Winning the Right to Housing: Critical Reflections on a Holistic Approach to Public interest Litigation" (2019 Forthcoming) SCLR 2:90; See also Stephen Brookfield, "So what Exactly is Critical About Critical Reflection?" in J. Fook, V. Collinton, F. Ross, F. Ruch &L. West, eds., *Researching Critical Reflection and Research: Multidisciplinary Perspectives* (New York : Routledge, 2016) at 13.
[334] *Ibid.*
[335] Scott Cumming, "Movement Lawyering" (2017) U. Illinois L. Rev. 1645, at 1654 – 1657.

intervener groups. Having had first-hand exposure to this process, I can say that working alongside the different parties in the *R2H* case, there were tremendous opportunities for the Dream Team to participate in this process in a meaningful way.

The Dream Team was grouped together with others who had similar concerns which was represented by the ARCH Coalition. Counsel for the Coalition played a remarkable role in navigating the differences within the group, and ensuring that there was consensus about the main issues raised, and that the voices of the intervener group reflected the broad priorities of the organization. While there was ample opportunity to work 'efficiently' by minimizing the amount of meetings that were held, grassroots organizations like the Dream Team in particular value the importance of face time, and meeting face to face with other community allies and stakeholder to delve through issues. In particular, the amount of care, and attention that went into the details such as the consolidated effort involved in drafting the factums together as a cohesive group, which was then submitted to the court was valued a great deal by the Dream Team. There were certainly challenges the organization faced during both strategic litigation challenges that are noteworthy, but I echo Professor Faraday, Tracy Heffernan and Helen Luu's observation that the *R2H* case reflected an exercise in movement lawyering. The membership throughout the whole process rarely complained about their concerns that the movement was 'co-opted.'

Despite the overall positive experience the Dream Team had in participating in these two strategic litigation challenges, there are some organizational challenges that are worth mentioning. Through the duration of both legal challenges, the organization experienced a number of difficulties that could have derailed their strategic litigation endeavors from the get-go. The organization faced funding constraints which limited the amount of staff support and resources that were available. Throughout the *R2H* litigation in particular, the Team struggled to find it's voice and reflected deeply about what kind of narrative they wanted to produce, and what perspective they wanted to add. As noted earlier in the chapter, standing as an intervener is discretionary, and courts make determinations about the value the organization will add based on the unique perspective a proposed intervener may bring to the litigation. The organizations agreed that the perspective they wanted to bring was that of people with disabilities who

depended on on either *OW* or *ODSP* for their lives. Dream Team focused on empowering the members whose lived experiences were transcribed and included as affidavit evidence in the *R2H* case. The organization insisted on the authenticity of those affidavits being drafted by the individuals, using their own words, and their own understanding to paint a picture of the homelessness situation they had experienced due to systemic discrimination. In putting together the affidavits for the case, those with lived experience were encouraged to write the affidavits in their own voices.

Yet even selecting the members whose evidence would be submitted in the case was not without difficulty within the organization. The group was often conflicted, and the decision making process was not always conventional, nor easy, nor followed. However, with the right type of support and resources, and community allyship, the Dream Team managed to successfully participate in the *R2H* case in a meaningful way, and still continues to contribute to the *R2H* Coalition's work into today.

During discriminatory bylaw cases, the organization also faced a number of challenges in employing this form of strategic litigation. Ontario's Human Rights framework itself was being restructured at the time of the Dream Team's legal challenge, which produced uncertainty within the group with regards to what types of changes would be affected in the legislative framework, and what type of timeline to expect, and whether it was even worthwhile to launch these challenges. Since funding constraints were prominent, and the organization was operating on a non-renewable grant from the LFO, materializing the case was important, and demonstrating tangible outcomes was essential. In addition, at the time, none the members of the team were lawyers or urban planners, so significant outside help and strong community development skills was required to launch the challenge. Some of these pitfalls are inherent in grassroots organizations, who are often under-resourced, and have organizational capacity issues.[336] In addition, grassroots organizations often have limited access to experts and information making it difficult to bring about substantial changes to both the law, as well as planning, areas that require careful navigation and individualized expertise on the subject matter. Nevertheless through continued, and sustained relationships the Dream Team had with various stakeholders involved in the litigation challenge, the four

[336] *Heffernan, supra* note 3.

municipalities retracted their discriminatory planning bylaws, and this represented a big win for the organization, and for vulnerable Ontarians who depend on group homes to reside. Along with the long term relationship and trust the Dream Team had built with particular organizations, most notably the phenomenal lawyers at *ACTO*, or the *HRLSC* who embodied the concept of 'movement lawyering' this journey was significantly easier. While the homelessness situation itself is still yet resolved, strategic litigation can and has been a useful tool by which the Dream Team were able to meaningfully advocate for broader housing rights for people in Canada, and advocate for, and on behalf of people who experience homelessness and precarious housing.

Conclusion

Both *Tanudjaja* and the municipal bylaw strategic litigation challenges demonstrate that government actions and omissions were responsible for poor policies choices that were undertaken by both levels of government, which had the cumulative effect of limiting housing affordability and housing availability for people with disabilities. The elimination of discrimination in law is an important first step in materializing housing rights for everyone.[337] Yet, persistent, insidious discrimination, which manifests itself though attitudes and mindsets, remains a long-term problem that cannot be eradicated so easily. Nevertheless, the example of the Dream Team's municipal bylaw challenges at the Human Rights Tribunal of Ontario stands as model example of the kind of changes that can be achieved by grassroots organizations in enhancing housing rights for people with disabilities. There is still significant work to be done to help propel housing rights, and perhaps when the time is ripe, the Supreme Court will revisit state whether the judiciary will ever read in positive obligations on the state in a post *Gosselin* Canada. While *Tanudjaja* itself did not succeed in entrenching housing rights in Canada, the case itself was quite high profile and created significant public awareness about homelessness and the precarious housing issues across the nation. However, strategic litigation is only *but one* form of organizing to propel housing rights. While the law itself offers tremendous opportunity to shape the society, where the law fails to remediate the ills of the lack of affordable housing and stigma that is often associated with

[337] *NIMBY, ACTO supra* note 235.

homelessness, storytelling is a vehicle that can be used to promote long-term attitudinal shift in society. Law, and planning must incorporate the voiced of disenfranchised communities within both practices. Ensuring that both law and planning reflect the voices of disenfranchised groups is necessary to affect broader discussions about homelessness and housing precarity. These are the voices that enhance diversity, enhance equity, and are at the core of *a just society*. The cultural malady, which has historically left these voices out of the housing discussion, needs to dissipate. If Canada is ready to take *seriously* the creation and implementation of a *NHS*, the country will need to ensure that the *NHS* is backed by sound evidence based policy about what does, and does not work to house people. Those with 'lived experienced' and who have been victims of homelessness are best positioned to provide feedback and advice about what works to successfully house people who experience a range of complex issues that are best resolved through exploring their lived experiences. Storytelling then, can be a powerful force to shape, defend and historicize resistance to the dominant discourse of law, and urban planning, and a force to change the narrative, and the discourse about housing access and housing rights. Storytelling can also change whether an issue is 'justiciable' or not, and it is my hope that the *Charter* continues to evolve, and incorporate new stories within that evolution.

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