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Zoning Out Discrimination: Working Towards Housing Equality in Ontario

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Zoning Out Discrimination: Working Towards Housing Equality in Ontario

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En Ontario, c'est le gouvernement local qui doit assurer l'accessibilité du logement et l'élimination des barrières au logement. Cet article examine comment le *Code des droits de la personne* de l'Ontario peut être utilisé pour contester les règlements municipaux de zonage qui règlementent l'utilisation du terrain autorisée. Nous le faisons notamment en démontrant que certains règlements portent atteinte aux droits des personnes en vertu du *Code*, en limitant les endroits où ces personnes peuvent vivre. Bien que les plaideurs de l'Ontario aient relativement bien réussi à utiliser le *Code* pour lutter, directement et indirectement, contre la discrimination en matière de logement, le cas des règlements municipaux de zonage a révélé des obstacles importants dans l'utilisation des lois sur les droits de la personne pour atteindre l'égalité en matière de logement. Cet article compare le succès relatif des contestations judiciaires des règlements municipaux qui régissent les foyers de groupe logeant les personnes handicapées, aux règlements municipaux qui régissent les maisons de chambres logeant les personnes qui n'ont pas les moyens de se payer d'autre logement. Cette comparaison démontre les difficultés liées au fait de contester la discrimination envers un groupe de personnes diffus qui tombe sous plusieurs motifs de distinction interdits (les résidents de maisons de chambres), plutôt qu'un groupe distinct qui tombe sous un seul motif identifiable (les résidents des foyers de groupe). Elle révèle aussi les défis rencontrés en contestant la discrimination lorsque les iniquités procédurales sont enracinées dans les processus de prise de décision municipaux. Nous concluons que le plus grand défi auquel les défenseurs du droit au logement et des droits de la personne sont confrontés, en plus de l'élimination des règlements municipaux discriminatoires, est de faire face à la discrimination systémique dans les politiques et les pratiques en matière de logement. Le litige est un outil précieux pour relever ce défi mais ne constitue qu'une partie de la solution.

In Ontario, it is the role of local government to ensure that housing is accessible and to eliminate barriers to housing. This paper examines how the Ontario *Human Rights Code* can be employed to challenge municipal zoning bylaws regulating permitted land-uses, namely by establishing that certain bylaws adversely affect individuals protected under the *Code* by restricting where those individuals may live. While Ontario litigants have been relatively successful in using the *Code* to challenge direct and indirect discrimination in housing, the case of zoning bylaws reveals key limitations to achieving housing equality through human rights legislation. This paper compares the relative success of legal challenges to bylaws regulating group homes that house people with disabilities to bylaws regulating rooming houses that house people who cannot afford other housing. This comparison reveals the difficulty of challenging discrimination faced by a diffuse group of individuals falling within multiple prohibited grounds (residents of rooming houses), rather than a discrete group that falls under a single identifiable ground

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(residents of group homes). It also reveals the challenges of confronting discrimination when procedural inequalities are entrenched in municipal decision-making processes. It concludes that the larger challenge for housing and human rights advocates, in addition to eliminating discriminatory bylaws, is to confront systemic discrimination in housing policy and practice. In this task, litigation is a valuable tool but only part of the solution.

ZONING IS A REGULATORY PLANNING TOOL USED BY LOCAL GOVERNMENTS to designate permitted land-uses of privately owned land.[1] Municipalities regulate the use of land by passing bylaws that stipulate how land may be used, where buildings or structures may be located, and the types of buildings that are permitted.[2] The purpose of these bylaws is to control the development of communities, taking social, economic and environmental considerations into account.[3] Such bylaws ensure that new developments do not interfere with existing communities, preserving their character and protecting them from potentially conflicting or dangerous land-uses. Effective land-use planning can also support the development of inclusive neighbourhoods in which all members of the community have access to the services they require.

In this paper, I examine three forms of discrimination—direct discrimination, indirect discrimination, and systemic discrimination—and the impact of human rights legislation on municipal zoning bylaws that govern land-use for group homes and rooming houses. Direct discrimination is prohibited in municipal planning, as local governments cannot regulate "users of the land" through zoning bylaws. Instead they must zone for "land-use." As a result, zoning bylaws are facially neutral in that they do not directly discriminate through "people-zoning." However, zoning bylaws that regulate the "land-use" of particular kinds of housing have been challenged as indirect discrimination at the Human Rights Tribunal of Ontario (HRTO) and Ontario Municipal Board (OMB). Claimants have argued that bylaws developed by municipalities in southern Ontario adversely impact individuals protected under the Ontario *Human Rights Code*. In regulating the way land is used by prohibiting particular forms of housing in specific areas, by setting minimum separation distances between particular forms of housing, or by limiting the number of people who can live in a particular form of housing, municipal governments influence where people can live and the social composition of neighbourhoods.[4] For example, distancing requirements between group homes restrict where people with mental and physical disabilities are able to live. Such bylaws adversely affect the accessibility of accommodation and the choice of residency of identified groups. In response to these challenges, some local governments have amended bylaws to ensure that they conform with Ontario's *Human Rights Code*. Successes in this area confirm that municipalities have a duty to address human rights considerations in municipal planning.

The *Human Rights Code* has played a central role in human rights enforcement by providing a mechanism through which individuals can challenge bylaws that are facially neutral but adversely impact individuals protected by the *Code.* The *Code* has also been instrumental in requiring municipalities to proactively comply with human rights legislation when developing bylaws. The *Code* is a powerful tool that not only protects fundamental rights by providing

[1] 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-bay-practices-municiple-exclusion> [perma.cc/XL29-DEVR].
[2] Ministry of Municipal Affairs and Housing, *Citizen's 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].
[3] *Ibid.*
[4] Skelton, *supra* note 1 at 4.

redress for past discrimination but also aims to interrupt patterns of discrimination and uproot institutionalized practices that repeatedly undermine inclusion and equality.

In this paper, I first provide an overview of the statutory framework—notably, the *Planning Act* and *Human Rights Code*—in which human rights claims are made against zoning bylaws. I then describe the nature of such claims, focusing first on direct discrimination in zoning, followed by indirect or adverse effect discrimination. I argue that the success of challenges to zoning bylaws that regulate group homes demonstrates the potential of human rights legislation to create an environment of substantive equality for Ontarians with disabilities. However, this case study also reveals key limitations to achieving equality through human rights legislation, particularly due to systemic discrimination which pervades and reinforces the exclusion of certain people from our communities.

After describing successful challenges to zoning bylaws, I focus on two significant setbacks. The first is the difficulty of challenging discrimination when bylaws adversely impact a diverse group of people who fall within different prohibited grounds of discrimination, as compared to a discrete group of people who clearly fall under a single identity-based *Code*-protected ground. To illustrate this challenge, I compare the relative success of Torontonians challenging two kinds of zoning bylaws: zoning bylaws that regulate group homes which house people with disabilities; and those that regulate rooming houses which house people who cannot afford other forms of housing. Although many low-income people living in rooming houses fall within various *Code*-protected groups, including people with disabilities, single persons who receive social assistance, newcomers and so on,[5] due to the diffuse nature of discrimination in this context, zoning bylaws regulating rooming houses have been difficult to challenge and remain in place.

The second difficulty I identify is the inequality that is embedded in decision-making processes at the local level. Negative assumptions about the "type of people" who live in certain forms of housing (such as group homes, rooming houses and shelters) and the phenomenon of "Not In My Back Yard" or NIMBY-ism have a profound impact on both the way local governments make decisions and the decisions that are ultimately made. In these situations, the decision-making process itself becomes a source of discrimination. Procedural inequality also exists in the failure to "investigate the possibilities of accommodation [and the] exclusion of historically disadvantaged groups from decision-making."[6] These community attitudes and decision-making processes are difficult to challenge in courts, tribunals or boards, allowing systemic discrimination to persist.

This paper concludes by outlining some of the ways in which these obstacles may be overcome. A number of actors, including the Ontario Human Rights Commission (OHRC) and OMB, play an important role in fostering a human rights culture in Ontario by providing recommendations on how to embed the spirit of human rights law and values of equality into processes, practices and policy at the local level. Ultimately, the experience of discriminatory zoning illustrates that human rights legislation is transformative not only because it can be used to combat inequality through legal action or through proactive compliance, but also because of its normative potential in fostering systemic equality.

[5] *OHRC Submission on the City of Toronto Draft City-wide Zoning By-law*, report no PG21.1 (Toronto: Ontario Human Rights Commission, 2013) at 4 [OHRC PG21.1].

[6] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 147.

I. LEGAL FRAMEWORK: THE NEXUS BETWEEN HUMAN RIGHTS LAW AND ZONING BYLAWS

The built environment of cities shapes communities and the people that live in them. Section 34(1) of Ontario's *Planning Act* grants councils of local municipalities the power to pass and enforce zoning bylaws. In particular, city councils can restrict land-use by "prohibiting the use of land, for or except for such purposes as may be set out in the bylaw within the municipality . . . "[7] Zoning is one of the few legal tools that municipalities use to regulate land-use and manage the development of cities.[8] In exercising this power, city councils control how land may be used in general by carving out residential, commercial or industrial areas, and how specific plots of land may be used by, for example, restricting the kinds of buildings permitted in certain areas or establishing particular requirements for buildings, such as lot sizes, parking and building heights.[9]

The *Planning Act* empowers local governments to regulate land-use through zoning bylaws; however, due to the quasi-constitutional nature of the Ontario *Human Rights Code*, municipal governments must ensure that bylaws enacted under the *Planning Act* do not discriminate on the basis of identity-based grounds set out in the *Code*. The primacy of the *Code* over other statutes is set out in section 47(2), which states, "where the provisions of the *Code* conflict with provisions in another provincial law, it is the provisions of the *Code* that are to apply."[10] The *Code* takes precedence over all other legislation in Ontario, including the *Planning Act* and zoning bylaws.

The *Code* prohibits discrimination in five areas of social interaction, one of which is accommodation or housing.[11] Section 2(1) of the *Code* provides that:

> 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, gender identity, gender expression, age, marital status, family status, disability or the receipt of public assistance.[12]

This provision protects against discrimination in housing on sixteen grounds of differentiation, "which operate most frequently to disadvantage and prejudice individuals in society."[13] The *Code* works to prevent discrimination in housing and to eliminate it at both an individual and a systemic level.

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[7] *Planning Act*, RSO 1990, c P13, s 34(1) 1. [*Planning Act*].
[8] Prashan Ranasinghe & Mariana Valverde, "Governing Homelessness Through Land-use: A Sociolegal Study of the Toronto Shelter Zoning By-law" (2006) 31:3 Canadian Journal of Sociology 325 at 327 [Ranasinghe & Valverde].
[9] *Citizen's Guide*, No 3, *supra* note 2.
[10] *Tranchemontagne v Ontario*, 2006 SCC 14 at para 34 [*Tranchemontagne*]; *Human Rights Code*, RSO 1990, c H-19, s 42(2) [*Human Rights Code*].
[11] Mary Cornish, Fay Faraday & Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora: Canada Law Book, 2009) at 1 [Cornish, Faraday & Pickel].
[12] *Human Rights Code*, *supra* note 10, s 2(1).
[13] Cornish, Faraday & Pickel, *supra* note 11 at 35.

The test to establish discrimination under the *Code* was developed by the Supreme Court of Canada in *Meiorin*.[14] Claimants must establish *prima facie* discrimination by demonstrating that they possess a characteristic that is protected from discrimination under the *Code,* that they have been adversely impacted by a policy or practice, and that they have experienced the adverse impact due to the *Code*-protected characteristic.[15] In other words, they must prove adverse treatment owing to a prohibited ground. Once the claimant has established *prima facie* discrimination, the burden shifts to the respondent to justify the impugned policy or practice. The respondent must show that the policy or practice: (a) was adopted for a purpose that is rationally connected to the function being performed; (b) was adopted in an honest or good faith belief that it was necessary to fulfill the purpose; and (c) is reasonably necessary to accomplish the purpose such that it is impossible to accommodate the person without imposing undue hardship on the respondent.[16] If the respondent cannot show that the policy or practice is justified, discrimination has occurred.

This test aims to achieve both formal and substantive equality because the right to be free from discrimination involves the right to be free from both direct *and* adverse-effect discrimination. Formal equality exists when everyone is treated alike. Yet, facially neutral policies and practices can impact individuals disproportionately or disadvantageously due to specific traits or characteristics they hold.[17] Substantive equality focuses on the outcome or effects of policies and practices, and asks whether the same treatment produces unequal results.[18] Substantive equality is achieved when the underlying differences of individuals are considered and accommodated so that the impact of a policy or practice does not result in disadvantage.[19]

In the housing context, the *Code* is most often used to challenge discrete cases of discrimination experienced by particular individuals where they allege that they have personally been discriminated against. Discrimination in housing, however, can also be systemic—not just in the sense that the personal experience of discrimination is widespread amongst many individuals who belong to *Code*-protected groups, but also in the sense that discrimination has been institutionalized in the policies and practices that impact the availability of and access to housing. In this paper, I focus on the latter and examine how bylaws create and perpetuate a system of relative disadvantage for people presumably protected from discrimination by the *Code*.[20] As I will discuss below, there have been notable successes in challenging exclusionary zoning bylaws that discriminate both directly and indirectly. After examining these successes, I turn to the limits and possibilities of human rights legislation in countering systemic discrimination in housing.

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[14] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union*, 1999 SCC 48 [*Meiorin*].
[15] *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33 [*Moore*].
[16] *Meiorin*, *supra* note 14 at para 54.
[17] Cornish, Faraday & Pickel, *supra* note 11 at 39.
[18] *Ibid*..
[19] *Ibid.*
[20] 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].

II. DIRECT AND INDIRECT DISCRIMINATION IN ZONING BYLAWS

A. FORMAL EQUALITY AND DIRECT DISCRIMINATION IN ZONING BYLAWS

Formal equality is achieved when people are treated alike under the law, and is violated when people are explicitly included or excluded based on a certain trait or characteristic. This disparate treatment is called direct discrimination. Historically, zoning bylaws were directly discriminatory in that they regulated where certain kinds of people or families could live. For example, some municipalities had zoning bylaws that prohibited people of certain ethnicities or races from living in particular communities while others had bylaws that specified that only "single family" dwelling units were permitted in a specific residential community.[21]

Today, section 35(2) of Ontario's *Planning Act* states that municipalities may not pass zoning bylaws that "[have] the effect of distinguishing between persons who are related and persons who are unrelated in respect of the occupancy or use of a building…"[22] This provision reflects the Supreme Court of Canada's decision in *Bell v Regina* which struck down a bylaw in North York, Ontario that defined a "dwelling unit" as a living quarter designed or intended for use by an individual or family, and defined "family" as two or more people "living together and interrelated by bonds of consanguinity, marriage or legal adoption, occupying a dwelling unit."[23] The Court established that while it is the prerogative of local government to zone for "land-use," it does not have the right to zone for "users of the land."[24] Spence J, writing for the majority, held that permitting only families as occupants of self-contained dwelling units is, "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men … [T]he Legislature never intended to make such rules and the device of zoning by relationships of occupants rather than the use of the building."[25] The Supreme Court of Canada also stated that personal characteristics or qualities are not a proper basis on which to develop zoning bylaws meant to control density or address other legitimate planning concerns.[26]

This case prohibits municipalities from "people-zoning" on the basis that it is only within the jurisdiction of local governments to zone for land-uses. Although not based on human rights law, the effect of this limitation is that municipalities cannot directly discriminate by regulating who can and cannot live within particular areas. Zoning bylaws, as a result, are facially neutral in that they apply to everyone equally, without explicitly permitting or prohibiting specific individuals from living in a given community based on the traits or characteristics that they hold.

[21] Skelton, *supra* note 1.
[22] *Planning Act*, *supra* note 7, s 35(2).
[23] Skelton, *supra* note 1 at 18; *Advocacy Centre for Tenants Ontario v Kitchener*, [2010] OMBD PL050611 at para 36 [*Advocacy Centre*]; *Regina v Bell*, [1979] 2 SCR 212 at 220, Spence J [*Bell*].
[24] *Advocacy Centre*, *supra* note 23; Skelton, *supra* note 1 at 8.
[25] *Bell*, *supra* note 23 at 223; *Kruse v Johnson*, [1898] 2 QB 1 at 99-100, Lord Russell CJ.
[26] *Advocacy Centre*, *supra* note 23; *Bell*, *supra* note 23 at 221.

B. SUBSTANTIVE EQUALITY AND INDIRECT OR ADVERSE EFFECTS DISCRIMINATION IN ZONING BYLAWS

The concept of indirect or adverse effects discrimination recognizes that although a policy or practice is facially neutral in that it applies to everyone equally, it may adversely affect particular individuals due to the traits or characteristics that they hold. Where the impact of a policy or practice produces unequal results, indirect or adverse effects discrimination exists. Human rights legislation seeks to protect substantive equality and has proven to be a powerful tool in challenging indirect or adverse effects discrimination. The substantive equality approach demands that any policy or practice that differentially impacts individuals due to a *Code*-protected ground they hold be eradicated or changed to account for the underlying differences between individuals and to neutralize the impact of the policy or practice. Duty holders bear the responsibility of accommodating difference and proactively ensuring equality of outcome.[27] This is profoundly different from the notion of accommodation that existed prior to *Meiorin*, in which a policy or practice would remain in place despite its differential impact but an accommodation in the form of an exception would be made for specific individuals who were adversely impacted by the policy or practice.[28]

The Court in *Meiorin* eradicated the distinction between direct and adverse effects discrimination, and developed a transformative approach to achieve substantive equality through human rights legislation. This concept was developed by Shelagh Day and Gwen Brodsky, who critiqued the former model of accommodation on the basis that "[i]t allows those who consider themselves 'normal' to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are 'accommodated'." [29] Day and Brodsky suggested that to achieve substantive equality, human rights legislation must impose a duty to accommodate that requires duty-bearers to develop policies and practices that take diversity into account from the outset, that are inclusive of difference, and that eliminate or remedy the adverse effects of facially neutral policies and practices.[30]

As described above, zoning bylaws are facially neutral because municipalities cannot regulate users of the land. Instead, municipalities must determine appropriate land-uses and base planning decisions on legitimate planning considerations regarding the use of the land. Zoning theoretically "allows the segregation and compartmentalization of spaces according to uses… not persons."[31] However, although "zoning formally controls land-uses, it effectively also controls people who may or may not use the land and consequently their ways of life."[32] In particular, in regulating where land may be used within municipalities for certain forms of housing such as supportive housing, residential care facilities, group homes, boarding houses or rooming houses, zoning bylaws can have a disproportionate effect on individuals living in these kinds of homes.

Local governments have a duty to accommodate individuals protected under the *Code.* To fulfill this duty, city councils must consider whether facially neutral bylaws are

[27] Cornish, Faraday & Pickel, *supra* note 11 at 39-40.
[28] *Ibid* at 40.
[29] *Meiorin, supra* note 14 at para 41; Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can Bar Rev 433 [Day & Brodsky].
[30] *Meiorin, supra* note 14 at para 41; Day & Brodsky, *supra* note 29; *Moore, supra* note 15 at para 61.
[31] Ranasinghe & Valverde, *supra* note 8 at 327-328.
[32] Skelton, *supra* note 1 at 2.

discriminatory in effect or adversely impact members of their communities who are protected by the *Code*.[33] It is only by changing or eradicating seemingly innocuous land-use bylaws that have discriminatory effects that local government may uphold substantive equality and work towards genuine inclusiveness.

C. CHALLENGING ADVERSE EFFECTS DISCRIMINATION IN THE REGULATION OF GROUP HOMES: SUCCESSES IN KITCHENER, TORONTO, SMITHS FALLS AND SARNIA

Over the past few years, grassroots groups and non-profit organizations have brought human rights claims against a number of municipalities in southern Ontario, challenging zoning bylaws that regulate group homes. Group homes are defined by the City of Toronto as, "premises used to provide supervised living accommodation, licensed or funded under the Province of Ontario or Government of Canada legislation, for three to ten persons… living together in a single housekeeping unit because they require a group living arrangement."[34] Group homes specifically provide supportive housing to people with physical, developmental, or mental health disabilities; they are places where people who require group living arrangements due to emotional, mental, social or physical conditions can live.

Since disability is a ground that is protected by the *Code*, claimants have challenged zoning bylaws restricting where group homes may be located within municipalities on the basis that they adversely impact individuals with disabilities. The Ontario Human Rights Commission has also repeatedly stated that bylaws regulating group homes, such as those which require a minimum separation distance between group homes, further limit the availability of housing options for marginalized people, create additional barriers to affordable and supportive housing, and preclude the ability of individuals with disabilities to live in certain communities.[35] These bylaws impact the choice, cost and availability of housing for people with disabilities.[36] Although facially neutral, land-use bylaws that regulate group homes have been found to have a disproportionately negative effect on people protected by the *Code*.

In 2010, the OMB decided an unprecedented case at the nexus between land-use controls and human rights.[37] In this case, the Advocacy Centre for Tenants Ontario (ACTO) challenged municipal zoning bylaws in the City of Kitchener that limited or banned the development of new residential care facilities and assisted housing in a neighbourhood called Cedar Hill to respond to the "overconcentration of single person low-income households" and "residential care facilities and social/supportive housing." [38] The City's objective was to develop a bylaw that decentralized institutions, fostered a neighbourhood mix, and distributed such facilities throughout the municipality.[39]

Although the OMB found that the city's objectives for implementing these bylaws were reasonable, the OMB was unconvinced that the potential discriminatory consequences of the

[33] *Human Rights Code*, *supra* note 10, s 2(1).
[34] City of Toronto, By-law No 569-2013, *Zoning By-law* (9 May 2012), s 800.50(325) [By-law No 569-2013].
[35] Ontario Human Rights Commission, *supra* note 20 at 25.
[36] Terry Pender, "City of Kitchener to scrap minimum distance rules for group homes," *The Record* (18 June 2012), online: <therecord.com> [perma.cc/KPC3-JBW4].
[37] *Advocacy Centre*, *supra* note 23 at para 1.
[38] *Ibid* para 2.
[39] *Ibid* at paras 2, 39.

bylaws had been fully considered because the effect of the municipality's initiative was to exclude persons with physical or mental disabilities and recipients of social assistance—the primary users of residential care facilities, assisted housing and lodging houses—from new developments in Cedar Hill. The OMB did not ultimately decide whether the City of Kitchener violated the *Code* but gave city council fifteen months to assess the impact of these bylaws on people protected by the *Code* and redraft its initiative with *Code* objectives in mind.

It is particularly important that in its reasons, the OMB asserted that municipalities are bound by the *Code* and must fulfill their obligations towards rights holders when drafting zoning bylaws. The OMB emphasized that any bylaw or planning instrument that has a discriminatory effect is prohibited under the *Code,* unless the municipality can justify the imposition of the discriminatory policy.[40] Moreover, the OMB concluded that it has the jurisdiction to consider the human rights implications of bylaws in cases before it, and will assert this jurisdiction in the future.[41] The City of Kitchener repealed its bylaw banning certain forms of housing in Cedar Hill in June 2012.[42]

The Dream Team, a mental health advocacy organization, brought a similar human rights challenge to the HRTO against the City of Toronto in 2010. The Dream Team alleged that zoning bylaws requiring minimum separation distances of 250-metres between group homes and residential care facilities discriminated against people with disabilities.[43] Minimum separation distances are a planning tool used to avoid the overconcentration of certain land-uses. In some circumstances, minimum-distance bylaws are considered a legitimate planning tool. For example, in 2004, the OMB upheld Toronto's bylaw requiring a 250 metre separation distance between homeless shelters.[44] The OMB found that this bylaw was grounded in sound policy principles—namely, avoiding the concentrated of shelters in a particular area and ensuring that shelters are spread throughout the city. [45] It also concluded that a shelter cannot truly be considered "housing."[46] In the context of group homes, which are a form of "housing," the HRTO recognized the responsibility of municipalities towards people protected by the *Code*. Although it never determined whether Toronto's minimum-distance bylaws were discriminatory, in an interim decision rejecting the city's request for early dismissal, Adjudicator Michael Gottheil stated that the Dream Team's "application raises important, and in some respects novel legal issues concerning the interplay between the particular circumstances, needs and conditions of people facing mental illness and a municipality's legitimate interest in regulating land-use and the way it may exercise its planning authority."[47] Gottheil determined that the HRTO is an appropriate forum in which to decide whether zoning bylaws infringe the *Code* and that the parties should have the opportunity to present evidence and make full legal arguments regarding whether minimum-distance bylaws are indeed discriminatory.[48]

In response to the Dream Team's legal challenge of Toronto's bylaws regulating group homes, a Staff Report was released on 4 October 2013 in which municipal planning staff

[40] *Ibid* at para 144.
[41] *Ibid* at paras 139, 143.
[42] Pender, *supra* note 36.
[43] *The Dream Team v Toronto*, 2012 HRTO 25 at para 24 [*Dream Team*]; By-law No 569-2013, *supra* note 34, s 150.15.30.1(1).
[44] *MUC Shelter Corporation v Toronto*, [2004] OMBD PL030313 at 23.
[45] *Ibid* at 22-23.
[46] *Ibid* at 30.
[47] *Dream Team, supra* note 43 at para 27.
[48] *Ibid* at paras 22-29.

recommended to city council that group homes with up to ten residents be permitted in all residential areas as-of-right and those with over ten residents be permitted in zones that allow for higher intensity development.[49] City staff made this recommendation on the basis that minimum resident requirements and mandatory separation distances were not justified in light of the *Code* and its protection of people with disabilities, and therefore that this bylaw was discriminatory.[50] City council repealed the mandatory separation distance requirement for group homes and residential care facilities in June 2014.[51]

In addition to Toronto, the Dream Team brought human rights challenges in 2010 against Smiths Falls, Kitchener, and Sarnia aimed at discriminatory zoning bylaws regulating group homes. In response, Smiths Falls removed the offensive cap that restricted the total number of disabled people that could live in all group homes within its municipal boundaries to thirty-six.[52] Smith Falls also removed a mandatory 300-metre separation distance between group homes.[53] Kitchener negotiated a settlement in which it agreed to change its bylaw that required group homes to be at least 400 metres apart.[54] Sarnia proactively amended its bylaw in 2010 to remove all regulations restricting where group homes can be built and allowed group homes as-of-right in all residential use zones.[55]

These successes demonstrate that local governments must consider the discriminatory effects of zoning bylaws and re-examine their approach to planning by ensuring that policies are sound from both a municipal planning perspective and a human rights perspective. Human rights legislation provides a legal framework through which indirect or adverse effects discrimination can be challenged and requires local governments to proactively accommodate people protected by the *Code*. The *Code* therefore plays an important role in achieving substantive equality and genuine inclusiveness in our communities.

III. SYSTEMIC DISCRIMINATION AND THE LIMITS OF HUMAN RIGHTS LEGISLATION

While human rights law can provide a mechanism by which *Code*-protected groups may challenge specific bylaws that disproportionately impact them and thereby combat both direct and adverse effects discrimination, in this section I explore the limitations of human rights legislation in achieving equality. After defining the concept of systemic discrimination, I use the case study of rooming house zoning in Toronto to illustrate two shortcomings of human rights legislation in rooting out discrimination. First, where policies disadvantage or adversely impact

[49] 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> [perma.cc/RT9E-7JGW] [City Planning, *Zoning Provisions*].
[50] *Ibid*.
[51] City of Toronto, by-law No 550-2014, *Zoning By-law* (13 June 2014).
[52] Patty Winsa, "Smith Falls Votes to end group home bylaws," *Toronto Star* (7 October 2014), online: <the star.com> [perma.cc/SRK6-FNY4].
[53] *Ibid.*
[54] Pender, *supra* note 36.
[55] GHK International, "The Legal Basis For NIMBY: Final Report" in *The Dream Team Goes on the Road: A report to the Law Foundation of Ontario* (Toronto: Law Foundation of Ontario, 2007) Appendix F at 10, online: <docslide.us/documents/road-show-final-report.html> [perma.cc/YRH6-BUF7] [GHK]; Ontario Human Rights Commission, *supra* note 20 at 26.

individuals on a variety of prohibited grounds instead of one specific ground, it is very difficult to successfully establish discrimination. Second, human rights legislation struggles to address discriminatory decision-making processes wherein community members engage in NIMBY-ism and disadvantaged people are excluded. As a result, discrimination persists and remains embedded in our municipalities.

A. DEFINING SYSTEMIC DISCRIMINATION

Systemic discrimination is difficult to define and to identify. In *Action Travail des Femme v Canadian National Railway Company,* the Supreme Court adopted the explanation of systemic discrimination that Justice Abella developed in the Abella Report on equality in employment.[56] Although Abella J did not provide a precise definition of systemic discrimination, she explains that:

> [d]iscrimination… means practices and attitudes that have, whether by design or impact, the effect of limiting an individual's or group's right to the opportunities generally available because of attributed or rather than actual characteristics…
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. *If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory*.
>
> This is why it is important to look at the results of a system… [emphasis added].[57]

Like adverse effects discrimination, systemic discrimination results from the operation of practices and procedures that are not designed to promote discrimination, yet nevertheless adversely affect particular individuals due to attributed or actual characteristics that they possess.[58] This characterization of systemic discrimination was also reflected in *Meiorin* in which the Supreme Court of Canada explained that systemic discrimination occurs when adverse-effect discrimination "arises in the aggregate to the level of systemic discrimination."[59] Both definitions suggest that systemic discrimination goes beyond individual instances of discrimination; it is a deeper form of discrimination that underlies both obvious direct discrimination and the subtle adverse-effect discrimination.[60]

Systemic discrimination results in widespread inequality that persists and becomes embedded in institutions and attitudes. This form of discrimination exists when discrimination is so deeply rooted that it shapes society's understanding of what is normal. In *Action Travail*,

[56] *Action Travail des Femmes v Canadian National Railway Co.,* [1987] 1 SCR 1114 at 1138-1139 [*Action Travail*].
[57] *Ibid* at 1138-1139, citing Rosalie S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) at 2.
[58] *Ibid* at 1139.
[59] Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (Ottawa: Canadian Human Rights Commission, 2012) at 5, online: <chrc-ccdp.gc.ca/sites/default/files/accommodation_eng.pdf> [perma.cc/D2HZ-6A3E]; *Meiorin*, *supra* note 14 at para 29.
[60] Sheppard, *supra* note 6 at 132.

Dickson C.J. explains that in these circumstances, discrimination is "reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces."[61] When discrimination and inequality is normalized, instances of discrimination arise because people do things the way they have always done them and people do not make the connection between human rights and their decisions or actions.[62]

Colleen Sheppard aptly explains that when inequality is normalized, it is perpetuated because "inequitable norms and standards become the unquestioned backdrop upon which anti-discrimination laws are required to function."[63] Sheppard emphasizes that it is important to recognize that systemic discrimination is not only reinforced because it is institutionalized in policies and practices but because it is socially constructed and because those who are "overrepresented… in various social institutions have shaped our understanding of what is normal." [64] For Sheppard, "systemic discrimination arises when systems, practices and institutions of mainstream society reflect and reinforce the norms, attributes and privileges of the dominant group." [65] It is both the institutional and social dynamic of discrimination that entrenches, legitimizes and reproduces inequality and exclusion.[66] Since norms and standards are the source of exclusion, systemic discrimination is incredibly challenging to identify, let alone uproot.[67]

In *Action Travail des Femmes*, Dickson CJ writes, "to combat systemic discrimination, it is essential to create a climate in which both negative practices and attitudes can be challenged and discouraged."[68] While human rights legislation can be used to challenge manifestations of systemic discrimination such as specific policies and practices, the norms and attitudes that reinforce systemic discrimination often remain beyond the reach of human rights law and thus elude redress. The goal of transformation, which lies at the heart of the equality project, is largely unattainable because the law is relatively powerless to challenge the norms and attitudes that result in discriminatory policies and practices. To advance the equality project, it is necessary to identify and confront the norms and attitudes that reinforce exclusion.

B. THE CASE STUDY OF ROOMING HOUSES IN TORONTO

As discussed above, discriminatory bylaws regulating group homes have been challenged with relative success by demonstrating that they adversely affect people who are disabled by limiting their housing options. This has necessitated a move towards enacting inclusive bylaws that permit group homes in all residential areas as-of-right and that accommodate people with disabilities, increasing access to housing throughout Ontario's municipalities. In contrast, in the case of rooming houses, bylaws that severely restrict where rooming houses can be located remain in place despite sustained advocacy calling for the elimination of these bylaws and the

[61] *Action Travail, supra* note 56 at 1139.
[62] OHRC PG21.1, *supra* note 5 at 3.
[63] Sheppard, *supra* note 6 at 23.
[64] *Ibid*.
[65] Fay Faraday, "Building a Human Rights Culture in Ontario: Reflections on Systemic Discrimination and Institutional Design" (Contribution to the Symposium on the Ontario Human Rights Review, Toronto, 25 January 2013) at 3.
[66] Sheppard, *supra* note 6 at 23.
[67] *Ibid* at 20.
[68] *Action Travail, supra* note 56 at 1139.

position advanced by experts, including the Ontario Human Rights Commission, that rooming house bylaws infringe the human rights of *Code*-protected groups.

Rooming houses are regulated through zoning bylaws and/or licensing in many municipalities throughout Ontario, including Toronto, due to legitimate planning, development and health and safety concerns. The City of Toronto's municipal bylaw on rooming houses defines "rooming house" as a "building in which living accommodation is provided for at least three persons in separate rooms, each of which may have food preparation facilities or sanitary facilities, but not both."[69] In other words, a rooming house is a building in which three or more individuals who are not related rent a single room and share common spaces, including a kitchen and/or bathrooms.

Since individuals are able to rent one room of a rooming house instead of an entire apartment, rooming houses are widely considered an affordable form of housing.[70] The cost of renting a room in a rooming house ranges from approximately $350 to $500. This is far below the Canada Housing and Mortgage Corporation's average market rent for the Greater Toronto Area, which was $822 for a bachelor and $979 for a one-bedroom apartment in 2007-2011.[71] As such, rooming houses "are one of the only feasible housing options for people on welfare ($585/month) and disability support ($1020/month) in Ontario."[72] Bachelors and one-bedroom units in the private sector are unaffordable for these individuals, unless they are provided with a rent supplement. Besides those on social assistance and disability support, rooming houses provide affordable housing to seniors, students, immigrants, low-income singles and families, and others who do not have access to other forms of affordable housing.[73]

Prior to amalgamation in 1998, the City of Toronto consisted of six separate municipalities. Each of the former municipalities had its own bylaws regulating rooming houses and these bylaws remained in place following the amalgamation. As a result, rooming houses in Toronto are regulated through a patchwork of zoning bylaws and are inconsistent throughout the city.[74] While rooming houses are legal and regulated through licensing and inspections in Etobicoke, York, and Toronto, a "rooming house" is not a permitted land-use in Scarborough, East York, and North York. In some parts of the amalgamated city, rooming houses are prohibited in all residential zones, while in others licensing bylaws provide permissive but not as-of-right zoning.[75] On 9 May 2013, the City of Toronto enacted a consolidated or amalgamated city-wide zoning bylaw that harmonized the vast majority of bylaws across the city. Although

[69] By-law No 569-2013, *supra* note 34, s 150.25.10.1(2).
[70] Oriole Research & Design Inc., *Shared Accommodation in Toronto: Successful Practices and Opportunities for Change in the Rooming House Sector* (Toronto: East York East Toronto Family Resources and the Rooming House Working Group, 2008), online: <toronto.ca/city_of_toronto/shelter_support__housing_administration/files/pdf/eyet_rooming_house_study_executive_summary.pdf> [perma.cc/QCB4-HKXB] at vii [Oriole Research]; Chief Planner and Executive Director of City Planning, *Staff Report: Extending Zoning and Licencing of Rooming Houses* (Toronto: Planning and Growth Management Committee, 2008), online: <toronto.ca/legdocs/mmis/2009/pg/bgrd/backgroundfile-17594.pdf> [perma.cc/8U3J-MACJ] at 3 [City Planning, *Extending Zoning*].
[71] Lisa Freeman, *Toronto's Suburban Rooming Houses: Just a Spin on a Downtown Problem?* (Toronto: Wellesley Institute 2014) at 5-6, on <wellesleyinstitute.com/wp-content/uploads/2014/10/Suburban-Rooming-Houses-FINAL-Sept-24.pdf> [perma.cc/M9B2-GZR4].
[72] *Ibid*.
[73] Public Interest, *Rooming House Review: Public Consultations* (Toronto: City of Toronto, 2015), online: <toronto.ca> [perma.cc/9JFT-HBKB] [Public Interest].
[74] Freeman, *supra* note 71.
[75] *Ibid* at 1.

bylaws regulating other land-uses were consolidated, including those regulating group homes, city council chose not to consolidate bylaws regulating rooming houses, leaving them to be dealt with at a later date.

The number of rooming houses in the former City of Toronto has been declining for decades. While there were 870 licensed rooming houses in 1985 and 501 licensed rooming houses in 2003, as of October 2008, City records indicated that there were 445 licensed rooming houses.[76] The 445 rooming houses were estimated to contain 7,100 rooms and accommodated about 8,900 individuals.[77] Only 412 licensed rooming houses were reported as of May 2012.[78]

Meanwhile, reports on rooming houses in Toronto estimate that thousands of individuals live in unlicensed rooming houses throughout the city.[79] For example, a report commissioned by the City of Toronto concluded that there was evidence of "the widespread existence of illegal rooming houses across the amalgamated City" and "that the number of such rooming houses equals or exceeds the number of licensed rooming houses."[80] Another report used 2006 census data on the number of low-income single adults in Toronto and, after accounting for the probable number of people who live in licensed rooming houses, supportive housing, and other forms of rent-geared-to-income housing, deduced that little is known about where 100,000 low-income singles live in the amalgamated city except that many singles live in unlicensed rooming houses and many of these rooming houses are located in the former municipalities of Etobicoke, York, North York, Scarborough and York.[81] Recently, a 2014 qualitative report on rooming houses in Toronto published by the Wellesley Institute confirmed that the number of unlicensed rooming houses is growing in Toronto's inner city suburbs where rooming houses are illegal.[82]

It is important to highlight that the inner city suburbs in which rooming houses are not permitted, and are therefore illegal, are also the city's poorest areas. David Hulchanski's study, *The Three Cities within Toronto*, the United Way of Greater Toronto's study, *Poverty by Postal Code*, and John Stapleton's study, *The "Working Poor" in Toronto Region,* each found an increased concentration of low-income earners and a growing number of high-poverty neighbourhoods in the northwestern and northeastern inner suburbs of Toronto.[83] Of particular importance for this paper is the intensification of poverty in the former municipalities of Scarborough and North York where rooming houses remain illegal. The Wellesley Institute's report on rooming houses emphasizes that, "despite their illegality in the majority of Toronto's

[76] City Planning, *Extending Zoning*, *supra* note 70 at 3.
[77] *Ibid*.
[78] Freeman, *supra* note 71 at 7.
[79] *Ibid* at 2; City Planning, *Extending Zoning*, *supra* note 70 at 3.
[80] City Planning, *Extending Zoning*, *supra* note 70; Social Housing Strategists & Richard DRDLA Associates, *Rooming House Issues and Future Options: Final Report*, vol 3 (Toronto: Centre for Urban & Community Studies, University of Toronto, 2004) at 12, online: <urbancentre.utoronto.ca/pdfs/curp/2004_Toronto-Rooming-House-Report.pdf> [perma.cc/CP5E-93GZ] [Social Housing Strategists].
[81] Oriole Research, *supra* note 70 at 11.
[82] Freeman, *supra* note 71.
[83] J David Hulchanski, *The Three Cities Within Toronto: Income Polarization Among Toronto's Neighbourhoods, 1970-2005* (Toronto: University of Toronto Cities Centre, 2010), online: <urbancentre.utoronto.ca/pdfs/curp/tnrn/Three-Cities-Within-Toronto-2010-Final.pdf> [perma.cc/F4NR-R6L8]; United Way of Greater Toronto & The Canadian Council on Social Development, *Poverty by Postal Code: The Geography of Neighbourhood Poverty, 1981-2001* (Toronto: United Way of Greater Toronto, April 2004), online: <unitedwaytyr.com/document.doc?id=59> [perma.cc/A87Z-GBNW]; John Stapleton, Brian Murphy & Yue Xing, *The "Working Poor" in the Toronto Region: Who they are, where they live, and how trends are changing* (Toronto: Metcalf Foundation, 2012), online: <metcalffoundation.com/wp-content/uploads/2012/02/Working-Poor-in-Toronto-Region.pdf > [perma.cc/5KGU-FC9K].

inner suburbs, rooming house accommodations are an essential part of the affordable housing market."[84] The prohibition of rooming houses in the inner city suburbs contributes to the lack of affordable housing options in communities where people need them most. Moreover, prohibitive bylaws render tenants of illegal rooming houses vulnerable to abusive landlords and unsafe living conditions, and make rooming houses a precarious form of housing which may be shut down by the city if reported.

Reports written by non-profit organizations, the Ontario Human Rights Commission, and the city staff repeatedly recommend that city council harmonize zoning bylaws across Toronto to permit rooming houses as-of-right.[85] The current patchwork of bylaws regulating rooming houses is not grounded in a sound planning rationale; the inconsistencies in rooming house bylaws across the City of Toronto are indicative of their arbitrary nature. As well, these bylaws, which restrict the location of much needed forms of housing for people protected by the *Code*, fall short of the *Code* and discriminate against those protected by the *Code* because they have the effect of creating barriers or denying access to affordable housing.[86] For example, municipalities now recognize that the regulation of group homes requires human rights consideration because they provide accommodation specifically for people with disabilities. Yet, although not specifically for people with disabilities, these individuals also live in rooming houses due to their affordability. In fact, rooming houses provide one of the few rental rates that match disability support allowance. However, rooming house bylaws are even more discriminatory than bylaws regulating group homes; they do not just set minimum distances between group homes but are prohibited from entire areas of Toronto. Although the treatment of group homes and rooming houses by municipalities is disparate, the example above demonstrates that the same issues of discrimination exist in both contexts.

The recommendation to allow rooming houses throughout Toronto as-of-right reinforces the responsibility of local governments under the *Planning Act* to "have regard to… the adequate provision of a full range of housing, including affordable housing" when carrying out their responsibilities under the *Act.*[87] It is also consistent with the "Affordable Housing Action Plan" adopted by the City of Toronto in 2009, which emphasizes the need to preserve and expand the supply of affordable housing for single persons, including rooming houses.[88] The Action Plan specifically states that for many of the city's "most vulnerable residents, the availability of such options means the difference between being homeless and being housed."[89] Despite the responsibility of municipalities to expand municipal housing option, the recommendations to allow rooming houses as-of-right and the largely arbitrary regulatory regime that governs rooming houses in Toronto, city council continued to defer action on this matter. The city finally

[84] Freeman, *supra* note 71.

[85] Social Housing Strategists, *supra* note 80; Oriole Research, *supra* note 70; Chief Planner and Executive Director of City Planning, *Staff Report: Approach for Proposed Zoning Regulations for Rooming Houses* (Toronto: Planning and Growth Management Committee, 2009) at 1, online: <toronto.ca /legdocs/mmis/2010/pg/bgrd/backgroundfile-26014.pdf > [perma.cc/58PK-N8FN] [City Planning, *Proposed Zoning Regulation*]; Letter from Barbara Hall to Planning and Growth Management Committee (21 October 2013) Ontario Human Rights Commission, online: <ohrc.on.ca/en/news_centre/submission-city-toronto-group-homes-and-%E2%80%9Cdwelling-room-accommodation%E2%80%9D-%E2%80%93-october-22-2013> [perma.cc/XK85-RBSE] [Barbara Hall Letter].

[86] OHRC PG21.1, *supra* note 5.

[87] *Planning Act*, *supra* note 7, s 2(j).

[88] City Planning, *Proposed Zoning Regulations*, *supra* note 85 at 9; Affordable Housing Committee, *Housing Opportunities Toronto: An Affordable Housing Action Plan 2010-2020* (City of Toronto, 2009) at 25, online: <toronto.ca/legdocs/mmis/2009/ah/bgrd/backgroundfile-21130.pdf> [perma.cc/7QXC-MZBT].

[89] *Ibid*.

launched a Rooming House Review to identify and address issues relating to the conditions and regulation of rooming houses in the spring of 2015.

C. THE CHALLENGE OF SPECIFYING A GROUND OF DISCRIMINATION IN THE FACE OF WIDESPREAD EXCLUSION

As discussed above, systemic discrimination exists when discrimination is normalized. When this occurs, it is very difficult for human rights legislation to be employed successfully to challenge discriminatory policies or practices. It seems that the more widespread or typical the discrimination is, the more difficult it is to address. I suggest that this is one of the reasons why exclusionary rooming house bylaws have remained in place in Toronto. Although people who live in rooming houses, like residents of group homes, are adversely affected by zoning land-use regulations because they act as a barrier to accessing housing and restrict where individuals live within municipalities, individuals living in rooming houses are diverse; they are unified by the fact that they cannot afford other forms of housing, but they do not all fall within a single *Code*-protected group. Compounding this problem is the fact that poverty or social condition is not a prohibited ground of discrimination in Ontario. As a result, claimants must establish *prima facie* discrimination by showing that rooming house bylaws adversely impact them as a result of a specific ground. The diversity of rooming house residents impacted by such bylaws makes it very difficult to prove discrimination on a particular ground and thus systemic discrimination persists in Toronto's communities.

To date, Toronto's rooming house bylaws have not been challenged through legal claims. One of the reasons for this is the fact that unlike residents of group homes, those living in rooming houses fall within many *Code*-protected groups. Prior to challenging bylaws regulating group homes in Ontario's municipalities, the Advocacy Centre for Tenants Ontario (ACTO) researched many forms of housing regulated through zoning bylaws that "effectively [limit] the ability of an already vulnerable population to meet a basic human need: shelter." [90] ACTO studied rooming houses, shelters, group homes, and supportive housing in order to decide how to focus its legal claim. ACTO ultimately focused its legal challenge on group homes because group homes are defined by the characteristics of their residents and serve the needs of people explicitly protected by the *Code*—those with mental and physical disabilities.[91] ACTO wanted to develop a strong and focused case against people zoning that challenged a blatant form of discrimination in order to establish precedent and signal an end to the use of planning powers to regulate users of land.[92] By focusing on group homes, ACTO was able to successfully challenge bylaws on a clear prohibited ground.[93] The cohesive nature of the adversely affected group–disabled group home residents–assisted ACTO in identifying the harm caused by the bylaw to a specific demographic and demonstrating *prima facie* discrimination.

Establishing a *prima facie* discrimination claim in the regulation of rooming houses and other forms of affordable housing is more difficult because they are not defined by the characteristics of their residents and they do not serve a cohesive group of individuals that fall within a single *Code* ground, even though it is well established that they serve vulnerable groups

[90] GHK, *supra* note 55 at 1.
[91] *Ibid* at 16.
[92] *Ibid* at 4.
[93] *Ibid.*

protected by human rights legislation.[94] The Ontario Human Rights Commission recognized this in a letter to the City of Toronto's Planning and Management Growth Committee in which it explained that rooming houses are "an essential form of affordable housing and [are] particularly important to people with disabilities, single people who receive social assistance, newcomers and other groups protected by Ontario's *Human Rights Code*." [95] However, the "defining characteristic of individuals living in rooming houses is their low income whether from social assistance, a disability pension, CPP or a low wage job."[96] While bylaws limiting access to rooming house accommodation adversely impact individuals protected by the *Code*, the unifying trait of rooming house residents is not a basis for a discrimination claim in Ontario, as "poverty" or "social condition" is not a prohibited ground in Ontario. As a result, "despite facing such strong barriers to equal participation in society, and despite being harshly stigmatized, poor people have no legal recourse for discrimination on the basis of poverty or social condition."[97] Rooming house tenants and advocates must challenge rooming house bylaws indirectly by demonstrating that the zoning bylaws adversely impact them, not because they cannot afford other housing, but because they are single, have a disability and/or are immigrants. Proving that rooming houses are *prima facie* discriminatory on such a basis is very challenging.

In 2000, the *Canadian Human Rights Act* Review Panel chaired by the Honourable Gerard La Forest, released a report on its findings as to whether the *Act* adequately upheld human rights and equality principles in Canada.[98] The report considered whether social condition should be added as a prohibited ground of discrimination under the *Act*. The Panel acknowledged the existence of discrimination against the poor, that poor people suffer because of stereotyping and the negative perception others hold about them, and that there is a close connection between the current grounds and the poverty suffered by those who share many of the personal characteristics referred to under the Act.[99] The Panel also recognize how difficult it is to prove discrimination without the ground of social condition. The claimant is forced to take an indirect approach and prove that the impact of an infringing policy or practice is not due to the fact that they are poor, but due to some other *Code*-protected ground such as sex, disability, *or* marital status. Although some barriers related to poverty could be challenged on one or more existing grounds, these cases are rarely successful and are "difficult to prove because they do not challenge the discrimination directly."[100] The Panel further recognized that discrimination is even more difficult to prove when it arises from intersecting or multiple grounds such as the sex, disability *and* marital status of the complainant.[101] On this point, the Panel concluded: "if a policy or practice adversely affects all poor people… a ground by ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem."[102] The Panel ultimately supported the inclusion of social condition in human rights

[94] *Ibid* at 4, 16.
[95] Barbara Hall Letter, *supra* note 85.
[96] Oriole Research, *supra* note 70 at 4.
[97] Lynn Iding, "In a poor state: The long road to human rights on the basis of social condition" (2003) 41:2 Alta L Rev 513 at 515.
[98] Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Minister of Justice and Attorney General of Canada, 2000) at 109, online: <publications.gc.ca/collections/Collection/J2-168-2000E.pdf> [perma.cc/6XTF-G9Q3].
[99] *Ibid* at 116-117.
[100] *Ibid* at 118.
[101] *Ibid.*
[102] *Ibid.*

legislation because it is essential to challenge stereotypes about the poor and protect the most destitute against discrimination. [103]

A similar conclusion was reached in a report for the Canadian Human Rights Commission. Its authors, Wayne MacKay and Natasha Kim, suggest that, "without adequate protection against discrimination on the basis of social condition, the risk of individuals "falling through the cracks" remains ever apparent for claimants who straddle an enumerated category and an unenumerated ground."[104] Like the La Forest Commission, they recommended adding social condition as a ground of discrimination to reflect the multifaceted and intersectional experience of discrimination, and to ensure that the rights of those on the margins of society are advanced.[105]

These insights resonate in the case of rooming houses where tenants cannot afford other forms of housing because of a range of *Code*-protected attributes, and are adversely affected by zoning bylaws in Toronto that severely restrict where they may live, yet challenging zoning bylaws on one particular ground falls profoundly short in remedying the discrimination experienced by rooming house tenants. A ground-by-ground consideration of discriminatory zoning bylaws that affect many *Code*-protected groups fails to capture the reality and the complexities of discrimination experienced as a result of these bylaws. In an effort to distinguish between market-based exclusions and identity-based exclusions, human rights law falls short and fails to protect the rights of claimants.

While many argue that adding poverty or social condition as a ground of discrimination would go a long way in sealing cracks that currently exist in human rights legislation, some academics argue that adding new grounds does not remedy the inherent problems with human rights legislation. These academics claim that human rights law is simply unequipped to combat systemic discrimination because it does not approach discrimination in a holistic way or work from a principled theory of what discrimination is and why it is wrong, but takes a piecemeal or pigeonhole approach that requires claimants to fit their claim into predetermined enumerated grounds of discrimination that reflects "a political and social reality to which the law has, belatedly, given recognition."[106] This approach prevents adjudicators from identifying and addressing the harm caused by discrimination, and fails to respond to the lived realities of victims of human rights violations who are disadvantageously impacted by discriminatory policies and practices.[107]

Denise Réaume, for example, criticizes human rights jurisprudence on the basis that it "is stuck in a style of adjudication that insists on matching litigants to prefabricated categories, rather than engaging in a process of continually redesigning the categories to meet human needs".[108] As a result, human rights law does not allow for the "opportunity to understand the subtleties of discrimination and its harmful effects."[109] Ultimately for Réaume, "the human

[103] *Ibid* at 120.
[104] Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009) at 79, online: <chrc-ccdp.ca/sites/default/files/sc_eng_1.pdf> [perma.cc/F4LG-LVSM] [MacKay & Kim].
[105] *Ibid* at 76.
[106] Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experience" (2001) 13 CJWL 37 at 41; Denise G Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:2 Osgoode Hall LJ 113.
[107] *Ibid* at 130; MacKay & Kim, *supra* note 104 at 117-118.
[108] Réaume, *supra* note 106 at 130.
[109] *Ibid* at 137.

phenomenon of discrimination–of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage–is not capable of being codified in precise terms."[110] This is particularly evident when discrimination is experienced by many individuals who are in a position of disadvantage due to a range of different attributes that they hold and this disadvantage becomes the norm. The complexity of discrimination in these circumstances does not fit nicely within human rights legislation's codified notion of discrimination.

One limitation of human rights legislation in Ontario is that when a claim does not fit within a specific identifiable ground, but instead affects people on the basis of many identity-based grounds, the disadvantage is more difficult to identify and seems to be less deserving of the protection of human rights legislation. The case study of zoning bylaws suggests that when discrimination is so pervasive that many people are adversely affected by a policy as a result of attributes that they possess, the more difficult it is to challenge the impugned conduct or policy. The result is that systemic discrimination persists, immune from challenge by human rights legislation.

D. DISCRIMINATORY ATTITUDES, NIMBY-ISM AND PROCEDURAL INEQUALITY

Although the *Human Rights Code* enshrines the right to equal treatment with respect to housing, "Not in My Back Yard" (NIMBY) attitudes have arisen throughout Ontario to oppose as-of-right housing for certain land-uses, including group homes and rooming houses.[111] NIMBYism refers to the protectionist attitudes and negative reactions from local residents to proposed new development.[112] When decision-making processes at the municipal level involve NIMBYism, discriminatory attitudes infuse the processes, which undermines inclusiveness at the outset. This has significant implications, often resulting in a failure to consider possibilities of accommodation and the exclusion of disadvantaged groups from debates on issues that directly affect them.[113] However, the discussions and attitudes involved in policy development are not directly susceptible to legal challenge and thus systemic discrimination persists within our communities.

Public input is fundamental to local democracy and municipal decision-making often involves fairly extensive public participation.[114] In fact, under the *Planning Act*, municipalities must hold at least one public meeting prior to amending zoning bylaws to provide a forum in which the public can make representations on and discuss the merits of the proposed plan.[115] In these public meetings, city council must provide any member of the public wishing to speak on a proposed bylaw with a fair opportunity to do so.[116] Residents use this opportunity to learn about

[110] *Ibid* at 143.
[111] GHK, *supra* note 55 at 3.
[112] Sylvia Novac et al, *Housing Discrimination in Canada: The State of Knowledge* (Ottawa: Canadian Mortgage and Housing Corporation, 2002) at 33, online: <cmhc-schl.gc.ca/odpub/pdf/62781.pdf?fr=1440528949350> [perma.cc/GFE6-WE7Z] [Novac et al].
[113] Sheppard, *supra* note 6 at 147.
[114] Ranasinghe & Valverde, *supra* note 8 at 326.
[115] *Planning Act*, *supra* note 7, s 17(15)(d).
[116] Ontario Human Rights Commission, *supra* note 20 at 12; *Planning Act*, *supra* note 7, s 61; Jordana Ross, *Balancing Supportive Housing with Civic Engagement* (Toronto: University of Toronto Centre for Urban and

changes in their neighbourhood, ask questions, and voice concerns about or support proposals. Such public participation is mandatory and important to democracy at a local level, although extensive public debate can lengthen the time it takes to amend exclusionary bylaws and, due to imbalances of power within the process itself, may result in policies that reinforce the status quo of exclusion, rather than protect the rights of vulnerable people.[117]

While the conduct and the format of public meetings is not prescribed by the *Planning Act*, the *Act* suggests that the content of planning discussions should focus on legitimate land use planning, not on the users of the land.[118] However, public meetings and discussions often focus on the future residents of proposed developments.[119] For example, in the spring of 2015, the City of Toronto embarked on the first consultation phase of the Rooming House Review, which included fourteen neighbourhood-based consultations.[120] Four of these consultations took place in the inner city suburb of Scarborough where rooming houses are currently illegal. While consultations in areas of Toronto where rooming houses are legal focused on improving the condition and regulation of rooming houses, Scarborough residents expressed vociferous concern and called for an outright ban on rooming houses throughout the city.[121] Of the many concerns that Scarborough residents had, they felt "rooming houses compromise community safety by attracting the "wrong" types of people into the community and by encouraging dangerous, disruptive behaviours such as crime and drug use."[122] Such reactions are not uncommon. The Ontario Human Rights Commission has reported that "resistance to affordable housing is often based on stereotypes and misconceptions about the people who will live in it and the incorrect belief that it is acceptable to prevent certain groups of people from living in certain neighborhoods."[123] NIMBY attitudes reflect intolerance and prejudice based on "deeply held beliefs about the residents… including negative perceptions about their personal and moral habits, and assumptions about their ethnic backgrounds or racial status."[124] When discussions centre on the type of people that may live in the proposed form of housing and these residents are protected by one or more *Code*-grounds, public consultations are discriminatory.[125] Although these are not legitimate planning considerations, such views and attitudes voiced during community consultations cannot be directly challenged under human rights law.

Moreover, planning language is often used to hide discriminatory sentiments directed towards the "users of the land". Residents conceal their concerns regarding the type of people who will live in the proposed housing by raising concerns regarding depreciated property values, population density, garbage, noise, changes to the neighbourhood, traffic and strains public services or the city's infrastructure.[126] While some of these concerns are legitimate and must be

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Community Studies, 2007), online: <urbancentre.utoronto.ca/pdfs/elibrary/Ross-208SupportiveHousing4-2007.pdf>. [perma.cc/B24Q-ZL48]

[117] Ranasinghe & Valverde, *supra* note 8.

[118] Ross, *supra* note 116; *Bell*, *supra* note 23.

[119] Ross, *supra* note 116.

[120] Public Interest, *supra* note 73 at 4.

[121] *Ibid* at 8, 22.

[122] *Ibid* at 36.

[123] OHRC PG21.1, *supra* note 5 at 3.

[124] Novac et al, *supra* note 112 at 33.

[125] GHK, *supra* note 55 at 3; Ontario Human Rights Commission, *supra* note 20 at 8.

[126] *Ibid* at 8-19; Affordability and Choice Today (ACT), *Housing In My Backyard: A Municipal Guide For Responding To NIMBY* (Ottawa: Federation of Canadian Municipalities, 2009) at 4-6, online: <fcm.ca/Documents/tools/ACT/Housing_In_My_Backyard_A_Municipal_Guide_For_Responding_To_NIMBY_EN.pdf > [perma.cc/GGP2-KY8N].

examined further by municipal planners, the Ontario Human Rights Commission and the Canada Mortgage and Housing Corporation have argued that the majority of these concerns, which are often raised in resisting affordable housing initiatives, are unwarranted from a planning perspective.[127] These reports state that affordable housing does not decrease property values, increase crime, strain public services, increase traffic, or change the character of neighbourhoods.[128] In the context of group homes in Toronto, for example, a city staff report responded to some of these concerns and found that although the "impacts, nuisances and externalities generated by certain types of land-use must be considered, there is no documented evidence of any kind of negative externality generated by group homes."[129] For example, concerns pertaining to traffic and parking are not warranted because most residents of group homes do not own cars, and concerns regarding density and the incompatibility of group homes with their surroundings are not warranted because group homes are almost always located in buildings originally constructed as detached homes.[130] Based on these findings, municipal planning staff concluded that separation distances between group homes could not be supported as good planning.

In a study of zoning bylaws and NIMBYism, Ian Skelton found that, "NIMBY, while predominantly grounded in unjustified social fears, has been a major driver of the application of municipal powers in land-use regulation."[131] Despite the requirement that municipal zoning be based on legitimate planning considerations and regulate land-use rather than users of the land,[132] Toronto's city councillors frequently cite the negative reactions of community members to proposals of new land-use laws.[133] The impact of NIMBYism on city council is evident in local news stories on rooming houses in Toronto. For example, some councillors have attributed the fact that city council has avoided discussions to extend the regulation of rooming houses across Toronto to protecting the "*Leave it to Beaver* version of the suburbs,"[134] while other councillors in the inner suburbs have openly defended the prohibition against rooming houses in their wards on the basis that rooming houses will "absolutely disrupt our neighborhoods."[135] City councillor and chair of the Planning and Growth Management Committee, Peter Milczyn, recently explained that suburban councillors want to continue the rooming house ban in their neighbourhoods because rooming houses are a tough sell politically.[136] Constituents simply do not like them. In Scarborough, local media reported that the hostility of the community and ratepayer groups to allowing legal rooming houses in their neighbourhoods "should give pause to anyone hoping a city review will harmonize Toronto's different rooming house bylaws at the end of 2015."[137] Strong local resistance delays the enactment of bylaws that increase affordable

[127] Ontario Human Rights Commission, *supra* note 20.
[128] *Ibid* at 9-10.
[129] City Planning, *Zoning Provisions*, *supra* note 49 at 11-12.
[130] *Ibid* at 12.
[131] Skelton, *supra* note 1 at 16.
[132] Ontario Human Rights Commission, *supra* note 20 at 10; *Bell*, *supra* note 23.
[133] Skelton, *supra* note 1 at 21.
[134] Rachel Mendleson, "Toronto councillors evade showdown on suburban rooming houses," *Toronto Star* (13 February 2013), online: <thestar.com> [https://perma.cc/26ZH-PEDZ].
[135] Mike Adler, "Rooming house rules delayed, despite Scarborough concerns," *East York Mirror* (1 November 2013), online: <insidetoronto.com> [perma.cc/Y6E6-BHNL].
[136] Paul Moloney, "Toronto needs to take action on rooming houses, planning chair Peter Milczyn urges," *Toronto Star* (21 March 2014), online: <thestar.com> [perma.cc/8EMQ-2LNK].
[137] Mike Adler, "Close illegal rooming houses, Scarborough residents tell city consultation meeting," *Scarborough Mirror* (21 April 2015), online: <insidetoronto.com> [perma.cc/TM4A-MP5X] .

housing options and the elimination of exclusionary bylaws.[138] The case study of rooming houses in Toronto is demonstrative of this, as city council has continued to defer action on this matter due to the politicized and contentious nature of the rooming house question. More concerning, however, is the fact that residents influence land-use bylaws and the way in which city councillor's ultimately vote on these issues at city hall. Discriminatory attitudes of the dominant group can not only delay human rights but can also perpetuate the violation of human rights.

In a socio-legal study on municipal decision-making and shelters in Toronto, Prashan Ranasinghe and Mariana Valverde explain that although public input is theoretically open to all concerned parties, those who have legal occupancy in relation to a particular property (such as tenants or homeowners) have greater influence in land-use planning because of their social and political power as occupants, taxpayers, and constituents.[139] In comparison, those advocating for the eradication of restrictive land-use bylaws have relatively little social and political influence because they do not have legal occupancy.[140] Ironically, those seeking a roof over their heads are "without the requisite means (in this case, property) to launch an attack based on the right to shelter; in other words, one has no claim, in municipal politics at least, to a roof over one's head if one does not have a (permanent) place to call home."[141] Furthermore, the "propertied" have the additional advantage of supporting the position to maintain the status quo rather than challenging it and advocating to expand affordable housing options.[142]

The exclusion and disadvantage that has become the status quo tends to result in the entrenchment of exclusion and disadvantage. Colleen Sheppard writes that, "while democratic participation within social institutions may intuitively seem to promote greater inclusion and equality… [p]roblems of exclusion from participation in democratic governance undermine its process as a pathway to greater equality."[143] Of course, the fact that the propertied have their ideas heard is not in and of itself problematic.[144] What is problematic is that public consultation presupposes that all parties have equal status to voice their opinions, and this is not always the case. [145] While the *Code* is meant to protect minority rights by imposing a duty on local governments to be attentive to inequality and to ensure that bylaws are not discriminatory, systemic inequities such as legal occupancy result in a failure to investigate the possibilities of accommodating *Code*-protected groups.[146] The policies and practices that result from seemingly democratic processes can reinforce the norms and privileges of the dominant group despite the existence of the *Code*. As a result, public input in local decision-making processes can have the effect of reinforcing exclusion. Therefore, the reason for the persistence of discrimination is not only due to the mere existence of bylaws that adversely affect disadvantaged people, but also due to the social dynamics of discrimination and its manifestation in decision-making processes within municipalities.

Unfortunately, views expressed by participants in the course of public consultations that are conducted as part of the policy-making process are beyond the purview of human rights legislation. The *Code* cannot do much to address discriminatory attitudes. This also means that

[138] Novac et al, *supra* note 112 at 33; Ranasinghe & Valverde, *supra* note 8.
[139] *Ibid* at 328-329.
[140] *Ibid* at 329.
[141] *Ibid*.
[142] GHK, *supra* note 55 at 3.
[143] Sheppard, *supra* note 6 at 121.
[144] Ranasinghe & Valverde, *supra* note 8 at 329.
[145] Sheppard, *supra* note 6 at 121.
[146] *Ibid* at 147.

although NIMBYism plays a significant role in determining politicized issues like rooming houses, it is difficult to prove that the votes city councillors ultimately cast are the result of discriminatory attitudes that they or their constituents hold. This is particularly the case because municipal policy-making processes are complex and multifaceted. For example, along with public input, councillors consider the recommendations of experts and city staff who provide advice that has not been vetted by political actors as well as the recommendations of specific committees prior to casting their votes on zoning bylaws. The elusive nature of discrimination and the complexity of municipal decision-making processes make it difficult to address issues like housing, hold local government to account, and identify discrimination that persists at a systemic level.

That being said, human rights litigation may be able to address certain elements of municipal policy-making procedures to mediate the impact of NIMBYism in the development of zoning bylaws. The *Human Rights Code* prohibits discrimination in the provision of "services", is defined in *Braithwaite v. Ontario (Attorney General)* as "something which is of the benefit that is provided by one person to another or to the public."[147] Since human rights legislation must be read in a broad, liberal and purposive manner, there has been a trend towards expanding the governmental activity that constitutes a government service. [148] Therefore, it is likely that public meetings and consultations are a "service" under the *Code* and therefore city staff and councillors are presumably obligated to conduct them in such a way that eliminates physical barriers to participation as well as disadvantage caused by systemic and attitudinal that results in the exclusion of individuals or groups protected by the *Code*.[149]

Jordana Ross has provided two excellent recommendations that would improve the consultation process to conform to the *Code.* First, she recommends that municipal planning staff host separate meetings with marginalized groups where public meetings are likely to be hostile or exclusionary.[150] This was done in the 2015 Rooming House Review during which seven tenant focus groups, consultations with interest groups and an anonymous online survey were conducted along with the 14 community consultations.[151] Second, Ross suggests that planners attend mandatory trainings on human rights and develop standards to ensure that public meetings are facilitated in such a way that respect the rights of *Code*-protected groups.[152] Similarly, the Ontario Human Rights Commission has suggested that municipalities lay ground rules at the beginning of public meetings that emphasize that discriminatory language will not be tolerated and that city staff be prepared to interrupt residents when such discussions arise.[153] It is not clear whether any effort has been made in this respect or whether planners are aware of their duty to accommodate under the *Code*. More must be done to ensure that city staff members are comfortable with managing discriminatory behaviour during public meetings and that they

[147] 2005 HRTO 31 at para 22 [*Braithwaite*]; *Ontario (Attorney General) v Ontario Human Rights Commission*, 88 OR (3d) 455 at para 39-40.
[148] *Braithwaite*, *supra* note 147; *Action Travail*, *supra* note 56 at 1134; Claire Mumme, "At the Crossroads in Discrimination Law: How the Human Rights Codes overtook the Charter in Canadian Government Services Cases" (2012) 9 JL & Equality 103.
[149] Ross, *supra* note 116 at 9.
[150] *Ibid*.
[151] Public Interest, *supra* note 73.
[152] Ross, *supra* note 116.
[153] Ontario Human Rights Commission, *Room for everyone: Human rights and rental housing licensing* (Toronto: Ontario Human Rights Commission, 2013) at 14 [OHRC, *Room for everyone*].

structure the policy-making process to allow for resident input while also upholding the right of individuals to be free from discrimination.

When discriminatory attitudes and views of *Code*-protected groups pervade the decision-making process, the processes themselves–no matter how inclusionary–can reinforce the exclusion of marginalized people. Institutional practices of policy development can contribute to discriminatory outcomes. Human rights law is meant to ensure that duty bearers, such as city councils, proactively consider and uphold equality rights when developing bylaws. However, to uphold these rights, city councils must recognize their responsibility as duty bearers towards individuals who are protected under the *Code* not only in developing bylaws that are not discriminatory, but also in developing processes that eliminate barriers rather than reinforce those that are built into pre-existing systems. If they do not, the participatory decision-making process itself can become a mechanism of discrimination that entrenches inequality. Unfortunately for the equality project, the process of policy development and the discriminatory attitudes that permeate these processes cannot be directly challenged. As a result, systemic discrimination can, and often does, remain beyond the reach of human rights law.

IV. MECHANISMS TO CHALLENGE SYSTEMIC DISCRIMINATION

Litigation is an important tool in challenging discriminatory practices, particularly in order to secure specific remedies for individuals, but "litigation is not the whole system. It is not the only available tool for building a sustainable human rights culture."[154] Due to the inherent limitations of human rights legislation and the complexity of discrimination, it is important to recognize the utility of other mechanisms in Ontario's human rights regime to effectively combat systemic discrimination. Indeed, some of these tools may be better suited to promote and foster equality than employing human rights law through litigation.

The Ontario Human Rights Commission (OHRC) plays a central role in identifying discrimination, promoting the elimination of discriminatory practices and effecting systemic change. The OHRC engages in proactive measures to prevent discrimination through its public education, policy development and research functions.[155] For example, pursuant to section 29(c) of the *Code*, the OHRC has the power "to undertake, direct and encourage research into discriminatory practices and to make recommendations designed to prevent and eliminate such discriminatory practices."[156] Instead of dealing with individual complaints, the OHRC addresses systemic human rights issues faced by vulnerable groups. The OHRC, therefore, can play an important role in ensuring that municipalities understand their responsibility towards marginalized citizens and develop bylaws that comply with the *Code*.

In 2012, for example, the OHRC developed a guide, *In the zone: Housing, human rights and municipal planning*, which outlines the human rights responsibilities of municipalities in developing bylaws that regulate forms of housing. It suggests best practices to overcome discriminatory opposition and policy recommendations on developing bylaws that uphold the right to discrimination-free housing–individually and systemically. The Commission also published *Room for everyone: Human rights and rental housing licencing*, which sets out

[154] Faraday, *supra* note 65 at 5.
[155] Cornish, Faraday & Pickel, *supra* note 11.
[156] *Human Rights Code*, *supra* note 10, s 29(c).

thirteen points for municipalities to consider when embarking on rental housing licencing and zoning.[157] One best practice cited by the Commission, for example, is a recommendation to set ground rules prior to public meetings that prohibit discriminatory or negative comments about the people who will live in the proposed housing and a recommendation to city councillors not to hold frivolous public consultations on issues like rooming houses to ensure that procedural inequality and discriminatory discussions do not translate into discriminatory bylaws.[158] Finally, the Commission has provided input on zoning bylaws in Ontario's municipalities. In March 2013, for example, the Commission submitted a report to the City of Toronto in which it voiced concern that some central human rights issues were not being addressed by the city in its bylaws and specified that the zoning bylaw falls short of the *Code* because it retains the requirement for separation distances between group homes (which has since been repealed) and does not allow rooming houses as of right in most parts of Toronto.[159] The OHRC plays an important role in pressuring and educating municipalities to ensure that they comply with their obligations under the *Code*.

While the OHRC's policy and research work does promote a culture of human rights in Ontario, the OHRC also has the power to address systemic discrimination through litigation by initiating its own applications and by intervening in applications with the applicant's consent.[160] Section 35 of the *Code* grants the OHRC the authority to determine what issues should be litigated in the public interest and make applications to the HRTO in the public interest either to allege discrimination or ask for a Tribunal order.[161] Theoretically, this allows the OHRC to bring cases as an extension of its research on issues of systemic discrimination. However, the Commission has initiated few applications at the Tribunal and seems hesitant to use this tool, employing it only when other efforts to resolve human rights disputes have failed.[162] Although the Commission has made significant progress on many of its initiatives without resorting to litigation and has successfully employed non-litigious strategies to effect change—as the Commission stated in a submission to the City of Toronto regarding its zoning bylaws—"human rights delayed are human rights denied."[163] Such applications, although expensive and unpredictable, could have a significant impact in reducing or eliminating systemic discrimination and fostering systemic equality. The case study of rooming houses demonstrates the importance of the Andrew Pinto's recommendation that the Commission should develop a litigation strategy focusing on cases in which rights are systematically deprived and applicants would otherwise have difficulty advancing or proving their case.[164]

Another important development that supports combating systemic discrimination, identified by Fay Faraday, is the "proliferation of tribunals which now have jurisdiction to address substantive human rights concerns."[165] In 2006, the Supreme Court of Canada ruled in

[157] OHRC, *Room for everyone*, *supra* note 153 at 12-21.
[158] Ontario Human Rights Commission, *supra* note 20; OHRC, *Room for everyone*, *supra* note 153 at 14.
[159] OHRC PG21.1, *supra* note 5.
[160] *Human Rights Code*, *supra* note 10, s 29(i).
[161] *Ibid* at s 35.
[162] Andrew Pinto, *Report of the Ontario Human Rights Review* (Toronto: Ontario Ministry of the Attorney General, 2012) at 128, online: <attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf> [perma.cc/SS7K-R428] [Pinto Report].
[163] OHRC PG21.1, *supra* note 5 at 5.
[164] Pinto Report, *supra* note 162 at 131.
[165] Faraday, *supra* note 65 at 7.

Tranchemontagne that due to the primacy of the *Code*, a myriad of administrative tribunals in addition to the HTRO must interpret and apply the *Code*, should a human rights issue arise in cases before them.[166] Faraday explains that in *Tranchemontagne*, the court recognized the systemic nature of discrimination and that "human rights issues can arise in a multiplicity of contexts."[167] For example, the OMB, which hears applications and appeals regarding municipal planning, including zoning bylaws, has the power to decide human rights issues arising in that specific context. As a result, the OMB considered the *Code* in reviewing Kitchener's bylaws regulating rooming houses and recognized the importance of considering human rights issues when developing bylaws. *Tranchemontagne* allows for the implementation of systemic remedies that contribute to combating discrimination in Ontario, and signals to municipalities the vital importance of considering human rights issues when making municipal planning decisions.

Finally, it is clear from the initiatives undertaken to combat discriminatory bylaws regulating group homes and rooming houses in Ontario that civil society plays an essential role in challenging the status quo. By using human rights law as a normative tool, civil society organizations employ the values of equality, inclusion, dignity and belonging in order to advocate for systemic change. In *Action Travail*, Dickson CJ wrote that, "to combat discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged… [to] look past these patterns of discrimination and to destroy those patterns."[168] Although human rights law has limitations, the values and language of human rights are invaluable in creating a climate in which we can collectively work towards the elimination of all forms of discrimination, including systemic discrimination. Human rights law provides a lens through which to identify, challenge and discourage dynamics of exclusion. Importantly, by setting out norms, values and a language of human rights, the *Code* plays an invaluable role in assisting civil society to contest policies and practices that entrench discrimination *outside* the courtroom, without resorting to litigation. As a normative tool, it also contributes to disrupting decision-making processes that perpetuate discrimination and confronting discriminatory attitudes that reinforce exclusion in our communities. There is no doubt that human rights law will continue to be employed by advocates and activists to challenge exclusionary bylaws, such as those regulating rooming houses, far into the future.

V. CONCLUSION

Housing is a basic need, but for many people affordable housing is difficult to find. Where these difficulties are the result of characteristics protected under the *Code*, they are illegal. It is the role of local governments to ensure that housing is accessible and to eliminate arbitrary or discriminatory barriers to access. In this paper, I have demonstrated how human rights law, namely the Ontario *Human Rights Code*, can be employed to challenge discrimination in zoning bylaws, as well as the limits of human rights law in this domain. The relative success of challenges to group home and rooming house bylaws illustrates the constraints and possibilities of litigation under the *Code*, and the need for complement tactics beyond litigation. The larger challenge, in addition to eliminating discriminatory bylaws, is to confront systemic

[166] *Tranchemontagne*, *supra* note 10 at para 39.
[167] Faraday, *supra* note 65 at 9.
[168] *Action Travail*, *supra* note 56 at 1139.

discrimination in municipal decision-making and societal views. In this task, *Code* litigation is a valuable tool, but only part of the solution.