THE WEST LODGE FILES: JOINING CLINIC AND COMMUNITY TO OVERCOME TENANTS' SUBORDINATION©

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Organizing with members of the community is an essential part of realizing change through legal advocacy. This article explores how organizing with tenants' associations in the Parkdale community created a foundation for success in the courtroom in what are perhaps Parkdale Community Legal Services' most famous files—The West Lodge Files. The article traces the long history of legal and other battles surrounding the West Lodge towers, beginning with a groundbreaking Supreme Court of Canada case for tenants' rights in the 1970's and ending with the tenants' 1997 attempt and courtroom battle to buy the buildings and turn them into a cooperative. Through each of these battles, cooperation and interface between the legal clinic and its lawyers, and community members and organizers was fundamental.

Pour réaliser des changements au moyen de recours juridiques, il est essentiel de faire participer les membres de la communauté et de les aider à s'organiser. Cet article analyse de quelle façon l'organisation des associations des locataires de la communauté de Parkdale a établi les fondations du succès juridique dans ce qui constituent probablement les dossiers les plus connus de *Parkdale Community Legal Services*—les dossiers *West Lodge*. Les auteurs racontent la longue histoire des batailles—juridiques et autres—qui ont entourées les tours *West Lodge*. Cette histoire débute dans les années 1970 avec l'importante décision de la Cour suprême du Canada sur les droits des locataires et se termine en 1997 avec la lutte menée par les locataires dans leur tentative d'acheter les edifices pour les convertir en coopérative. Lors de chacun de ces conflits, la coopération et les relations entre la clinique juridique, ses avocat(e)s, les membres de la communauté et les organisateurs se sont révélées fondamentales.

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I. INTRODUCTION

Say the words "West Lodge" at Parkdale Community Legal Services (PCLS), and you will receive a look of sympathy from anyone who has worked there for more than a month. Although a multitude of PCLS file numbers and litigants have been attached to the two high-rise apartment buildings of 103 and 105 West Lodge Avenue, there has been a decades-long, continuous and single conflict between the tenants and the various landlords of the complex. PCLS has represented individual tenants in the courts, but the conflict is basically one in which a low-income community of tenants, without any means, struggles against powerful financial and property interests.

Throughout the conflict, not only courts, but also city councillors, community groups and media have been used by the tenants in their organizing to correct the severe security and disrepair problems that haunt the two towers on West Lodge Avenue. Without community organizing, our legal successes would have been empty and singular remedies. In examples like the following West Lodge stories, PCLS reconfirms its founding belief that grass roots support and community organizing are necessary in meaningful legal work for tenants.

II. BATTLES AND ALLIANCES

In his article, "*Pajelle Investments Ltd.* V. *Herbold*: On the Importance of Having a Convenient Enemy,"[1] Brian Bucknall describes the evolution of a tenants' victory from the county court decision in 1972[2] to the decision of the Supreme Court of Canada in 1975.[3] The tenants, Lillian Herbold and her daughter, had rented a unit in the West Lodge Towers advertised as an apartment with air-conditioning and access to a swimming pool. Certainly, in the 1960s, the West Lodge

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[1] (1997) 35 Osgoode Hall L.J. 685.

[2] MacRae, Co. Ct. J., (7 July 1972) [unreported] [hereinafter *Herbold*].

[3] *Pajelle Investments Ltd.* v. *Herbold*, [1976] 2 S.C.R. 520.

Towers were developed with relatively wealthy tenants in mind. Indeed, Tommy Hunter, one of Canada's best known singers, lived in one of the West Lodge penthouse apartments in the early days. Ontario Premier John Robarts opened the complex with much fanfare in 1965. At that time, West Lodge Towers made the front page of a prominent architecture magazine.

By the 1970s, however, the complex was already sliding downhill in terms of general disrepair and lack of services. The evidence of the tenants in *Herbold* was that their apartment building was in a deplorable condition of repair. However, because the landlord had remedied most of the disrepair items listed in an inspector's report from the City of Toronto's housing standards division, the learned trial judge dealt only with the issues of the inoperable swimming pool and the lack of air-conditioning.

Ms. Herbold's landlord, Pajelle Investments Ltd.,[4] argued that the air-conditioning and pool's disrepair was not subject to the recently legislated requirement of landlords to provide and maintain "the rented premises in a good state of repair and fit for habitation."[5] Nevertheless, all appeal courts affirmed the county court judge's decision that a landlord is required to maintain in a state of good repair more than just the individual apartment unit,[6] such as the swimming pool and air conditioning systems.

Indeed, *Herbold* was a landmark decision for West Lodge tenants and, more generally, for tenants in Ontario. Bucknall contends that this victory was only possible because of the exceptionally stubborn personality behind the corporate landlord. Mr. Wynn was determined to fight the new tenants' regime to the bitter end, no matter the cost, or the likelihood of success. Contrarily, as Bucknall points out in his article, the Herbolds moved out before the appeal process began. It was not PCLS's client, then, who inspired and motivated the defence of appeal after appeal. The driving force behind the Herbolds' case was the West Lodge Tenants' Association (WLTA), formed with the help of the Parkdale Tenants' Association (PTA), which had existed prior to PCLS's birth.

Two years later, when *Herbold* was being appealed to the Ontario Court of Appeal, the disrepair at issue continued to exist.

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[4] The owner of Pajelle Investments Ltd, Phil Wynn, named the company for his three sons: *Pa*ul, *Je*ff, and *Le*slie.

[5] *Landlord and Tenant Act*, R.S.O. 1970, c. 236, s. 96(1) (now R.S.O. 1990. c.L.7, s.94(1).

[6] (1974), 47 D.L.R. (3d) 321 (Ont. C.A.).

Having tested the meaning of one aspect of the repair section of the new landlord and tenant legislation, the WLTA wanted to go further and continued to organize. The PTA and the WLTA continued to protest the increasingly alarming extent of disrepair in the complex—especially 105, which was stripped to furnish the repair needs of 103. From that effort, some of the tenants at West Lodge withheld their rents on the basis that the building continued to be in a state of bad repair.

Never before had a rent strike been addressed in the courts, nor had disrepair been addressed with such support. In the resulting case, *Re Quann and Pajelle Investments Limited*,[7] the evidence of disrepair from the applicant tenants was overwhelming. Not only was the city's building inspector there to testify, but also representatives of the city's development department, the fire department (director of fire prevention), the crime prevention department of the police, and the Ministry of Consumer and Commercial Relations, elevator licensing branch. More important problems than the lack of advertised pool facilities and air-conditioning were at issue. Disrepair of the elevators servicing the eighteen floors, system failures of garbage disposal and fire safety, lack of hot water, and disrepair in the laundry rooms and the hallways were the focus of the trial.

Phil Wynn, on behalf of the landlord, testified that the disrepair was the fault of vandalism, and that much of the disrepair had not been reported to the landlord. The county court judge allowed the withholding of rent (it was paid into court once the application commenced), ordered an abatement of rent, ordered that repairs be made, and that a security system be installed, including the hiring of security guards.[8]

Although this court victory was an incredible achievement for the tenant population in Ontario, it did not rectify the disrepair problems in the West Lodge complex. Some clean up was made, but it did not last. The fact that the pool has not since seen a drop of water has been the least of the tenants' worries.

Into the 1980s, the buildings continued to deteriorate. The Wynn family sold the buildings, but maintained an interest as a mortgagee. The various successor landlords continued to siphon rents from the tenants without putting revenue for repair back into the building. The landlords became interested in the money game being

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[7] (1975), 7 O.R. (2d) 769 (Co. Ct.) [hereinafter *Quann*].

[8] *Ibid.* at 792.

played at Rent Control Boards, where a landlord could apply for rent increases above the legislated guidelines.

By 1987, the tenants had organized with city officials to target the disrepair of the West Lodge Towers. A blitz of city inspections in both towers resulted in hundreds of work orders against the landlord of the time, West Island Investments, which later became Zaidan Realty Corp. of Montreal. The substantial body of necessary repairs was not made, and tenants successfully worked with the Ministry of Housing to freeze the rents at their 1 October 1990 level pursuant to the Ministry's Orders Preventing Rent Increases or OPRIS.

Simultaneously, the WLTA was strategizing around the issue of another rent strike, and early preparations were made. By 1990, a major effort was underway. The result was *Tagwerker* v. *Zaidan Realty Corp*,[9] a case where sixty-four tenants made joint applications for an abatement of rent against Zaidan Realty Corp. Their application was heard in February 1991. Once again, the tenants did a lot of ground work in the preparation of the trial. The list of witnesses for the tenants resembled the impressive list of witnesses testifying in *Quann*.

After hearing all of the evidence, Mr. Justice Hoilett concluded:

> [T]he standard of maintenance of the common areas of the two buildings is of such a low standard that it borders on abandonment; visually they are an eyesore and the stenches often do violence to the olfactory sensibilities; security in the buildings is minimal, at best, and may well be a significant contributory factor to the vandalism of which the landlord complains; all services in the building are of very low quality.[10]

Interestingly, the judge dismissed any argument that tenants paying low rents might expect such conditions of the West Lodge Towers:

> But even at the lowest end of the scale tenants should not be required to live in circumstances that would sully the image of any civilized society.[11]

Needless to say, evictions were not allowed and abatements of 35 per cent were granted. The rest of the rent withheld by the tenants was to be dedicated to the repairs of the building.

The core group of sixty-four tenants in *Tagwerker* was supported by the majority of tenants in both towers on West Lodge Avenue. But it was the core group that suffered throughout the time of the litigation. The landlord sued the tenant litigants who acted as rent collectors during the strike for conspiracy to defraud the landlord of rental income.

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[9] (1991), 5 O.R. (3d) 129 (Gen. Div.) [hereinafter *Tagwerker*].

[10] *Ibid.* at 139.

[11] *Ibid.* at 140.

PCLS was also sued for counselling the tenants. Neither of the landlord's actions were successful, but both were exhausting for the tenants[12] and the resources of the clinic.

Similarly, rent strikers were summarily evicted without due process, and PCLS went through an immense effort to set aside their eviction orders. Rent strikers were denied their legitimate parking privileges in the garage, and ticketed for illegal parking. PCLS students spent a major portion of their summer fighting these tickets. Rent strikers' cars were vandalized. The landlord allegedly towed the car of the WLTA's president from the parking garage.[13]

Needless to say, tenants became disheartened by the landlord's constant attempts to sabotage their legal rebellion. It was necessary for clinic staff to support in every way the tenant's organizing, not only through legal defense, but also in organizing press conferences and demonstrations. The clinic wanted to ensure that the West Lodge case was constantly in the news, and that the politicians did not lose interest in the plight of the tenants. This sort of support renewed energy, and enabled the tenants to remain organized until the *Tagwerker* trial was finished.

The rent strike and the ongoing publicity from the demonstrations and press events associated with the rent strike (organized by PCLS and the WLTA) had a political "ripple effect" at both the municipal and the provincial levels of government. The name "West Lodge" became synonymous with "slum building" in tenant circles. It was the "West Lodge" syndrome that became central to the City of Toronto's "high rise rehabilitation task force," which was formed by the city to address the urgent and hazardous disrepair situations in about thirty similar buildings in Toronto.

III. END OF AN EMPIRE

Conflict between the tenants and the landlord at the West Lodge towers continued. In December of 1993, the heating system at 103 West Lodge Ave. completely failed. As Toronto's coldest winter in years wore on, both towers experienced serious problems with their heating systems. The WLTA organized political action to support the legal action undertaken in the courts, which, on its own, produced no lasting remedy—and no heat.

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[12] Interview with Anna Thaker, president of the WLTA (17 November 1997).

[13] *Ibid.*

The tenants took to the streets in protest. They orchestrated an event in front of City Hall that attracted the media, and then invaded the city council chambers, where the council was debating its budget. The tenants demanded, under the glare of the television cameras, that West Lodge be debated immediately as an emergency item. With their children accompanying them, the tenants threatened to sleep in council chambers if their issue was not addressed. They got what they wanted with the support of a few sympathetic councillors, and the West Lodge property became a priority item on the city's agenda.

Representatives of the city's departments of buildings and inspections, fire, and health began to inspect the property, bringing back to the councillors reports of nearly uninhabitable buildings. The legal department also became involved in various actions against Zaidan for non-compliance with municipal legislation such as the Fire Code and City of Toronto By-Laws. At this time, councillors began speculating about the possibility of taking over the building.

By June of 1994, Zaidan had stopped paying gas and hydro bills, city property taxes, and payments to the mortgagees. Of course, they also refused to make any repairs. Then, they abandoned the building, taking with them all rent records and office equipment and delivering the keys to the mayor. The city passed on the keys to one of the mortgagees, 981673 Ontario Limited, a company controlled by none other than the Wynn family.

As mortgagee in possession, the Wynn's company was the complex's new landlord. Pressure by the WLTA concerning heating and security resulted in the city demanding a new heating system and the presence of a private security company on the premises. The mortgagee in possession was not effecting repairs, nor was it complying with approximately six hundred work orders issued on the complex. The city was going to court regularly to try to enforce orders, but the tenants decided to support this effort with one of their own.

While failing to effect repairs or to provide adequate security, the mortgagee in possession initiated eviction proceedings against an unprecedented number of tenants for whatever reason possible, and the WLTA felt extremely vulnerable.[14] PCLS represented forty-six tenants, who had received eviction notices and counter-claimed for abatements because of the disrepair. Instead of joining all applications, it was agreed that the case of Heather Jessome, one of the tenants, would serve as the test case for all of the applications.

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[14] *Ibid.*

In *981673 Ontario Ltd.* v. *Jessome*,[15] extensive evidence was led of the serious disrepair which the learned trial judge found "could almost be described as *Tagwerker* v. *Zaidan Realty Corp.* revisited."[16] An abatement of 30 per cent was ordered, 20 per cent of which represented the disrepair in the common areas such as the elevators, electrical and fire protection systems and boilers. As a result of the decision, tenants who were not a part of the original forty-six applications came to the clinic seeking the same kind of abatement, and letters were prepared for each one, advising them how much they could withhold pursuant to the *Jessome* decision. The landlord lost a significant flow of rental revenue, and, for a time, the tenants felt victorious. The Wynns, however, went to court for an injunction, and were successful. The clinic appealed, but the appeal was never heard because the Wynn's corporation abandoned management of the building reverting to its position as a regular mortgagee.

IV. CHANGING STRATEGY: A TEMPORARY TRUCE

Prior to the abandonment of the building by the mortgagee in possession in June, 1995, the WLTA and PCLS came to realize that slamming work orders with follow-up court action was not solving the problems of the tenants. Political strategizing was necessary. Informal negotiations between the city, PCLS, and the WLTA resulted in the city's neighbourhood committee recommending to city council that temporary ownership of the West Lodge Towers by the city be investigated and that the city support the WLTA in converting the building to a non-profit housing cooperative by all means possible. These recommendations were subsequently accepted by council. When the Wynns as mortgagee in possession initially abandoned management of the complex that June of 1995, the city immediately applied to commercial court for an independent receiver to operate the building, and an interim receiver was accordingly appointed.[17]

After extensive litigation between the city and the Wynns, who had changed their minds and wanted the building back, the appointment

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[15] (1994), 21 O.R. (3d) 343 (Gen. Div.) [hereinafter *Jessome*].

[16] *Ibid.* at 344.

[17] *The Corporation of the City of Toronto v. Zaidan Realty Corporation and 981673 Ontario Ltd.* (22 June 1995), No. RE5184/94 (Ont. Ct. (Gen. Div.)), Wilkins J. [unreported].

of the receiver was confirmed.[18] As a part of the appointment order, the receiver was obligated to abide by rehabilitation and management plans authored by the city in consultation with the WLTA. In addition, the receiver was ordered to sell the building after rehabilitating it.

Today, the WLTA laments this time as a lost opportunity for the city to have taken possession of the building, given its position as a major creditor. The city continued to be owed approximately $4,000,000 in taxes as well as encumbrances of hydro and gas bills never paid by landlords of the complex. Instead, the city had a receiver appointed.

It cannot be emphasized enough how much political work the tenants did with support from PCLS when it was clear that legal work was not achieving their desired result: the building's rehabilitation. Without the tenants and PCLS's constant pressure on the city, the case specific challenges against landlords would have remained the exclusive venue for tenants to address the disrepair.

When the receiver took over the possession of the building, one of its main concerns was making the building safe for the tenants and their families, both with respect to making repairs and to installing proper security. Security was poor and there were problems with drug trafficking on many floors of the towers. No one would venture into the stairwells, and tenants complained of constant crime. The fire security system was almost non-existent. The elevators were unpredictable, and on more than one occasion, ambulance attendants were unable to access tenants needing assistance on the upper floors.[19]

The WLTA recognized a good landlord in the property management company that was placed in the building by the receiver. PCLS and the WLTA made a deal with the receiver not to seek abatements and to pay rents up to the maximum allowable amount on the condition that all rental income of the property would be applied to its rehabilitation. The receiver rehabilitated the building, replacing the infrastructure and making necessary repairs pursuant to the court order that appointed the receiver, and in consultation with the WLTA. The receiver's ultimate goal was to prepare the building for sale.

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[18] *The Corporation of the City of Toronto v. Zaidan Realty Corporation and 981673 Ontario Ltd.* (25 October 1995), No. B243/95 (Ont. Ct. (Gen. Div.)), Blair J. [unreported].

[19] *Supra* note 12.

V. THE ULTIMATE WEAPON

Since the early 1990s, discussions with the WLTA, the Parkdale Tenants Association and PCLS on how to find a permanent solution to the endlessly revolving maintenance problems at West Lodge Towers began to beg the question, "Why not enable the West Lodge tenant community to buy the complex and manage it as a non-profit housing cooperative?"

Some of the elements necessary for non-profit conversion seemed to be there, such as an experienced tenants' association and a large enough pool of rent (720 units) to finance a mortgage. Yet other elements seemed to be inimical to conversion. The very size of the complex would make it difficult to manage. The state of disrepair of the complex might make this type of conversion too costly.

Nevertheless, by the early 1990s, several serious attempts were made with the help of non-profit developers to look at the feasibility of conversion. These efforts were facilitated by PCLS which put the WLTA into contact with several non-profit developers.

During this early stage of non-profit conversion, it became clear that very little government assistance would be available for this project. Both federal and provincial governments were already cutting back severely on subsidizing non-profit housing because of the new emphasis on deficit reduction. Furthermore, West Lodge Towers was regarded by many as a hopeless slum. Many expressed concern that assisting and subsidizing a West Lodge conversion would be like "pouring money into a black hole."[20]

However, during the discussion that took place with the City of Toronto in 1995, it became evident that the city was actually looking at the possibility of co-op conversion as a credible solution to the problems of a number of large buildings in serious disrepair in Toronto. To a municipality unable to shut down large buildings with urgent and severe disrepairs (there was nowhere to house the tenants) and very reluctant to take over and manage these troublesome buildings, off-loading onto the tenants by means of non-profit conversion looked very attractive politically. Hence, no one was surprised when the city made a motion to aid and assist the WLTA and PCLS in attempting a conversion to a non-profit housing cooperative.

During the receivership, the WLTA and PCLS started another serious effort to form a non-profit housing cooperative to finance, buy

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[20] *Ibid.*

and operate the building. A prominent non-profit developer [Tenant Non-profit Development Cooperative (TNDC)] agreed to work with the WLTA. A well known housing co-op expert, Mark Goldblatt, was engaged to work on the project for TNRC. By early 1996 the West Lodge Housing Cooperative was incorporated and a co-op conversion plan was submitted to city council. The co-op put together a very unique financing package to buy the building: a first mortgage was secured, guaranteed by Canada Mortgage and Housing Corporation, while the City of Toronto guaranteed a second mortgage at 15 per cent of the acquisition costs. No government subsidy was present in the arrangement.[21]

In the Spring of 1996, West Lodge Housing Co-operative Inc. and the TNRC ran an extensive education and information campaign on co-op conversion for the tenants in the complex. On 6-7 June 1996, a tenant referendum was conducted by PCLS under the supervision of the City of Toronto.[22] All residents sixteen years and older were eligible to vote. Of the 1996 votes cast, at least one person from 92 per cent of the units voted. Eighty-nine per cent voted in favour of co-op conversion and 10 per cent voted against.

In the fall of 1996, the WLTA retained PCLS to obtain status to intervene in the City of Toronto's receivership proceedings. Soon, the receiver would bring a motion to have its choice of prospective purchaser approved by the court. The tenants had seen decades of dysfunction in the complex. To their chagrin, it was becoming clear that the Wynn family's mortgagee corporation, the second mortgagee and party to the proceedings, would be supporting the bid of another of their corporations, newly created to purchase 103 and 105 West Lodge Avenue. The tenants wanted to present evidence that the only way to properly run the two towers and ensure the health and safety of its residents, was through a non-profit, tenant-run cooperative. Intervenor status was granted.[23]

In the spring of 1997, the cooperative made an offer to purchase the property from the receiver. Although the offer was arguably the fair market value of the West Lodge property, and certainly above any bids of outside parties, the Wynn's newly formed corporation was able to out-bid the cooperative because its financing package required cash be

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[21] *Ibid.*

[22] Polls were open from 7 a.m. to 10 p.m. Counting of the ballots took place immediately after the polls closed on Friday, 7 June 1996 at 10 p.m.

[23] *The Corporation of the City of Toronto v. Zaidan Realty Corporation and 981673 Ontario Ltd.* (10 October 1996), No. B243/95 (Ont. Ct. (Gen. Div.)), MacPherson J. [unreported].

paid only to those creditors with priority over the Wynn's second mortgagee. In the final hour, the receiver chose the offer of the Wynn's bidding corporation.

In May 1997, at the motion of the receiver to have the court approve the sale, the WLTA echoed the protests of the City of Toronto. Both the WLTA and the city asked the court to instead approve a sale to the cooperative. The WLTA was hoping that the court would look to the interests of the tenants and refuse to approve any decision of the receiver to sell to a corporation closely related to the very landlord which had failed to successfully manage the building in the past. In fact, earlier in these very proceedings, when the Wynn's mortgagee company was scrutinized, their track record as managers of the property was found to be "abysmal."[24]

Unfortunately, the Honourable Madame Justice Epstein relied on established caselaw which dictated that the interests of the creditors are paramount, and that the choice of a receiver should only be questioned by the court in the most exceptional of cases.[25] Although unwilling to allow social factors to prevent the sale, she was sympathetic to the plight of the tenants, and ordered that the purchasers comply with the rehabilitation and management plans put forward by the city and the tenants. To further protect the tenants, the court ordered that the purchasers provide a two million dollar letter of credit against which the city might draw monies to complete work not performed by the purchaser in default of the rehabilitation and management plans.

After decades of disrepair in the West Lodge Towers, the tenants are now enjoying the benefits of the period from 1995 to 1997 when the receiver diligently rehabilitated the building, a spirit that the purchaser has been forced to follow. The tenants' cooperative is appealing the decision of Madame Justice Epstein to the Ontario Court of Appeal. In the meantime, the cooperative is hoping that the Wynns may sell the property; otherwise, the honeymoon from the chaos is expected to end as soon as the rehabilitation and management plans are complied with, and the landlord can again direct rent revenue away from the maintenance of the building. History, as proven at the West Lodge Towers, repeats itself.

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[24] *Ibid.* (9 November 1996) [unreported].

[25] *Ibid.* (4 July 1997) No. B243/95 (Ont. Ct. (Gen. Div) (oral reasons delivered previously on 2 June 1997) [unreported].

VI. CONCLUSION

Lawyers find it difficult to admit that exhausting litigation does not necessarily make a difference. In his chapter entitled "The Rebellious Idea of Lawyering Against Subordination,"[26] Gerald López surveys the various forms of lawyers working in poverty law. He concludes that lawyers and clinics who make real differences are those who work closely with the community in a relationship of intimate and mutual support. An empowered, grass roots community of tenants working through, with and around the law has a better chance of effecting meaningful change than a single tenant being used by lawyers in a test case.

A low-income community requires a high level of support in any fight against the rich. At times, the WLTA took virtually all the resources of PCLS's landlord and tenant division to sustain it in its fight for justice against powerful landlords. It is not enough to simply help organize a low-income community. The challenge remains in maintaining and supporting it by means of legal, political, social and organizing support as well as with mundane material supports such as printing and translation for the many different linguistic groups in the complex.

These everyday necessities need to be filled on an ongoing basis because tenants simply do not have the incomes to finance them. The most difficult challenge, especially in this age of downsizing and cut-backs, is to have in place a permanent support mechanism, free of charge, to aid in such David and Goliath battles.

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[26] *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder, Colo.: Westview Press Inc., 1992) c. 2.