Rational Reform of Housing Access Policy in Ontario

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of the Faculty of Law
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Abstract

Ontario’s current regulatory approach to low-income housing lies between two primary challenges: the human right to housing, and political/fiscal constraints. This thesis draws on legal theory and economic analysis of law to articulate the proper goals of housing access policy. A structural theory is proposed to explain the normative relationship between efficiency, communitarianism and justice in housing. An array of regulatory options are compared and considered in light of the features that characterize Ontario’s low-income rental housing markets. This analysis favours demand-side housing subsidies to low-income households, combined with supply-side tax expenditures to improve elasticity in the low-income rental market. Further reform of rent and covenant controls, social and affordable housing supply, and land use planning is recommended to ensure an efficient residential tenancy market. These reforms are offered as a framework for the implementation of the human right to housing in Ontario.
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Finally, it is with sadness that I note the tragic passing of Jack Layton just prior to the completion of this thesis. His commitment to ending homelessness in Canada has been both a bright light and a shared end, irrespective of the means endorsed.
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Introduction

The regulation of housing in most societies is a matter of critical social and economic importance, due in no small part to the centrality of shelter as a basic human need and despite its conventional distribution through the free market. In Ontario, several related pieces of law and policy comprise the province’s regulation of housing access – that is, state intervention in the otherwise private ordering of shelter.

However, existing policies do not necessarily reflect a coherent (or, in some cases, intentional) regulatory strategy. For example, Ontario’s land use planning policies generally imply a view of homelessness as social problems of little direct relevance,\(^1\) despite the obvious way in which planning decisions determine land prices and, by extension, the cost and availability of housing. While numerous supply and demand subsidies are currently targeted at a subset of the low-income rental market, tax policies are nonetheless heavily skewed toward *de facto* subsidy of occupant-owned housing.\(^2\)

Despite the extensive range of state interventions that help determine the cost of shelter in Canada, housing is ostensibly considered a free market good and, by extension, a matter of individual preference and responsibility for citizens. At the same time, the centrality of shelter as a basic human need is a matter of broad social consensus. Thus many activists

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\(^1\) That said, the recent passage of the *Housing Services Act, 2011*, S.O. 2011, c. 6 (not yet proclaimed) creates a parallel social planning system for housing and homelessness strategies, to be led by the province and implemented by municipal governments. The eventual interaction between this framework and the existing land use planning process is, as of the time of this writing, uncertain.

\(^2\) *infra* note 280
speak of the need for domestic legal recognition of a human “right to housing”, the articulation of which has long been a feature of international human rights treaties.³

Even without the domestic entrenchment of shelter as a human right that creates state obligations, the regulation of Canadian housing remains far less coherent than that of another basic human need: health care. While health services were once firmly the purview of private markets, provincial governments (later supported by the federal government) moved to a regulatory model featuring a mandatory, state-exclusive medicare insurance scheme that provides de facto vouchers for a well-specified range of medically necessary services and generally prohibits the private provision of these services.⁴ This approach, coupled with supply-side efforts to reduce medicare costs and to coordinate a consistent level of service across a multitude of communities, conveys a collective determination to define a set of universal health entitlements and ensure their availability to all citizens. In contrast, the current patchwork of federal and provincial housing programs suggest no effort to guarantee, much less articulate, a standard set of universal shelter entitlements.

Competing political conceptions of housing – as either a purely private commodity, a positive human right, or something in between – tend to confound the question of which (if any) regulatory tools are appropriate and justifiable with respect to housing access the North American context. However, steadily increasing rates of poverty and homelessness have generated such severe social and economic costs as to demand a coherent policy

³ infra notes 56, 57 and 58
⁴ infra note 73
framework for housing access.\textsuperscript{5} That is, the need for an adequate housing supply is a matter of presumably greater political consensus than the theoretical intersection (or lack thereof) of housing and human rights. Insofar as stakeholders may lack this shared theoretical understanding, it is necessary to construct a normative theory of housing distribution drawn from the basic philosophical foundations of our liberal institutions.

Part I of this thesis outlines the possible goals of housing access regulation under the broad headings of economic efficiency, communitarianism, distributive and corrective justice. While specific efficiency rationales are elaborated in Part II, the thesis first proposes a structural theory of the right to housing that draws on liberal legal philosophy, international law and domestic human rights jurisprudence. Structural theory explains the regulation of housing access as an attempt to compensate for public infringement on housing freedom: the negative right to create shelter for oneself (that would be generally preserved for all in a libertarian land commons). Modern policies that have the effect of regulating housing for other purposes – from the creation of private land markets for efficiency gains, to the use of zoning bylaws to achieve communitarian notions of how a neighbourhood ought to evolve – are \textit{prima facie} infringements on housing freedom. For those consumers who can nevertheless afford to purchase adequate housing, these infringements may be justified. However, a structural theory of housing rights proposes that those persons who cannot afford adequate housing must be compensated as a matter of distributive and corrective justice. This theory implies and supports a context-specific

range of low-income housing entitlements that serve as the normative basis (from a
distributive and corrective justice standpoint) for the state’s other regulatory interventions
in the housing market. However, Part I stops short of prescribing housing policy; instead,
it proposes a structural theory as a juridical account of the reflexive relationship between
conflicting rights and regulatory goals.

Next, Part II describes the general economic features of Ontario’s low-income rental
housing markets and the associated risks of market failure. In general, these markets
exhibit supply and demand inelasticity, positive and negative externalities, systematic
information and transaction cost asymmetries, and highly uneven price distribution across
the province’s municipalities. These features emerge from a variety of theoretical and
empirical descriptions of low-income housing in Ontario and comparable jurisdictions.

Finally, Part III surveys some of the most prevalent housing access policies deployed by
Ontario and/or comparable jurisdictions. These regulatory options are evaluated against
the normative framework developed in Parts I and II, with a view toward not only
distinguishing between forms of regulation, but also toward prioritizing the most
compelling reforms to Ontario housing law. Ultimately, this analysis concludes that a
market-based approach ought to pair demand-side subsidies with supply-side tax
expenditures to improve both supply and demand elasticity while targeting public support
to the poorest households. Further reform of rent and covenant control would improve the
elasticity and quality of the rental market. Existing social housing stock should be
converted to co-operative or non-profit operation wherever possible, and more broadly
realigned to provide supportive and specialized housing for unique priority groups.
While this analysis is undertaken with a specific focus on Ontario, it will be of some relevance to other Canadian provinces, the United States and, to a somewhat lesser degree, the broader developed world. While extra-jurisdictional sources are used, a rigorous comparative study is not attempted. Neither does this thesis attempt to discuss the appropriate or optimal institutional configuration with respect to the implementation and maintenance of housing regulation. Finally, “housing access” and “low-income housing” contemplate a certain subset of the broader housing markets in which most persons participate. In North America, this subset is typically coincident with rental and other non-equity forms of title; higher income, owner-occupied housing markets are presumed to operate under somewhat different conditions beyond the scope of this project. Thus matters pertaining to real estate transactions, taxation and zoning are considered only insofar as they affect consumers who struggle to afford shelter and the housing that they attempt to utilize.

The pathway of reform proposed in Part III – grounded in the market features outlined in Part II and the theoretical approach established in Part I – is presented as an overarching framework for the implementation of the human right to housing in Ontario. As the debate as to the meaning of this right finds its way into the province’s courts, this framework engages questions with which regulators at all levels of government must grapple. In this sense, rational reform of housing policy is not only possible, but crucial.

\[^6\] infra note 151
\[^7\] infra note 125
Part I: Goals of Housing Access Policy

“People say [they’ve got] God-given rights... if your rights came from God, he would have given you the right to some food every day, and he would have given you the right to a roof over your head. God would have been looking out for you!” – George Carlin

At first glance, the most obvious type of modern housing access regulation is that which attempts to increase the availability of shelter to persons who cannot otherwise afford adequate housing. However, access to housing is just as powerfully affected by regulation pursued for other (valid) purposes. This Part aims to present a unified view of housing access policy by canvassing the various justifications for both types: efficiency, communitarianism, distributive and corrective justice.

Modern housing markets, such as that in Ontario, are initially justified by communitarian and efficiency-based rationales despite many features that adversely affect the affordability and/or availability of shelter for low-income persons. However, predominant liberal conceptions of both distributive and corrective justice require a regulatory response that remedies these adverse effects – because shelter is a primary good and an essential part of legal personality (respectively).

This interaction between housing policy goals – presented as a ‘structural theory’ of the human right to housing – has both descriptive and normative dimensions. While a taxonomy of justifications for housing policy helps to explain how housing access is
treated by sources of domestic and international law, it also charts a course between competing accounts of the proper legal content of a (human) ‘right to housing’.

Ultimately, the articulation of these goals – combined with an understanding of how modern low-income housing markets operate (discussed in Part II) – provides the basis for a critical analysis of housing access regulation.
1. Efficiency

Descriptive and normative accounts of modern regulation within the field of ‘law and economics’ typically begin by asking which rules might be expected to increase individual welfare among persons who are presumed to be rationally self-interested economic actors. Economic analysis of law, therefore, categorizes these regulatory approaches in terms of those which enable free market-based exchanges (“Pareto efficiency”) and those which correct for market failures (“Kaldor-Hicks efficiency”).

While the appropriateness of regulation enabling Pareto efficiency depends primarily upon the extent to which goods may be commodified, Kaldor-Hicks efficiency implies a set of regulatory responses that are tailored to the specific features of the market for a given good. The general features of modern housing markets – including their interaction with other social and economic goods – are discussed below. A more exact description of low-income housing markets is offered in Part II.

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8 Trebilcock, M. “The Lessons and Limits of Law and Economics” in Noreau, P. (ed.) In The Eye of the Beholder (Montreal: Université de Montréal, Centre de recherche en droit public, 2007), pp. 118-119
10 Trebilcock, supra note 8, pp. 133-134
**Pareto Efficiency**

In theory, a property system that allocates exclusive ownership and possession of land and structures through voluntary exchanges promotes Pareto efficiency (that is, changes in resource allocation that make some individuals better off and no individuals any worse off). Where land, building materials, construction labour and other housing-related resources are finite, private property and contract should allocate each unit of housing to the person(s) who value it most highly.

The ideal of Pareto efficiency assumes that individual actors are rationally self-interested and that they possess perfect information. These actors are also assumed to experience no costs when obtaining information or executing transactions. Thus, the normative and predictive power of free exchange is greatest where transactions are easily negotiated between parties and where their respective information about those transactions is both substantial and similar. Under those circumstances, an absence of state intervention (beyond protecting property rights and enforcing contracts) may be expected to produce the most efficient allocation of resources.

**Kaldor-Hicks Efficiency**

However, government regulation may promote a different kind of efficiency by interfering with a purely free market for shelter. Kaldor-Hicks efficiency includes
adjustments to resource allocation wherein those who gain from the change would be in a theoretical position to adequately compensate those who lose, but do not do so voluntarily. The reasons that said exchanges do not occur on their own are referred to as market failures; possible failures of low-income housing markets are further discussed in Part II.

Thus housing access regulation may seek to correct certain failures in the markets for land and shelter in order to achieve greater social welfare than the likely outcome of unconstrained markets. For example, governments may attempt to ensure the supply of more low-income housing than the market would otherwise create, due to the comparative health and social costs associated with homelessness and under-housing. However, otherwise straightforward attempts to reduce the price of housing (e.g. through zoning greater amounts of residential land) are often precluded by a desire to achieve Kaldor-Hicks efficiency in other sectors. For example, increased residential land designation may lower housing prices, but at the expense of urban sprawl which is associated with more costly service delivery, poor health outcomes and increased pollution from vehicles.11

In fact, land that is proximate to employment and services characteristic of industrialized society is a scarce resource constrained by both private and public legal mechanisms. This distinction between all land and suitable land is particularly apparent in Canada, where an estimated 75-90% of the population is clustered in largely urban centres along

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the nation’s southern border. These urban centres include significant numbers of homeless and under-housed persons despite the existence of comparatively large tracts of uninhabited Crown land in the northern interior. Standing in stark contrast to the Caucasian settlement history of North America – in which farms, villages and towns were established out of an abundance of land and resources with which European émigrés could construct their own forms of shelter with relative ease – the current relationship between housing and land markets must be understood in light of modern urbanization. In economic terms, the concentration of populations has enabled significant welfare gains through economies of scale, industrialization and thus increased comparative advantage through trade. On this account, scarcity of habitable space is a social cost offsetting these social welfare gains.

Canada’s post-war trend of an increasing population converging on limited geographical space is reflected in the legal structures that regulate the land market, which arguably limit the supply of habitable space and contribute to the price of housing (and thus the need for housing law). Ontario’s conservation legislation and a variety of urban by-laws

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12 While the upper-bound estimate of 90% within 160 km of the border is given by the CIA World Fact Book (Washington: Central Intelligence Agency, 2011, https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html), other sources within the Canadian government have commonly presented this statistic as 75% within 150 km, for example, Hillmer, N. “A Border People” (2005) 24 Canada World View (Ottawa: Foreign Affairs Canada).

13 For example, European settlers were permitted to petition the Crown for grants of free land in Quebec, Ontario and Western Canada for much of the 19th century. Great Britain also offered loans and other forms of financial assistance to encourage emigration of its own citizens to Canada, alleviating overcrowding and unemployment at home. See Madokoro, L. “Government Rules and Regulations”, Moving Here, Staying Here: The Canadian Immigrant Experience (Ottawa: Library and Archives Canada, 2006, http://www.collectionscanada.gc.ca/immigrants/021017-1300-e.html).

generally foreclose the possibility of shelter on public land. At the same time, land use planning, building and maintenance standards constrain the availability of shelter on private property. Finally, the law of trespass – what many might consider an essential feature of private property – is itself a constraint on human shelter.

Public property in inhabited parts of the province may be subdivided into state-owned land that is (a) used by the state for some purpose incompatible with shelter, (b) held for natural preservation, or (c) used as a thoroughfare. The first category includes post offices, schools and administrative buildings, which are generally treated as the property of whatever agency or Crown corporation holds them. The second category is typically composed of conservation areas and public parks falling under the jurisdiction of conservation authorities and municipalities, respectively. By-laws that limit loitering, overnight occupancy and shelter construction in these spaces are variously aimed at either environmental protection or minimization of individual encroachment to maximize the number of users that can make transient use of a given space (e.g. a public square, waterfront pier, etc.) The last category includes bridges, roads and highways – strips of land whose public transportation purpose usually excludes shelter. It is therefore the cumulative policy of most Western jurisdictions that persons build or acquire on private property shelter (with the possible exception of campgrounds and public housing units).

However, not all private property may be used for shelter. Land use planning instruments, implemented in Ontario under the Planning Act and related pieces of provincial and

15 See, for example, Public Lands Act, R.S.O. 1990, c. P.43, s. 26 and Provincial Parks and Conservation Reserves Act, 2006, S.O. 1996, c. 12, s. 22
16 Here “inhabited” refers to areas under the control of municipal law. “Unorganized territory” is defined by s. 1 of the Municipal Act, 2001, S.O. 2001, c. 25 and is mostly found in the northern areas of the province.
municipal legislation, divide inhabited areas of the province into rural land and settlement areas. Municipal zoning by-laws, Official Plans, and Provincial Plans such as the Provincial Policy Statement, 2005 (“PPS”) are kept in hierarchical conformity through a process of approvals and appeals. The cumulative effect of this system currently limits housing construction in rural areas (through mechanisms such as subdivision control\(^\text{19}\)) while mandating increased density in settlement areas (through residential intensification targets such as those found in the Growth Plan for the Greater Golden Horseshoe, 2006\(^\text{20}\)). Within settlement areas, province-led planning policies have long required that land zoned for residential uses be distinct from that which is zoned for commercial and industrial uses.\(^\text{21}\) A myriad of additional constraints at the municipal level ensure that the supply of shelter-suitable land remains low and inelastic.

Even if shelter-suitable land is acquired by a prospective resident or group of residents, further legal instruments restrict the type of shelter that may be constructed and maintained on said space. In Ontario, the Building Code Act, 1992, its regulations, and a number of supplementary provincial and municipal policies provide great specificity as to the size, design, materials and services that most physical structures (including residences) must possess.\(^\text{22}\) Infringement of these regulations may variously result in prosecution, condemnation, prohibition of entry and/or demolition of non-compliant

\(^{17}\) Provincial Policy Statement, 2005 (Toronto: Ministry of Municipal Affairs and Housing, 2005, “PPS”), s. 1.1
\(^{18}\) Planning Act, R.S.O. 1990, c. P.13, ss. 3, 14.7, 22, 24, 26, 27 and 34
\(^{19}\) ibid, s. 50
\(^{20}\) (Toronto: Ministry of Municipal Affairs and Housing, 2006, “Growth Plan”), pp. 14-16
\(^{21}\) PPS, supra note 17, s. 1.1.3.2
\(^{22}\) S.O. 1992, c. 23, s. 34
In any event, the compliance costs involved in the supply of human shelter are significant and have a direct effect on the resulting supply and price of housing.

Many of the aforementioned policies are arguably justified, in economic terms, as attempts to limit collective action failures and capture the externalities of a hypothetically unrestrained land market. Unplanned residential development (e.g. urban sprawl) might lower the cost of land, but at great expense to municipal service delivery and the environment. Removal of building standards may increase the supply of cheap housing, but at increased risk of injury or death due to fire or collapse. Nevertheless, the conflict between land regulation and housing need is undeniable; welfare gains made by the former must be set off against the social costs of increased homelessness and underhousing.

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23 *ibid*, ss. 36-38.1
24 *supra* note 11
2. Communitarianism

Some regulation of housing access may be justified by goals that have an imprecise relationship with individual social welfare but reflect, nonetheless, values held by the community as a whole. These may include the promotion of shelter that resembles cultural ideas about a “home” – occupied by a nuclear family, with certain key amenities and situated within a certain kind of community. Communitarian goals may also extend to common aesthetic preferences regarding, for example, the outward visual appearance of shelter structures or the preservation of certain natural geographic features.

The Ideal Home

Regulation – particularly at the provincial and municipal levels of government in the case of Ontario – places detailed limits on the permitted internal design of shelter structures intended for long-term residential occupancy. As noted above, the Ontario Building Code prescribes a number of building materials and construction, plumbing and electrical standards that are broadly concerned with physical safety through structural integrity and/or fire prevention. However, residential structures are also typically subject to a set of municipal by-laws that augment the Building Code. In the city of Toronto, these range from required features of each room (e.g. all kitchens must have sinks and connections

\[\text{25 supra note 22}\]
for both a refrigerator and an oven/stove)\textsuperscript{26} to the activities intended for each (e.g. one
must neither eat in a laundry room nor sleep in a washroom).\textsuperscript{27} Rooming houses are also
prohibited in many parts of the city, which amounts to a selective prohibition of shared
kitchens and bathrooms between persons who are not part of the same family.\textsuperscript{28}

While Kaldor-Hicks efficiency may be a frequent justification for regulation of health
and safety standards in home design, some of the aforementioned policy examples are
more easily explained by social and cultural notions of human habitat. The notion that all
residents, regardless of their individual circumstances, tastes or needs, ought to have a
defined personal space to bathe (that is clearly separate from the places where they sleep
and eat) is an otherwise extensive intrusion into the individual freedom of any person
who might wish to arrange his or her home differently.

Thus some housing regulation, while potentially limiting options and affordability for
some, may have the goal of promoting a level of consistency across all households. This
type of coordination may be part of a positive effort to promote common identity within a
given polity, strengthening broadly shared conceptions of family life, leisure, health and
social patterns that comprise the social meaning of the term “home”.

\textsuperscript{26} City of Toronto Municipal Code s. 629-34
\textsuperscript{27} ibid, s. 629-1
\textsuperscript{28} See City of Toronto Staff Report: Approach for Proposed Zoning Regulations for Rooming
Houses (Toronto: Planning and Growth Management Committee, 2009,
The Ideal Neighbourhood

The instruments of residential building regulation noted above – combined with land use planning instruments – also shape and limit the external features of residential communities in a variety of ways that are not obviously justified by efficiency rationales alone. In Ontario, municipal planning policy typically divides land not only by residential and non-residential uses, but by a variety of numeric parameters regarding occupant density, building height, roadway setback and lot size. By controlling the size, appearance and location of each residential neighbourhood, planning and municipal policy inevitably allocates housing resources in ways that are neither market-based nor based on the correction of market failures.

One obvious example of this type of communitarian policy rationale is that of visual aesthetics. Residential neighbourhoods may be planned to take advantage of commonly attractive natural features, such as bodies of water or views of mountains – in a manner that takes frequent priority over the placement of non-residential zones. This may reflect shared social and cultural assumptions about the relative desirability of beauty in the home as opposed to the workplace. Kaldor-Hicks efficiency may inform the use of regulatory measures like maximum height restrictions, for example, by forcing occupants to internalize costs similar to the economic externalities associated with living next to buildings of similar size and visual quality. However, the aesthetic benefit of visual consistency within a given cluster of residential buildings may also be a communitarian good. This type of visual appeal is mirrored by competing communitarian claims as to

29 See PPS, supra note 17, ss. 1.4 and 1.6.6, and Planning Act, supra note 18, s. 41
neighbourhoods ought to be demographically consistent or diverse, and to what degree – a debate also taken up by welfare economics (e.g. whether market-based residential stratification and polarization represents a failure that need be corrected through ‘inclusive zoning’\(^{30}\)) and distributive justice (e.g. equality) alike.

Another communitarian goal that is highly visible in municipal housing regulation is that of historic preservation.\(^{31}\) Beyond the possibility that protection of architectural heritage generates net (individual) gains not sufficiently valued by the market and therefore represents Kaldor-Hicks efficiency, the regulatory choice to preserve the historic appearance of certain buildings may be a social value in its own right. This must be especially true if preservation policies are to be justified while preventing the more efficient use of a given shelter space either in terms of capacity or cost.

**Ecology and the Precautionary Principle**

Since housing regulation for the purposes of natural/environmental protection will only be Kaldor-Hicks efficient where it generates a net individual economic benefit not otherwise valued by the market, broader environmental protection rationales are inevitably communitarian – particularly when dealing with environmental risks that are highly uncertain and difficult to value. Policy-makers sometimes refer to this approach as

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\(^{31}\) PPS, *supra* note 17, s. 2.6
the “precautionary principle” – that is, a decision to air on the side of caution, restraint and inaction where the possible ecological consequences of a decision are especially unclear. This principle is often difficult to reconcile with economic policy analysis, because it does not disclose the timing or quantity of potential efficiency gains that ought to be forgone in the name of imprecise fear.

Much of modern land-use planning – particularly that which limits settlement areas, sets density intensification targets and mandates the protection of natural features – eludes a human cost/benefit analysis. It may be difficult or impossible to know if the loss of any given species of wildlife will have any effect on humans. Yet a cultural sense of regret about past colonial and industrial practices – from unrestrained deforestation and wetlands destruction for agriculture and settlement, to automobile-centric urban transportation design leading to undue air pollution – has bolstered ecological caution as a communitarian value that influences regulation.

**Geographic Mobility and Equality**

While the price of housing may vary widely depending on its location (see Part II), housing access regulation sometimes targets low-income housing subsidies in amounts adjusted for average local housing costs. Land-use planning decisions, as well as state

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33 *ibid*, pp. 2-3
investment in affordable housing projects, can have the effect of adjusting the relative price of housing across different geographic areas.\textsuperscript{34} While these policies may be motivated by distributive and corrective justice (discussed later in this Part), they also represent a broader social commitment to a degree of geographic equality. Just as communitarianism may motivate the regulation of internal housing design to ensure a minimum degree of continuity across residences, housing regulation may also attempt to promote the general ability of any person to choose to work in any geographic region of the country – a right expressed in s. 6 of the \textit{Charter of Rights and Freedoms}.\textsuperscript{35}

This goal may (predictably) conflict with that of Pareto efficiency, as \textit{prima facie} geographic variations in housing prices and rent levels presumably signal real differences in demand. Similarly, communitarian commitments to geographic equality challenge the optimal delivery of housing subsidies in the context of limited public resources. Public spending will, after all, purchase the most housing for the most persons if targeted in areas where shelter costs are lowest. The degree to which state housing investment decisions depart from this principle – whether at the neighbourhood, borough, municipal or provincial level – may reflect the chosen balance between rational and communitarian policy.

\textsuperscript{35} \textit{Constitution Act, 1982}, Part I
Communitarianism when Other Rationales Fail

Many communitarian goals are undoubtedly related to Kaldor-Hicks efficiency; for example, regulation that promotes the cohabitation of nuclear families and some level of environmental preservation may have some connection to superior social welfare. However, the important point is that communitarian goals need not be exhaustively compared to alternatives to establish the most efficient outcome. These goals become relevant to this analysis insofar as they may also preclude otherwise straightforward attempts to reduce the price of housing (e.g. through the removal of restrictions on the visual appearance of residential buildings).

In this sense, communitarian rationales for policy interventions are inherently problematic, as they threaten to serve as ad hoc rationalizations of choices that are otherwise unwarranted and/or unprincipled. For example, the tax policies through which North American jurisdictions favour and promote low-density home ownership have been purportedly justified as welfare-enhancing (in Kaldor-Hicks terms) insofar as home equity is said to promote a level of personal savings that citizens would otherwise underachieve, to their detriment. While recent global financial crises in real estate valuation and mortgage default have led many to question this hypothesis, it would be both tempting and disingenuous to shift from efficiency-based justification of the status quo to a communitarian defence (e.g. that there is something indescibably satisfying about home ownership on an emotional level such that owner-occupied residences are an

37 ibid
intrinsic good, etc.). As this example demonstrates, meaningful analysis and recommendation of policy reform requires, at least, a healthy skepticism of communitarian policy rationales.

The appropriate distinction between cogent, democratically-informed communitarian principles and unprincipled, reactionary ignorance of evidence-based policy argument is not always clear. As a normative matter, it is therefore difficult to place much emphasis on communitarian ideals – especially in the face of contrary efficiency, distributive and/or corrective justice goals.
3. Distributive Justice

Perhaps the most obvious rationale for regulation of housing access is the notion that persons may be entitled to some standard of shelter regardless of their ability to afford its acquisition in the free market. This principle of distributive justice – the right to a standard of living that includes adequate shelter – is recognized in several international human rights treaties to which Canada is party (e.g. the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*). However, it has thus far been difficult for North American governments to articulate or guarantee a minimum universal standard of housing.

Recent Canadian human rights jurisprudence points, instead, to a shifting standard of housing redistribution to compensate low-income individuals for the law’s prima facie infringement on their freedom to shelter themselves. Compensation for housing freedom speaks not only to distributive justice but corrective justice as well, insofar as a prima facie constitutional right to housing freedom forms a part of the initial (or “baseline”) entitlements of citizens. This logic may be generalized to a structural theory of housing rights, wherein regulation that reduces the availability of low-cost shelter (while nonetheless justified by economic and/or communitarian goals) is normatively linked to regulation that restores at least a commensurate amount of shelter access.

38 *infra* notes 57 and 58
39 *infra* note 73
Equal Entitlement and Non-Commodification

A prominent part of most theories of distributive justice is the concept of equality – particularly, that some goods ought to be distributed entirely by the community according to some prior framework or formula. This type of distribution necessarily precludes (or at least restricts, in the case of secondary markets) the operation of market-based resource allocation for given goods. Thus theories that would imply complete state distribution of housing are also often arguments for the non-commodification of housing.⁴⁰

In the *Nicomachean Ethics*, Aristotle proposed that justice in distribution requires certain goods to be allocated within the community in a manner proportional to a given set of personal characteristics, depending on the good in question.⁴¹ Where housing is concerned, such a broad principle might be said to encompass the feudal land system, wherein real property is allocated to persons according to their family lineage, in amounts corresponding to a hereditary hierarchy. A more modern yet limited example may be rules relating maximum housing unit size to the number of persons in a given household or nuclear family, which appear in most social and non-profit housing programs across Ontario.⁴² It should also be noted that, unlike these examples, the distribution described by Aristotle spoke only to initial or ‘baseline’ entitlements and did not necessarily preclude later, voluntary exchanges – otherwise known as a secondary market.

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⁴⁰ *supra* note 9
⁴² “Chapter 4: Occupancy Standards.” *Rent-Geared-to-Income Guid* (Toronto: Shelter, Support & Housing Administration, 2010)
For Margaret Radin, however, the pertinent question is which goods ought to be exempt from voluntary exchange at all – a question unresolved by Aristotle. To that end, Radin proposes the non-commodification of those goods which are essential to “human flourishing” and would likely include housing as just such a good.\(^{43}\) This principle also offers little guidance as to how non-commodity goods should be distributed among the population, if not through market mechanisms. It would presumably require the state to supervise the construction and maintenance of housing for all, and perhaps to allocate housing throughout the population in one or more of the ways in which housing is allocated in the social and non-profit sectors.

John Rawls offers a different distributive framework that is much more precise than Aristotle’s proportional justice and much more limited than Radin’s sweeping approach. In* A Theory of Justice* – arguably the most influential and prominent account of distributive fairness in modern liberal states – Rawls begins with the assertion that certain goods must be distributed equally throughout the population.\(^{44}\) Specifically, he describes these goods as “only those liberties which are compatible with the basic liberties of others.” Thus for Rawls, the state may only ensure truly equal distribution of negative rights, or freedoms.\(^{45}\)

As will be developed later in this Part, there are an important set of negative housing rights that would be internally compatible and consistent across an entire population. For the moment, however, this analysis will focus on the positive state provision of housing.

\(^{43}\) Radin, M.J. “Market-Inalienability” (1987) 100(8) Harv. L. Rev. 1849


\(^{45}\) ibid, pp. 63-64
That type of good is, by definition, not a form of liberty compatible with the basic liberty of others (where the provision of housing to some persons requires payment by others).

**Shelter as a Primary Good: Maximin**

Rawls further asserts that, beyond purely equal distribution of a few basic liberties, distributive justice must then distinguish between primary and secondary goods. Secondary goods are those that, from a normative standpoint, should be entirely subject to market mechanisms and efficiency goals – any distribution of them is acceptable, no matter how unequal. Primary goods, however, are those for which the permissible distribution is bounded by the principle of maximizing outcomes for the least-privileged participants.\(^{46}\)

This principle, also called the “maximin rule”, begins from the standpoint of individual entitlement in a theoretical position of even distribution, and then permits the introduction of an unequal distribution so long as no participant is disadvantaged relative to their position under equal distribution. Put another way, this requires maximization of the allocation of primary goods to the worst-off; the paradigmatic case is that of the modern welfare state allowing markets to drive investment in a given primary good, while using taxation/redistribution schemes to create a minimum entitlement (regardless

\(^{46}\) *ibid*, pp. 90-95
One might therefore infer that Western approaches to education, health care and housing reveal each to be a specific primary good, insofar as these approaches resemble maximin strategies. Welfare systems and progressive income taxation, however, imply that income itself may be a primary good.

The pursuit of maximin strategies for both housing specifically, and income generally, can create theoretical and practical conflicts. On one hand, housing and other basic needs stand out as intuitive primary goods, easily distinguished from (secondary) consumer goods on physiological grounds. On the other hand, there are empirical reasons to believe that, as household income approaches zero, the household’s demand arising from basic needs (housing, food and clothing) approaches some constant (discussed further in Part II). Thus policy instruments that redistribute fungible wealth automatically cause some consequential redistribution of housing.

As a result, some economists have argued that the most efficient policy response to poverty is a guaranteed minimum income, whereby the income tax system transfers a net fiscal benefit to all those below some prescribed income level, leaving the beneficiaries free to spend that money how they wish. This may reflect the neoliberal view that individuals – rather than Rawls’ theoretical consensus behind the ‘veil of ignorance’ – are

47 ibid, pp. 75-83
48 Cayne & Trebilcock, infra note 154
49 This proposal has been historically taken up by a range of economists, from John Kenneth Galbraith on the left to Milton Friedman on the right; various incarnations of the policy have been implemented in most European states. An overview of the relevant academic history is provided by Van Parijs, P. “Competing justifications of basic income”, Arguing for Basic Income (London: Verso, 1992, http://www.uclouvain.be/cps/ucl/doc/etes/documents/1992.Verso__Intro__Competing__final.pdf)
the only agents capable of determining their own preference order of needs, undermining social attempts to specify and impose a taxonomy of primary and secondary goods.\textsuperscript{50}

On the other hand, the Rawlsian approach may justify separate realms of policy aimed at redistributing both fungible income \textit{and} housing resources, respectively, so long as the maximin of the former is a more unequal distribution than that of the latter. For this to be true, one must assume that the optimal income tax-and-transfer scheme creates a minimum income that, while theoretically maximized compared to all other distributions, affords the rent or purchase of less minimum shelter than could otherwise be allocated through an optimal \textit{housing} redistribution scheme.

The aforementioned conditions may be intuitively possible, in light of the fact that Rawls’ maximin implies a certain descriptive theory of market distribution for primary goods. Without any market failures, the Pareto efficient maximization of total wealth is utilitarian.\textsuperscript{51} But Rawls suggests that utilitarianism typically entails greater wealth disparity and lower minimum allocation than distributive fairness.\textsuperscript{52} Thus, in terms of classical economics, Rawls implies that a certain amount of market ‘distortion’ (e.g. progressive taxation that weakens wealth incentives and thus prevents certain efficient exchanges) is permissible to raise the lot of the worst-off, but only to the point where

\textsuperscript{50} For a further characterization of libertarian responses to Rawls, see Metcalf, S. “The Liberty Scam” (Slate Magazine Online, 2011, http://www.slate.com/id/2297019/pagenum/all/), p. 2
\textsuperscript{51} With perfect information and zero transaction costs, rationally self-interested agents will make exchanges until there are none left to be made: no changes in resource allocation that will make any party better off and no parties worse-off. This theoretical state is ‘Pareto optimal’. In such a theoretical state lacking market failures, Kaldor-Hicks efficiency is redundant because net gains in utility are fully compensated.
\textsuperscript{52} Rawls, \textit{supra} note 44, pp. 76-78
further redistribution or distortion would begin to lower everyone’s allocation including that of the worst-off (an outcome sometimes referred to as ‘levelling down’).  

Thus, returning to the previous question of a proposed ‘maximin gap’ between income and housing, one must only predict that the amount of permissible distortion, on Rawls’ account, is greater for housing than income. Were it not, distributive justice in housing would be entirely subsumed by a just distribution of income. But there are plenty of reasons to believe that the maximin of housing creates a greater minimum shelter allocation than what might be afforded by the minimum income in a just distribution. Perhaps the most significant is that shelter is inherently resource-limited (e.g. by land, building materials, etc.) to a degree that cannot be said of fungible wealth in the overall market – a condition that becomes increasingly true as the price of housing is driven up by communitarian and/or externally efficient regulation (discussed previously in this Part). As such, one finds no mention of the need for state housing assistance in, for example, the platforms of depression-era Canadian socialists.  

Rather, many appeared to be under the assumption that just distribution of income – through job creation, employment insurance, welfare and disability support – would automatically satisfy the basic needs of food, clothing and shelter for all. It may well be the case that housing costs have increased so dramatically (due, in part, to the types of exclusionary regulations discussed earlier in this Part) as to negate this assumption.

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53 ibid, pp. 265-274  
54 Housing is remarkably absent from the otherwise-broad founding platform of the Co-operative Commonwealth Party, the first socialist party to form government in North America. See The Regina Manifesto (Regina: Co-operative Commonwealth Federation, 1933, reproduced 2001, http://www.saskndp.ca/assets/File/history/manifest.pdf)  
55 ibid, pp. 5, 8
An interesting and immediate consequence of this analytical framework is that it implies a *prima facie* division in the respective ways that income and housing redistribution are funded. One might easily expect that job creation programs and income supplements would be funded through income taxes. However, affordable housing subsidies and state-provided social housing projects would seem more appropriately funded by property taxes (as a redistributive transfer from those with the most housing to those with the least). Certainly some use of income tax revenues to support low-income housing may be justified by Kaldor-Hicks efficiency; such expenditure may correct aggregate under-investment in housing, for example, due to externalities not easily valued by the market.

The identification of housing as a primary good (separate from income) also implies, from the standpoint of distributive justice, the notion of housing *insurance*. This concept entails the specification of some minimum shelter entitlement for all persons, especially those who cannot afford to purchase it due to a lack of income, and has been characterized as a “right to housing”. As discussed below, however, the legal and political content of this right has been far from clear.
The Positive Right to Housing at International Law

Housing rights have been affirmed by many international declarations and covenants,\textsuperscript{56} two of which are central to international human rights law. Article 25(1) of the \textit{Universal Declaration of Human Rights} (“UDHR”), adopted by the United Nations General Assembly in 1948, reads as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.\textsuperscript{57}

In 1966, the United Nations General Assembly adopted the \textit{International Covenant on Economic, Social and Cultural Rights} (“ICESCR”). Article 11(1) of the ICESCR reads:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this


effect the essential importance of international co-operation based on free consent.58

The ICESCR came into force in 1976 and was ratified by Canada the same year.59 While President Jimmy Carter signed the ICESCR in 1977, the United States Senate has neither considered nor ratified the treaty.60

The Optional Protocol to the ICESCR (“the Protocol”) was adopted by the UN General Assembly in 2008 and recognizes the competence of the UN Committee on Economic, Social and Cultural Rights (“the Committee”) to accept legal complaints from individuals regarding breaches of the ICESCR by States that have ratified the Protocol.61 Only Ecuador, Mongolia and Spain have ratified the Protocol as of this writing; the Protocol does not come into force for any parties until it has been ratified by at least ten states.62

None of the aforementioned documents provide detail as to the legal meaning of housing as a component of an “adequate” standard of living. The ICESCR was one of two treaties63 designed to elaborate the rights contained in the UDHR; the UDHR, in turn, was adopted to elaborate the meaning of “fundamental human rights” referenced by the

60 ibid
63 The other such treaty was the International Covenant on Civil and Political Rights (New York: United Nations General Assembly, 1966, http://www2.ohchr.org/english/law/ccpr.htm)
United Nations Charter.\textsuperscript{64} Although the Protocol is not yet in force, the Committee remains an important source of information with respect to state interpretation of and compliance with the ICESCR – including the right to housing in Article 11(1).

To that end, the Committee adopted a set of guidelines in 1991 discussing “[t]he right to adequate housing” in greater detail.\textsuperscript{65} While the Committee acknowledges that compliance with this right will not be instantaneously achieved by any country (and indeed, will be beyond the “maximum resources available” to some states), it also argues that state compliance with the right to adequate housing, broadly defined, is both possible and necessary.\textsuperscript{66} Critical steps to compliance by a party to the ICESCR includes demonstration that it has taken adequate steps “to ascertain the full extent of homelessness and inadequate housing within its jurisdiction” and (in most cases) has adopted a “national housing strategy” that creates a timeline for elimination of inadequate housing.\textsuperscript{67} The Committee also offers seven criteria for adequate housing rights that it believes to be universal despite any particular “social, economic, cultural, climatic [or] ecological” context.\textsuperscript{68} These are:

(a) “Legal security of tenure” that protects against “forced eviction, harassment and other threats”,

\begin{itemize}
\item \textsuperscript{65} The right to adequate housing: CESCR General comment 4 (Geneva: Office of the UN High Commissioner for Human Rights, 1991, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)
\item \textsuperscript{66} ibid at 10-12
\item \textsuperscript{67} ibid at 12-13
\item \textsuperscript{68} ibid at 8
\end{itemize}
(b) “Availability of services, materials, facilities and infrastructure” comprising minimum standards essential for “health, security, comfort and nutrition”,

(c) “Affordability” such that housing costs are commensurate with income levels and do not threaten the attainment of other basic needs – requiring targeted state subsidies, financing, and protection of tenants against “unreasonable” rents,

(d) “Habitability” including protection from the elements and various standards articulated by the World Health Organization,

(e) “Accessibility” giving priority to disadvantaged groups,

(f) “Location” providing access to the types of services discussed in Article 25(1) of the UDHR and avoiding hazards to health such as pollution sites, and

(g) “Cultural adequacy” having regard to diversity of building materials, design, policies and/or services.\(^{69}\)

While the Committee concedes that each state ought to achieve compliance using “whatever mix of public and private sector measures” the state deems appropriate,\(^{70}\) it is considerably more specific regarding the minimum legal content of the right in domestic law. According to the Committee, “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances…” (emphasis not mine) and thus “forced eviction” requires domestic legal remedy.\(^{71}\) While the Committee is imprecise as to what constitutes “forced eviction” (e.g. does it include eviction of a tenant for failure to pay rent?), direction for “a degree of security of tenure” and appeal procedures regarding court orders for demolition

\(^{69}\) ibid
\(^{70}\) ibid at 18
\(^{71}\) ibid at 17
of residences are examples that suggest clear limits on state forbearance of force where eviction is warranted.\footnote{ibid at 8(a)}

Miloon Kothari, the United Nations’ “Special Rapporteur on adequate housing as a component of the right to an adequate standard of living”, reported in 2007 that Canada was not in compliance with the right to housing under the ICESCR.\footnote{Kothari, M. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Addendum: Mission to Canada (Geneva: UN Human Rights Council, Tenth Session, 2009, http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.7.Add.3.pdf), pp. 4-6} Mr. Kothari noted that Canada had not collected statistical data regarding adequacy of housing beyond “core need” (that is, the number of households for which shelter costs exceed 30% of income).\footnote{ibid, pp. 13-14} He also criticized governments for failing to develop a national housing strategy, failing to recognize housing as a legal right and for allowing homelessness and adequacy indicia to worsen in the face of recent cuts to housing programs across all levels of government.\footnote{ibid, pp. 24-27}

Despite Canada’s official ratification of the ICESCR – in contrast with the United States’ failure to do so – commentators and policy makers in both countries have shared comparable scepticism as to the feasibility of legal economic and social rights as claims to scarce resources. While many Americans associated economic and social rights with communism during the Cold War,\footnote{Banks, T.L. “A Few Random Thoughts About Socio-Economic ‘Rights’ in the United States in Light of the 2008 Financial Meltdown” (2009) 24 Md. J. Int’l L. 163, p. 170} liberal economists have asserted that goods such as access to housing and health care are inherently indeterminate policy goals at best, and
inexhaustible claims for wealth from the state at worst.\textsuperscript{77} This critique may be particularly salient if one assumes that housing is a market good; while Canadians may now consider themselves recipients of a ‘universal’ right to health care, such a right has historically been implemented through the parallel elimination of certain private health care markets.\textsuperscript{78}

A related objection to positive economic and social rights posits that their justiciability is incompatible with the normative structure of liberal justice.\textsuperscript{79} From the perspective of legal formalism, private legal claims between individuals must be adjudicated exclusively in terms of negative rights and correlative duties of non-interference; public law is conceived as an entirely separate category wherein judicial action is largely limited to supervisory, procedural review of state decisions.\textsuperscript{80} A further characteristic of the North American liberal tradition is the sense that private, negative rights are (a) inclusive of some basic private property rights (b) ontologically prior to the state’s attempts at distributive justice. While this view may countenance human rights \textit{qua} freedom from state interference with fundamental liberties, it would be at odds with the possibility of a positive legal right to housing by individuals that, whether claimed against an individual or the state, would supersede private property.

\textsuperscript{77} Block, W. “Postscript: A Reply to the Critics” in Block, W. & Olsen, E. \textit{Rent Control: Myths & Realities} (Vancouver: Fraser Institute, 1981), pp. 300-302
\textsuperscript{78} Canada’s first medicare program did allow each doctor the choice to operate either entirely within or outside of the government reimbursement scheme. See Johnson, A.W. “Medicare” in \textit{Dream No Little Dreams: A Biography of the Douglas Government of Saskatchewan, 1944-1961} (Toronto: University of Toronto Press, 2004), pp. 299-301
\textsuperscript{80} See Weinrib, E.J. “Corrective Justice in a Nutshell” (2002) 52(4) U. Tor. L. J. 349
One proposed resolution to the apparent conflict between positive human rights and legal formalism is to view these ‘rights’ as interpretive guides for the application of other sources of positive law. In contrast to the absence of positive rights in the US and Canadian federal constitutions (with political and equality rights as possible exceptions to each), a robust range of positive social and economic rights pervade the written constitutions of American and European states. Helen Herskoff has observed that while such rights are rarely thought to imply direct judicial enforcement (either against the government or private parties), their legal significance may be nonetheless indirect. In some cases, the existence of social and economic rights in a state constitution has influenced the courts’ interpretation of statutes and development of common law doctrines. Other such constitutional rights have been added through New Deal-era ballot initiatives as a means of shielding associated public welfare programs from the threat of judicial invalidation – in other words, as a means of carving out and protecting a legal space in which the government’s delivery of the right is protected.

However, many critics of direct legal enforceability of economic and social rights nevertheless insist that the legal content of those rights is indeterminate and rooted in the domain of political economy. In his observation of the contemporary function of constitutional housing rights in northern European countries, Bo Bengtsson has described the right to housing as a “political marker of concern” that represents a variety of

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82 ibid, pp. 1558-1569
83 ibid, pp. 1541-1546
different political claims, depending on the source.\textsuperscript{84} Thus government officials may employ the phrase to acknowledge an overarching state commitment to the improvement of housing adequacy; critics may employ the same phrase to imply that the state has fallen short of this commitment and must do more.\textsuperscript{85} On this view, legal instruments associated with the improvement of housing may be broadly associated with a “right” to housing, albeit without the degree of precision normally attributed to constitutional rights in North America.

Given a diversity of perspectives on the legal meaning of social and economic rights in the liberal state, legal academics and commentators have struggled to connect the right to housing in the ICESCR with specific legal content at domestic law.\textsuperscript{86} However, some degree of consensus exists with respect to legal security of tenure as a basic manifestation. Just as the UN Committee’s interpretive comments shift from equivocal guidelines to a certain minimum standard, many housing rights scholars have railed against so-called ‘forced evictions’ as self-evident violations of housing rights – often without much specificity as to the circumstances in which coercive legal instruments may or may not play a role in the loss of individual shelter.\textsuperscript{87} Indeed, the relevant literature has cited both individual and mass evictions as paradigmatic rights violations.\textsuperscript{88}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{84} Bengtsson, B. “The right to housing in universal and selective housing regimes” (Cambridge: European Network for Housing Research Conference, 2004, \url{http://www.ibf.uu.se/PERSON/bosse/cambridgeplenary.pdf}), pp. 1-2
\item \textsuperscript{85} ibid, p. 4
\item \textsuperscript{86} For example, see comparative survey by Adams, \textit{infra} note 92, pp. 294-298
\item \textsuperscript{87} supra note 65
\item \textsuperscript{88} Audefroy, J. “Eviction trends worldwide – and the role of local authorities in implementing the right to housing” 6:1 \textit{Environment and Urbanization} 8 (1994, \url{http://eau.sagepub.com/content/6/1/8}), p. 11
\end{itemize}
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Mass evictions may seem most antithetical to the right to housing because they are more readily imagined to be beyond the realm of choice or control for the (rights-bearing) individuals affected. Thus the question of personal alienability of housing rights is almost completely (and conveniently) avoided. Often undertaken as a result of state initiative, the large-scale displacement of a given community may evoke associations with genocide or ethnic cleansing at worst; however, the more frequent implication may be a simple lack of proportionality with the state’s goals. Thus Joel Audefroy tabulates numerous examples of large-scale evictions by non-democratic regimes for such reasons as “preparation for a visit by the Queen” with obvious denotation. More controversially, China faced international criticism during the 1990s for its relocation of rural citizens on the floodplain of the Three Gorges Dam hydroelectric project. Recently, the UN Special Rapporteur expressed concerns regarding evictions and relocations on Vancouver’s lower east side in preparation for the 2010 Winter Olympic Games. These examples illustrate the lack of a complete basis for identifying mass evictions as legal violations of the right to housing. That is, which public policy goals will justify what degree of population displacement in which circumstances and at whose behest? Does democratic legitimacy, a compelling goal or some form of compensation exculpate the evictor?

Other commentators have approached paradigmatic security of tenure from an individual perspective, often in the realm of private landlord-tenant relations. For example, Kristen Adams argues that nothing less than a legal, constitutional right to housing is necessary in

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89 ibid
91 supra note 73, pp. 23-24
the United States, but proposes that the rather anti-climactic content of said right should be “Promise Enforcement” (capitalization hers) – that is, the legal right of tenants to remain in their rental accommodations “so long as they keep their contractual promises.” However, it is unclear how this concept differs, in practice, from the interdependency of lease covenants in Ontario and most other jurisdictions in North America (discussed in Part III). If Adams means to say that a positive right to housing requires the elimination of no-fault evictions (e.g. for purchaser’s personal use, demolition, etc.), her proposal could have devastating consequences to secondary rental supply.

Ultimately, security of tenure is an unsatisfying, incomplete account of the legal content implied by a universal human right to housing. Mass displacements of communities are less obviously violations of individual rights than potential wrongs on other grounds (e.g. lack of democratic legitimacy, expropriation without compensation, etc.). Undue focus on this paradigm also circumvents consideration of many critical issues, such as the standard of legitimacy for displaced housing claims (i.e. squatters’ rights).  

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92 Adams, K. “Do We Need a Right to Housing?” (2009) 9(2) Nev. L. J. 275, p. 320
93 For example, Audefroy (supra note 88) avoids normative discussion of juridical concepts like adverse possession and trespass in his discussion of the treatment of squatters across the third world.
The Negative Right to Housing at Domestic Law

In 2008, a human right to housing was introduced into Canadian constitutional jurisprudence. In *Victoria (City) v. Adams* the British Columbia Superior Court interpreted section 7 of the *Charter of Rights and Freedoms* to include a negative right to shelter – a finding subsequently upheld by the B.C. Court of Appeal. While these courts have made explicit reference to the ICESCR as a factor in their *Charter* interpretation, their framing of housing *freedom* nevertheless departs from many of the political and legal approaches surveyed above. The Canadian approach builds on several recent precedents from the Supreme Court of Canada, including the relationship between international covenants and domestic law articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, the prospective scope of personal security and equality rights discussed in *Gosselin v. Quebec (Attorney General)* and the relationship between public social programs and constitutional liberties developed in *Chaoulli v. Quebec (Attorney General)*.

In addition to its precedential value as a landmark case on the duty of procedural fairness in administrative law, *Baker* also revolutionized the place of international legal instruments in domestic law. The case involved an application for judicial review of an order for the deportation of a Jamaican woman with Canadian-born children. The

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95 2009 BCCA 563 (CanLII)
96 [1999] 2 S.C.R. 817
Supreme Court was unanimous in its finding of numerous procedural grounds upon which to set aside the deportation order including, *inter alia*, a reasonable apprehension of bias on the part of the immigration officer. However, L’Heureux-Dubé J. (writing for the majority) went further to find that the officer’s decision was unreasonable insofar as it failed to consider the best interests of the child – a value articulated in international human rights law and elaborated in the *Convention on the Rights of the Child*. In partial dissent, Cory and Iacobucci JJ. argued the traditional position of the common law, which is that international covenants and treaties are completely unenforceable in domestic law – that is, until they are ratified and implemented by domestic statute.

The majority’s decision to expand the role of international instruments was based, in part, on the federal government’s own prior reports and assertions to international monitoring agencies naming the *Charter of Rights and Freedoms* as Canada’s primary vehicle of compliance with and implementation of international human rights (particularly through expansive judicial interpretation of ss. 7 and 15). Thus, the majority made implicit use of estoppel logic to take the government at its word. Since the rule of law already requires that the exercise of Ministerial discretion be consistent with *Charter* values, the majority had little difficulty finding that international treaties and covenants (to which Canada is party) should guide the interpretation of the *Charter* and thus inform the reasonability of public decisions.

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101 *Baker, supra* note 96 at 79-81
102 *ibid* at 70
In the wake of *Baker*, the Supreme Court has expanded its interpretation of several *Charter* rights under the influence of previously unimplemented international commitments. For example, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* the Court held that the *Charter*’s protection of freedom of association includes collective bargaining rights found, *inter alia*, in the ICESCR. In this respect one cannot argue with the *Baker* minority view that the distinction between direct enforceability of international rights on the one hand, and the indirect influence of international covenants through *Charter* interpretation on the other hand, will be a trivial distinction in many cases.

However, the judiciary’s continuing respect for normative limits on positive constitutional rights has prevented the wholesale incorporation of all international commitments into domestic human rights law. Some of these limits were considered by the Court in *Gosselin*, which involved a claim that limits on income security payments to Quebecers under 30 years of age infringed the claimants’ rights to equality and life, liberty and security of the person under ss. 15 and 7 of the *Charter*, respectively. While the Supreme Court divided on the issue of whether Quebec’s age-based restrictions on welfare payments violated s. 15, a clear majority were unprepared to find that cuts to welfare payments could constitute a threat to life, liberty or security of the person. This latter holding was supported by *obiter dicta* that s. 7 be restricted to rights involving the administration of justice and that s. 7 not be used to place positive obligations on the

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104 *Gosselin, supra* note 97 at 3
state.\textsuperscript{105} In her vigorous and influential dissent, Arbour J. dismissed these restrictions as generally unfounded. She would have held that s. 7 does impose a \textit{prima facie} duty on the state to ensure that all persons have access to adequate resources such that their life, liberty and personal security is not threatened – in other words, a positive human right to income security.\textsuperscript{106}

The Court’s rejection of positive welfare rights in s. 7 of the \textit{Charter}, combined with the longstanding denial of poverty as an analogous ground of discrimination under s. 15,\textsuperscript{107} foreclosed many possibilities for the direct implementation of the ICESCR through \textit{Charter} interpretation alone. Social and economic rights not primarily achieved through state expenditure – such as collective bargaining rights for unions – would achieve considerably greater traction than welfare rights contemplating judicial mandate of open-ended public program spending. Yet two further entitlement programs of the post-war welfare state – health care and housing – have nevertheless entered into \textit{Charter} jurisprudence in a unique manner that respects the Court’s formal approach.

Although many observers regard the Supreme Court’s decision in \textit{Chaoulli} as nothing less than a threat to Canada’s public health care system,\textsuperscript{108} few seem to have noticed that the Court’s willingness to constitutionalize negative health rights is a relatively progressive outcome. The applicants in \textit{Chaoulli} successfully challenged Quebec’s legislative prohibition on private health care services (similar to legislation found in

\textsuperscript{105} \textit{ibid} at 80-84
\textsuperscript{106} \textit{ibid} at 319-329
\textsuperscript{107} \textit{Toussaint v. Canada (Minister of Citizenship and Immigration)}, 2009 FC 873, [2010] 3 FCR 452 at 68-90
many other provinces) as a threat to the life, liberty and personal security of Quebec citizens. While a majority of the Court limited its finding to infringements on Quebec’s human rights legislation, McLachlin C.J.’s also held that prohibition of private health care infringed s. 7 of the *Charter* in her concurring judgement.¹⁰⁹ Justices writing for the majority emphasized trial evidence regarding clinical and emergency wait times as an important factor in both the infringement and justificatory components of their decision.

In this respect, the Court’s decision in *Chaoulli* arguably represents a novel approach not only to s. 7 of the *Charter* but to the constitutionalization of economic and social rights in Canada. Rather than construct a positive right to health care and corresponding state duty to provide it, the Court (and McLachlin C.J. in particular) conceives of a more conservative, abstract liberty: the negative right against interference with one’s attempts to heal oneself. As with other *Charter* rights, s. 1 contemplates state infringements on *prima facie* health care freedoms; however, these infringements are constrained by judicial consideration of the state’s purpose and proportionality. This approach casts health care in Canada as neither a limitless state obligation imposed by judicial fiat, nor a purely benevolent government program shielded from judicial scrutiny. Instead it is an area of public policy that will generally engage human rights, and as such its legal validity is determined (in part) by constitutional principles of universality and rationality.

Thus the progression of *Baker*, *Gosselin* and *Chaoulli* at the Supreme Court established the paradigm through which housing would receive *Charter* protection in *Adams*. The case was commenced in 2005 when the City of Victoria sought a writ of injunction from

¹⁰⁹ *Chaoulli*, *supra* note 98 at 109-153
the B.C. Superior Court to require the removal of a number of homeless residents who had built a ‘tent city’ in one of Victoria’s public parks. The City relied upon its own municipal by-laws that prohibited “taking up temporary abode” in public parks (specifically on an overnight basis). The occupants of the park gave notice of their intent to rely on the Charter in response, and the matter was converted to action for trial before the Superior Court.

At trial, Ross J. considered detailed evidence from the parties and intervenors on the causes and effects of homelessness, both in Victoria and generally. Ross J. found that during the relevant time periods, between 104 and 326 shelter beds were provided in Victoria despite the existence of over 1,000 homeless persons in the city. She also accepted medical evidence that for those forced to sleep outdoors, sleeping bags and blankets (permitted by the city) were insufficient protections against weather-based risks such as hypothermia. For this reason, Ross J. found that the effect of the city’s by-laws was to deprive or threaten to deprive homeless persons of life, liberty and security of the person.

In tandem with her factual findings, Ross J. interpreted s. 7 of the Charter to include the freedom to erect shelter for oneself. She did so by referencing the relevant provisions of the ICESCR and the UDHR, acknowledging their influence on Charter interpretation.
following the example set by the Supreme Court in *Baker*.[115] Dismissing the city’s argument that this construction of s. 7 would be tantamount to judicial enforcement of positive international rights, Ross J. noted that her finding of negative housing rights under s. 7 was entirely within the scope suggested by McLachlin C.J. in *Gosselin*.[116] She went on to suggest that the facts of the case were “analogous to the circumstances in *Chaoulli*…” in that neither the scarcity of state resources nor the complexity of housing issues could insulate the government’s legislation from constitutional review by the courts.[117] Ross J. proceeded to find that the by-law infringed s. 7 because it threatened the relevant interests in a manner inconsistent with the principles of fundamental justice, specifically because the self-shelter prohibition was “both arbitrary and overbroad”.[118] She also found that the prohibition was not saved by s. 1 due to the lack of a rational connection with the goal of preventing “urban problems” (e.g. drug use), the lack of minimal impairment, and the disproportionate impact of the prohibition on the rights of homeless persons.[119]

In 2009, the trial judgement in *Adams* was largely upheld by the B.C. Court of Appeal, with the exception of a slight variance to the remedy that highlighted the critical importance of overnight shelter shortages. While Ross J. had declared the city’s parks by-law to be of no force and effect insofar as it prevented homeless persons from erecting temporary shelters, the Court of Appeal qualified this declaration by instead using the phrase “temporary *overnight* shelter” (emphasis mine) adding the phrase “when the

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[115] *ibid* at 85-95
[116] *ibid* at 114-119
[117] *ibid* at 120-122
[118] *ibid* at 5
[119] *ibid* at 202-204
number of homeless people exceeds the number of available shelter beds in the City of Victoria.\textsuperscript{120} These changes were supported by the Court’s assertion that the city by-law would not have been unconstitutional in and of itself, but for the city’s concurrent failure to provide sufficient shelter beds and the resulting health risks to homeless persons.\textsuperscript{121}

Rather than seek further appeal of the \textit{Adams} decision, the City of Victoria adopted a policy to enforce its prohibition on temporary shelters in parks during the daytime only – consistent with the clarifications provided by the Court of Appeal. Thus in \textit{Johnston v. Victoria (City)}, Bracken J. refused to grant the appeals of self-represented homeless persons from convictions in Provincial Court for by-law infractions in the form of cardboard shelters erected during daytime hours.\textsuperscript{122} In his decision, Bracken J. held that the appellants had failed to meet their trial burden of demonstrating a lack of daytime shelter spaces in the city. This made it ultimately unnecessary to deal with the appellants’ assertions, for example, as to the significant portion of homeless persons who may sleep in the daytime, particularly as a result of various mental health conditions.\textsuperscript{123} However, Bracken J. did venture in \textit{obiter dicta} that Charter remedies may be available to litigants who can prove a shortage of daytime shelter space during intemperate weather.\textsuperscript{124}

Though indeed “analogous” to the reasoning of the Supreme Court in \textit{Chaoulli}, the structure of the right established in \textit{Adams} differs in several respects. Both housing and health care may be thought of (by liberals in particular) as market goods, the right to

\textsuperscript{120} \textit{Adams}, supra note 95 (BCCA) at 160-166  
\textsuperscript{121} \textit{ibid} at 162  
\textsuperscript{122} 2010 BCSC 1707 (CanLII)  
\textsuperscript{123} \textit{ibid} at 12, 33-34, 64  
\textsuperscript{124} \textit{ibid} at 52-53, 62-64
which is thus a specialized claim for resources by those who lack wealth. While the _Adams_ decisions take for granted that extreme poverty may prevent participation in the private housing market (despite leaving construction of one’s own shelter on public land as a viable option), _Chaoulli_ did not involve a claim by poor persons for the right to provide health services to themselves or each other. Rather, _Chaoulli_ scrutinized the state’s elimination of private health care markets against a patient’s s. 7 _Charter_ right to purchase private health care. Wait times and scarcity of resources were certainly part of the context of the _Chaoulli_ decision; however, the majority did not qualify its remedy with any benchmarks for the state. In contrast, the Court in _Adams_ scrutinized the state’s regulation of public property and provision of emergency shelter against the s. 7 right of homeless persons to be protected from the elements. In doing so, the Court set an explicit benchmark for the state: provide shelter beds for every homeless person, or lose the ability to keep public parks clear of temporary structures during the relevant time period.

At the time of this writing, _Adams_ remains good law in B.C. (as the decision was not appealed to the Supreme Court) but has yet to be applied by courts in other provinces. The Advocacy Centre for Tenants Ontario has commenced the early stages of a broader lawsuit against the governments of both Ontario and Canada that relies, in part, on the decision in _Adams_. However, ACTO has not restricted its allegations to infringements of a purely negative right to housing under the _Charter_.

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125 Notice of Application, _Tanudjaja v. Canada (Attorney General)_ , Ontario Superior Court File CV-10-403688
4. Corrective Justice

The outcome of *Adams* (discussed above) does not merely posit that the state must provide housing support (in order to justify its *prima facie* legal infringements on the negative right to shelter oneself) as a matter of distributive justice. It also positions housing freedom, as part of security of the person, as a fundamental right that is constitutionally and thus ontologically prior to positive law. In this way, housing access regulation is arguably an instrument of corrective justice, because it restores individual rights that are (as shown below) critical to the liberal concepts of freedom and legal personality.

An orthodox, formal legal view of public policies like housing subsidies would classify them as public law and therefore distributive justice. Property rights, however, are typically classified in the realm of private law and their preservation is thought to be a matter of corrective justice. This strict division rests, in part, on the assumption that private property is acquired as a matter of basic individual freedom (e.g. in a state of nature), while housing access policies are *ex post* state responses to human suffering and/or inequality. Whether or not these policies are required, as a matter of distributive justice, turns on an ontological division between that which the community may distribute and that which rightfully belongs to individuals as a moral baseline. This division informs and is informed by the traditional distinction between private and public law.
But in order to better understand the places of private property and housing within a taxonomy of formal public and private legal categories, it is necessary to interrogate the philosophical underpinning of legal formalism. In particular, why would (or wouldn’t) private property rights be thought to precede the liberal state’s attempts to satisfy housing need? A diverse group of major Western political philosophers have preferred to view property as determined by social consensus (either explicitly for Rousseau\textsuperscript{126} or implicitly for Kant\textsuperscript{127} and Rawls) or sovereign decree (Hobbes\textsuperscript{128}) – in any case, very much a matter of communal concern. While compelling, these perspectives do not easily explain the contemporary categorization of property within the realm of negative private rights.

In contrast to the social contractarians, two classical liberal philosophers provide accounts of property rights established unilaterally by individuals without the necessity of communal or public involvement. The first is John Locke, whose labour theory of property in his Second Treatise on Government proposed that one acquires private property when one mixes one’s labour with a physical object in the world. The second is Georg Wilhelm Frederick Hegel, who defended first possession as the proper means of establishing property.\textsuperscript{129}

\begin{footnotes}
\item[127] See Weinrib, E.J. “Poverty and Property in Kant’s System of Rights” (2002-2003) 78 Notre Dame L. Rev. 795, p. 798
\item[128] Hobbes, T. *The Leviathan* (Public domain, 1660), ch. XVII
\item[129] Contemporary neoliberal theorists such as Hayek, Friedman and Nozick are omitted from this analysis, as their views cannot be said to have influenced the early development of property at common law. Moreover, there has been recent debate regarding the degree to which Nozick recanted his views in later life: see Metcalf, *supra* note 50
\end{footnotes}
Property and Liberty: Locke

As between the accounts offered by Locke and Hegel, the latter offers a more compelling account of the common law of property. Put simply, Locke’s theory rests on two premises: that “God… hath given the world to men in common,” and that man owns his own physical body. Locke reasons that, by extension, man owns his own labour and the product of it; he need only mix his labour with a piece of the commons in order to acquire that object as his own private property. However, Locke warns that man may only rightfully appropriate a resource from the commons so long as there remains “as much” and “as good” of the same resource for other men to similarly acquire in the future. Better known as the Lockean proviso, this limitation on unilateral action based on the interests of others shares several characteristics of Kant’s moral philosophy. Yet even to the extent that Locke offers a unilateral method of property acquisition, labour is generally not the basis for private property rights in modern Anglo-American common law.

130 Locke, J. The Second Treatise of Civil Government (Public domain, 1960), ch. V at 26
131 ibid at 27
132 ibid at 35
133 supra note 127
134 Indeed, first possession – more consistent with the explanations offered by Kant and Hegel – is the fundamental basis for ownership of private property at common law. Important exceptions exist, however: the doctrine of constructive trust, now overtaken by statutory family law in most jurisdictions, does appear to incorporate a certain labour theory of property to find that persons may acquire a share in their spouses’ assets through in-kind contributions of work over long periods of time.
Property and Legal Personality: Hegel

In contrast, Hegel’s *Philosophy of Right* commences an account of private rights and obligations by identifying the capacity for individual free will in all persons. At the outset, Hegel distinguishes the particular will (e.g. unique individual preferences) from the universal will; the latter described as a basic impulse of freedom and independence from all physical and external circumstances.\(^{135}\) This premise forms the core of what Hegel terms personality – that is, the universal will within a given human and its recognition of the same within other human beings. The immediate implications of this structure may include (now uncontroversial) prohibitions against slavery and interference with bodily integrity. More broadly, Hegel’s idea of personality is a useful example of how the conceptual primacy of negative rights in private law conforms to the primacy of individual independence in liberal philosophy.\(^{136}\)

Of somewhat greater distinction is Hegel’s next move, which is to establish property rights as the immediate and natural result of interaction between persons and things. Reasoning that the absence of will within non-human objects makes them subject to the imposition of human will, Hegel asserts that every person has an unlimited right to use any particular thing for any particular purpose.\(^{137}\) At the same time, Hegel argues that the imposition of one’s particular will upon the external world through possession and use of

\(^{135}\) Hegel, G.W.F. *Philosophy of Right*, trans. by Knox, T.M. (London: Oxford University Press, 1952) at 7-29
\(^{136}\) See Benson, P. “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60(3) U. Tor. L. J. 731
\(^{137}\) Hegel, *supra* note 135 at 44
things is the first way in which personality finds tangible existence. Thus first possession is presented as a primary means of acquiring property rights, since through possession an object is infused with a person’s will. Hegel sets no Lockean proviso-like limit on this method of property acquisition, and proceeds to identify use, disposal and alienation as inherent features of property.

*Philosophy of Right* is remarkable not only for its libertarian introduction of private property, but the more general way in which its ontological presentation of legal categories reflects modern jurisprudential taxonomy. Hegel divides his presentation into two broad categories: abstract right (which explains the normative progression of persons to property, contract, tort and crime) and ‘civil society’ (which includes the administration of justice, the family, and the constitutional state). In greatly simplified terms, these sections follow the conventional division of private and public law (respectively) in the Western world.

**Mandatory Property: Waldron**

In his controversial interpretation/critique of Hegel’s *Philosophy of Right*, Jeremy Waldron asserts that, given Hegel’s parameters for legal personality, “all persons must

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138 *ibid* at 41
139 *ibid* at 50
140 *ibid* at 182
If property is the immediate way in which one’s free and particular will is reflected in the external world, freedom becomes a relation to others when others observe property. Many of Hegel’s contemporaries have dismissed Waldron’s view, preferring instead to interpret Hegel as endorsing the mere possibility of private property as something optional for persons, rather than a universal entitlement consistent with the orthodoxy of liberal capitalism. Waldron, however, highlights Hegel’s teleological arguments for property as an extension of personality. In so doing, Waldron builds on a tension in Hegel’s work and its subsequent application: if property is a necessary completion of free personality, why ought it to be any less universal than bodily integrity? One possible answer is that property, unlike bodily integrity, is created through human action: the first possession of previously un-owned things.

In the context of housing, two observations may be made of Waldron’s Hegelian account of property and personality. First, it is obvious that housing is an ideal example of the kind of property being described. Housing qua shelter is a basic need and thus connected to bodily integrity in the same manner as food and clothing. Housing qua “home” is an immediate expression of the particular will, recognizable as an individual domain of sovereignty, privacy and choice. If, as Hegel claims, property is the first way in which

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142 *ibid.*, pp. 351-360
individual freedom is reflected in the external world, surely housing is one of the first
types of property that performs this function.\textsuperscript{144}

The second observation is that, were land to be excluded from the class of things that
may be owned and exclusively possessed, all persons might have the freedom to possess
their own housing – in the very least, through self-made shelter. The negative freedom to
shelter oneself may remain resource-dependent in a land commons, but only in the sort of
remote manner in which bodily integrity is theoretically limited by extreme
overcrowding.\textsuperscript{145} What is clear to the modern reader is that Hegel’s world of
undiscovered, unclaimed frontiers (notwithstanding the colonial racism of such a
concept) has been replaced by one in which there can no longer be “first possession” of
land; all inhabitable space has been spoken for, whether by private owners or states.
Residential land – especially in the Ontario context – is acquired exclusively through
contract or inheritance, both of which are wealth-dependent options.

\textsuperscript{144} As Weinrib notes in his discussion of Kant (\textit{supra} note 127), there is some qualitative difference
between the “property” that forms the earth immediately under one’s feet, and the philosophically harder
notion of things that can be owned after possession, giving rise to duties of non-interference even in one’s
absence. It is suggested that shelter be located near the former end of this spectrum. Moreover, the
expressive function of property (highlighted by Waldron in his analysis of Hegel) implies a qualitative
difference between the sense in which personal and cultural identity are reflected in the home (discussed in
Adams, \textit{supra} note 92, pp. 301-305) and the metaphysical sense in which one’s personal will flows into
first possession of any object in nature under Hegel’s account. If relation to another is the primary purpose
of abstract right, the home is a universally-recognizable repository of social recognition.

\textsuperscript{145} Anticipating concerns about the possibility that the world may one day lack the geographic space for all
persons to have shelter, it is helpful to review the graphical representations of population density offered by
De Chant, T. \textit{If the world’s population lived in one city} (Per Square Mile blog, 2011
http://persquaremile.com/2011/01/18/if-the-worlds-population-lived-in-one-city/)
A Structural Theory of Housing Rights

Rather than attempting to formulate legal rights based on ideal human entitlements in a perfect world, a structural approach can justify the content of legal rights as a remedial response to basic deprivation and injustice. This approach begins by recognizing the inevitable conflict between the goals of housing regulation surveyed in this Part, acknowledging that balance – not the singular maximization of one value – must inform robust housing access rights in a modern liberal state.  

For example, Patrick Macklem’s account of international indigenous rights explains that group-differentiated entitlements for certain aboriginal peoples are an attempt to mitigate the exclusion of those peoples from a longstanding, entrenched international legal order. The racist distribution of sovereignty to European settlers rather than prior indigenous occupants – particularly in the American and Australasian continents – motivates a set of compensatory rights that leave established nations and borders intact. 

A similar explanation of housing law is demonstrated by the holding in Adams. Private property, land use planning and a host of other exclusionary regulations are prima facie infringements on the freedom to shelter oneself. Because our system infringes on a critical and necessary element of legal personality, a number of remedial policies aim to restore housing access while preserving the basic efficiency and communitarian

advantages of a planned land development market. Thus structural theory contemplates a normative link between the respective goals of housing regulation: policies motivated by efficiency and communitarian goals generate distributive and corrective justice obligations.

By shifting the theoretical, individual moral baseline to one of open shelter construction in the commons, structural theory portrays the move to private (exclusive) land ownership as Kaldor-Hicks (rather than Pareto) efficient. Of course, once private property rights are established, free exchanges of property may represent Pareto optimization. A structural theory of the right to housing tests the underlying assumption of the efficiency rationale for land regulation: that these interventions generate more than enough efficiency gains to justify the cost of low-income housing subsidies.

The theory also validates the Rawlsian difference principle: namely, that the distributive inequalities introduced by the land market, if effectively offset by low-income subsidies and other forms of access regulation, need not result in any individual being made worse off than he or she would have been under a hypothetical system of completely equal distribution (e.g. wherein all land is common property and all are free to construct their own shelter as they see fit).
Limitations of the Structural Approach

The structural theory proposed above is, however, somewhat deficient in its ability to give a precise answer to the following questions. Firstly, what type of theoretical housing might free persons be expected to construct for themselves in a land commons? Secondly, to what extent does a system of heritable private property, coupled with exclusionary regulation, interfere with the ability of low income persons to obtain shelter? Thirdly, what is an acceptable geographic distribution of housing access subsidies sufficient to achieve distributive and corrective justice in housing freedom?

An intuitively preferable answer to the first question might avoid theoretical speculation about a ‘state of nature’ in favour of concrete examples of communal land management; for example, one might begin with examples of shelter size and quality in certain Aboriginal and/or white settler communities prior to the assertion of Crown sovereignty and/or municipal organization. However, even this inquiry is largely unnecessary for the purposes of housing access regulation, because many of the exclusionary regulations that require distributive and corrective intervention also, themselves, define minimum standards for housing in the modern state. Thus two principles guide the specification of subsidized shelter: first, the Rawlsian difference principle (which suggests that distribution to the worst-off ought not just to meet but exceed an alternative allotment

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148 This is a particularly thorny issue, in light of the prevalence of the racist “savagery thesis” and equivalence between Aboriginal stereotype and the “state of nature” in classical liberal political philosophy (e.g. Locke, supra note 130). First Nations alternatives to the current settler property system offer diverse examples of flexible, communal land management in which subgroups could often acquire quasi-private rights. For example, the property law system of the Gitksan and Witsuwit’en peoples of British Columbia is described at length in Mills, A. Eagle Down is our Law (Vancouver: University of British Columbia Press, 1994)
within equal distribution) and second, the economic and communitarian goals that necessitated housing access interventions in the first place.

The second question – that is, the quantum of housing inequality that must be offset by distributive and corrective regulation – is far more complex. In Ontario, housing subsidies by all levels of government have targeted this problem using two apparent principles: first, the use of rent-geared-to-income ratios proposes that no household should have to spend more than a given percentage (commonly 30%) of its income on housing; second, the use of shelter allotments within general welfare schemes propose that all households with incomes below a given level (i.e. who qualify for welfare) should receive a certain fixed credit that may be used toward housing costs only. As will be discussed in greater detail in Part III, current regulatory instruments do not strictly adhere to the first of these principles where subsidies are rationed by lengthy waiting lists. Public investment in housing access subsidies and shelter provision is not even tied to the raw numbers of homeless persons as contemplated by the Court in *Adams*. Rather, current policies – ranging from rent control to the management of social housing projects – are largely directed at the maintenance of 1980s levels of public housing provision and private market management, both of which have been badly outstripped by several decades of population growth, wage stagnation, urbanization and demographic transformation.

In short, current housing access policy offers few examples of how the state’s distributive and corrective justice burdens may be measured and/or discharged. The Court’s baseline connection between homelessness, shelter beds and public space in *Adams* is taken to be
the simplest formulation. Beyond the elimination of this shelter gap, one might contemplate bridging any ‘affordability gap’ between welfare, disability and pension shelter allocations on the one hand, and the minimum price of lawful (e.g. compliant) housing in supply great enough to meet low-income demand. This approach admittedly (and beneficially) defers the question of precise shelter allocation levels to the domain of income benefit policy, which must manage (among other things) incentives to work.

Finally, the problem that looms large throughout this theoretical analysis is that of the geographic location of housing. Using the above-mentioned examples, would the Court’s justificatory analysis of housing rights in *Adams* have permitted the City of Victoria to designate space for a shantytown, say, at the edge of the City’s industrial lands, rather than face the choice between providing more shelter beds or allowing a ‘tent city’ to persist in downtown parkland? Can a province offset the prohibitive cost of living in its major cities by offering public housing in cheap, remote areas and asking low-income persons to move there? On the other extreme, is the City of Toronto required to ensure affordable, low-income housing in every neighbourhood, even those that are ‘upscale’ by reputation? The answers to such questions are tied to communitarian and distributive justice conceptions of physical mobility and geographic equality; moreover, they may significantly define the scale of the state’s burden under a structural theory of the human right to housing.

As with earlier questions of minimum housing quality, the geographic allocation of housing access interventions can be specified by the similarly arbitrary geographic granularity by which exclusionary land and shelter regulation is imposed – that is, at the
municipal level. In Ontario, it is municipalities that are required to designate residential land supply and pursue density intensification targets according to the projected population growth or decline of each municipality. Expected population growth in one neighbourhood may lead to the creation of new neighbourhoods. Municipalities also have broad authority to levy property taxes. Thus there is a certain intuitive sensibility to targeting housing subsidies in every municipality where affordability problems persist – but not necessarily in every neighbourhood. The correctness of this principle is called into doubt, however, in the case of large, amalgamated municipalities (e.g. the ‘megacity’ of Toronto) that consist of not one community but many, wherein housing interventions concentrated in certain boroughs may contribute to dramatic polarization in the geographic distribution of income within the municipality. As discussed further in Part III, these questions are partially subsumed in the debate over the relative effectiveness of purely low-income vs. mixed income delivery of subsidized housing.

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149 Growth Plan, supra note 20
150 Municipal Act, 2001, supra note 16, Part VIII
5. Conclusion

The foregoing analysis presents four different types of regulatory goals that animate housing policy: efficiency, communitarianism, distributive and corrective justice. Within each category, unique and often contradictory facets of housing policy are justified. Thus, the primary challenge of any comprehensive, normative framework for housing law is to reconcile these apparent contradictions.

The structural theory of housing as a human right explains modern housing access regulation as a remedial response to the ways in which capitalist, liberal welfare states have infringed the freedom to shelter oneself – namely by rendering shelter an unaffordable market commodity for certain low-income persons. As a matter of corrective justice, this freedom is a necessary part of legal personality because of the home’s critical connection to bodily integrity and tangible expression of free will. Thus all persons must have a home, and their right to a home precedes the state and any other forms of private right.

As a matter of distributive justice, state support of low-income housing reflects an understanding of housing as a primary good. Thus the best form of justice in housing distribution is that which reflects a maximin strategy, promoting private commodification of housing to the extent that it raises the minimum quality of housing available to the worst-off individuals. This may necessarily require the reallocation of housing over and above de facto income redistribution.
This structural account of corrective and distributive justice in housing access – that shelter rights ought to be ‘restored’ rather than preserved from the outset, because unequal distribution of housing can increase the allocation of shelter to all – reflects the basic consequence of an efficiency-based approach to housing policy. Pareto efficiency (in relative terms) is achieved by subjecting housing to market-based allocation, which necessarily includes private property and free exchange. Kaldor-Hicks efficiency is achieved through a variety of regulatory mechanisms that correct market failures – often by curtailing the ways in which unrestrained markets might pursue shelter without adequately assuming the costs of safety and environmental sustainability. Both forms of efficiency may be pursued to great lengths, on the assumption that they will generate enough net utility gains from which to support an *ex post* implementation of corrective and distributive justice.

Corrective and distributive reallocation of housing rights is also made necessary by communitarian-based policies that attempt to achieve inefficient social goals (that is, outcomes that cannot be said to increase individual utility) at the expense of housing access. The structural account of housing rights does not advance a position on libertarianism or the cogency of communitarian rationales for policy. Instead, this framework requires that the true cost of communitarianism must be considered not only in terms of foregone efficiency but in terms of justice as well. The more exclusionary a communitarian goal may be with respect to housing, the greater the state’s burden in compensating prima facie infringements on housing freedoms and in maximizing the housing allocation to the worst-off.
In sum, this proposed interaction between efficiency, communitarianism, distributive and corrective justice embraces a core assumption of modern liberalism: that as individuals, our primary duty to one another is one of non-interference. It is thus a liberal theory for the liberal state – a consistent and compatible framework from which to discuss modern housing policy. While this structural theory gives normative priority to justice as an overarching policy goal, it begins by requiring efficient regulation of low-income housing markets – a task that, in turn, depends on an accurate assessment of the market’s characteristics.
Part II: Features of Low-Income Housing Markets

“...everybody fifty cents from a quarter where I come from.” – The Roots

Residential tenancy markets often coincide with the subset of all forms of private housing in which the occupants are poor, and this is largely true in Canada.\(^{151}\) As a result – and especially in urban communities – there is a degree to which low-income housing markets and residential tenancy markets can be described interchangeably.

This Part outlines the features – and, in most cases, failures – of Ontario’s low-income and rental housing market. While some features of this market stem from the low-incomes of the participants, others are endemic to the rental form of property allocation. These intrinsic features justify remedial regulation in the first instance. Other market features may exist or be exacerbated by existing forms of regulation, thus supporting a case for regulatory reform.

As discussed in Part I, market failures prevent Pareto efficient exchanges, thus foregoing a potential net social benefit. Regulation is justified as Kaldor-Hicks efficient when it mitigates, overcomes or prevents these failures. For this reason, the features identified in this Part help justify some of the regulatory tools discussed in Part III.

\(^{151}\) See Lefebvre, S. “Housing: An Income Issue” (2002) 3(6) Perspectives on Labour and Income (Online edition, http://www.statcan.gc.ca/pub/75-001-x/00602/8442-eng.html) and Hulchanski, J.D. “Housing Policy for Tomorrow’s Cities” Discussion Paper F/27 (Ottawa: Canadian Policy Research Networks, 2002), p. 6. The latter reveals that although the median income of tenants has been approximately half that of owners over the past two decades, a far more dramatic shift has occurred in terms of median net worth.
1. Demand Inelasticity

Demand elasticity is defined as the degree to which consumers are able to increase or decrease individual consumption, or switch to substitutes, in response to changes in the price of a given good or service. Residential tenancies are just one form of housing, and many different sizes and types of units can be rented by individual households. However, the more limited options available to low-income tenants create a different, more rigid type of housing demand near the low end what is available. Under these circumstances, demand elasticity might be expected to correlate with household income across the rental market.

At one extreme, the high-income tenant should have highly elastic demand for rental housing. When moving costs are lower relative to both income and rent, tenants can afford to walk away from units that become too expensive. The same tenants may be more likely to own a vehicle, enhancing their ability to live in a wide variety of neighborhoods relative to place of work or study. When supply increases and rents are low, these tenants can afford to rent large units with enhanced features, services, and/or amenities. Conversely, the same tenants in an under-supplied market may often have the ability to reduce their demand accordingly – choosing to rent smaller spaces with fewer services, even if it means replacing one’s furniture or adjusting one’s lifestyle. Finally, middle and high-income tenants can typically access the mortgage credit required to exit the rental market when home ownership becomes a preferable option. These characteristics discipline landlord decisions, ensuring that they offer rates, units and services that are competitive.
At the opposite extreme, low-income tenants differ with respect to almost all of the characteristics mentioned above. Moving costs are significant; where a vehicle is not owned, tenant proximity to work or study is often a necessity. Increases or decreases in market rent are more likely to be simply absorbed, especially when tenants are already crowded into small units, containing the bare features required by local by-law: one basic bathroom, one basic kitchen, and no additional services or amenities. Typically, such tenants cannot qualify for a mortgage and/or afford the necessary down payment on home ownership. Sensing that tenants are unable to demand smaller, more basic alternatives than they do currently, landlords may be free to raise rents and/or defer maintenance and repair expenditures – especially if they face few market entrants (discussed later in this Part). For many tenants, the sole available method of exiting the tenancy market is through eviction; the result may be some form of homelessness.\(^{152}\)

A recent empirical study of rent levels in OECD industrialized nations concluded that overall rental housing demand is moderately inelastic – a conclusion that cannot necessarily confirm or contradict the internal composition of tenant populations described above.\(^{153}\) In Canada, income divergence between tenants and owner-occupiers suggests that the intuitive inelasticity of low-income demand has become increasingly representative of the tenancy market as a whole. This hypothesis is somewhat consistent, however, with decades-old consumer credit research regarding household demand for debt. In any case, the inelasticity of demand for housing as quality approaches some basic minimum is supported by consumer credit research in the 1960s regarding low-income demand.

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\(^{152}\) Layton, infra note 156

consumer debt. One study, cited by Cayne and Treblicock, found that as income was reduced for consumers at the low end of the market, spending on basic needs (food, shelter and clothing) steadily increased as a proportion of income in order to maintain a relatively stable absolute level.\textsuperscript{154} The lowest income consumers even demanded well over 100\% of their incomes for basic needs, seeking credit through any source – legal or illegal – to cover the shortfall. The behavioural inference one might draw from this dynamic is that, at the lowest price and income levels, consumer demand for basic needs becomes relatively insensitive to one’s ability to pay – which might include not only one’s own income, but the cost of fulfilling basic needs.

Contemporary behavioural accounts of tenants who cannot afford their rent also imply inelasticity of low-income housing demand. Recently, the Daily Bead Food Bank surveyed its users and found that many households had gone without food for at least one day of the year in order to meet rent obligations.\textsuperscript{155} Jack Layton’s description of under-housed and precariously housed persons in Ontario also includes the chilling example of families who will save money to purchase alternating nights staying in motels while spending the intervening nights outdoors or in emergency shelters.\textsuperscript{156} Despite the intuitive inefficiency of such strategies, tenants whose purchasing power falls below local market minimums are left with few alternatives.

\textsuperscript{154} Cayne, D. & Trebilcock, M. “Market Considerations in the Formulation of Consumer Protection Policy” (1973) 23 U. Tor. L. J. 396
\textsuperscript{155} infra note 296, p. 4
In this respect, inelasticity of low-income housing demand may be somewhat self-perpetuating. As rents increase due to a lack of demand-based discipline from a few of the poorest tenants, more tenants may demand housing that is closer to regulatory minimum standards and more concentrated in the lowest-cost neighborhoods – leaving a greater proportion of tenants renting ‘on the line’ with no ability to demand any less. As discussed in Part III, traditional regulatory responses may also exacerbate this problem by raising minimum (i.e. exclusionary) standards and restricting supply elasticity.
2. Supply Inelasticity

Given the apparent inelasticity of low-income housing demand, rental housing supply elasticity (that is, providers’ ability to increase or decrease their provision rental units in response to market price signals) appears critical to overall market competition for residential tenancies. If landlords possess an inherently limited supply of rental units that low-income tenants cannot help but demand, rents are almost certain to increase (unless restricted by regulation) far beyond the marginal cost of their provision. In rental markets, a key indicator of supply elasticity is the vacancy rate – that is, the number of unoccupied units as a percentage of all rental units at any given time.\(^\text{157}\) Some baseline percentage may be attributed to tenant turnover; thus the vacancy rate overstates the true number of rental units that remain empty for an extended period of time. The absence of this latter type of vacancy represents an apparent unwillingness of potential suppliers to compete with existing landlords for their tenants.

Persistently low vacancy rates in Ontario may, therefore, stem from a number of possible factors. Obviously for both landlords and tenants, rental units constitute large, often indivisible resources that cannot easily be removed from the market. Where the addition of new rental housing is concerned, however, two physical dimensions are required: land supply (growing out) and infrastructure (growing up).

\(^\text{157}\) Hulchanski, J.D. “The Economics of Rental Housing Supply and Rental Decontrol in Ontario” (Presentation to the Ontario Legislature Standing Committee on General Government, June 26, 1997), p. 5
New land supply is limited both in its own right, as well as in the ways that it can contribute to low-income rental housing. Land use planning policy constrains boundaries of settlement areas, designation of land for permitted residential use, and subdivision of land for multiple users. The current provincial policy for much of heavily-populated southern Ontario can be generally described as a prohibition of settlement area expansion until municipal density targets are met.\(^\text{158}\) Where outward physical expansion of a community does occur, primary rental supply often does not materialize due to the fact that peripheral settlements are typically low-density, far away from existing services and employment, and therefore more efficiently utilized by middle-income homeowners.\(^\text{159}\)

With new residential land typically allocated to owner-occupied homes, primary rental supply is typically developed on existing urban space through conversion or intensification of infrastructure. Thus the current urban intensification priority in Ontario’s planning policies is good news for rental construction. The bad news, however, is that the typical interchangeability of multi-residential rental and condominium complexes in high-density residential zoning allows high-margin developments to outbid low-margin ones. In these circumstances, relative limits on primary rental profitability are likely to constrain rental supply growth; several examples of these limits are canvased in Part III, ranging from rent control to home ownership tax advantages.

\(^{158}\) Growth Plan, supra note 20

\(^{159}\) Suttar, supra note 34, pp. 23-25
David Hulchanski and other authors confirm the general decline of new rental
collection in Ontario since the 1970s, coinciding with the imposition of rent control
and the loss of certain federal income tax subsidies for landlords. Conversely, the
Ministry of Municipal Affairs and Housing reported some modest growth in new rental
housing starts since the advent of vacancy decontrol. However, much of this growth has
occurred in secondary rental supply. The comparatively large degree of risk and capital
involved in primary rental construction may require a greater degree of certainty about
long-term rental profitability than the decisions of individual homeowners, for example,
to rent out their basements. However, secondary rental supply still has not kept pace with
demand in most urban markets; most recently, CMHC reported that the vacancy rate for
secondary rental units fell below that of primary rental in Toronto. This trend would
appear to be directed by outcomes in owner-occupied housing markets.

Primary rental supply may be compared to large-scale electricity generation: impervious
to short-term price fluctuations due to high entry costs. However, unlike small-scale
power generation units that respond to small changes in electricity consumption,
secondary rental supply depends on a host of external factors such as relative home
ownership demand. As discussed further in Part III, regulatory measures that improve

160 supra note 157
161 Residential Tenancy Reform Consultation Paper (Toronto: Ministry of Municipal Affairs and Housing, 2004), p. 32
162 ibid, pp. 32-34
163 Rental Market Report: Canada Highlights, Fall 2010 (Ottawa: Canadian Mortgage and Housing Corporation, 2010), p. 3
rental supply elasticity are therefore critical to the overall competitiveness of the tenancy market, as well as the efficacy of demand-side subsidies.
3. Externalities

As noted in Part I, the transactions between suppliers and consumers in modern housing markets inevitably generate a mixture of positive and negative effects on third parties, the costs and/or benefits of which are difficult to internalize between transacting parties. In the context of publically-provided firefighting, ambulance and health services, housing built below certain safety and quality standards externalizes a heightened risk of collapse, fire, and/or human injury; conversely, higher building standards internalize an externality that the market is unlikely to value sufficiently from a social welfare perspective.

In much the same way, housing location, construction and maintenance decisions regarding sustainability and energy efficiency internalize either harms or benefits to the environment that will affect broader populations over the long term. Housing tenure, location and quality may also contribute positively or negatively to other human factors like labour stability and/or flexibility, social conflict and crime.

Finally, increased housing density – that is, the inverse physical proximity between housing units – can dramatically decrease the long-term marginal costs of both public and private services to populations. While residents of higher-density neighbourhoods may capture some of these benefits through the reduced prices of goods and services and/or reduced municipal taxes, the eventual density of a neighbourhood may be difficult to predict and price at the times when housing is produced and consumed.
4. Information and Cost Asymmetries

Rental housing transactions typically include certain pieces of information that the parties may not efficiently share with each other – potentially leading to exchanges that are not Pareto efficient. The cost of information about tenancies also creates transaction costs that may be difficult for the parties to allocate during lease formation.

In the large, multi-residential complexes typical of primary rental supply, information costs often favour the corporate landlord (over individual tenants) due to economies of scale. This is particularly true with respect to the specific clauses of lease agreements, which will generally appear as lengthy, standard-form contracts. Each tenant will be rationally ignorant of many details in the bargain, instead relying on a few salient, advertised features (e.g. price, term, included utilities, location, number of bedrooms and bathrooms) to make rental decisions. The aggregate effect of multiple leases, however, gives landlords an incentive to select lease rules to their own maximum benefit, including rules to which well-informed tenants would not necessarily agree.165

Other information problems affect a broader range of tenancies – in rental complexes large, small, primary and secondary. Landlords typically have superior information about the physical unit, its history and past maintenance issues. Tenants, on the other hand, will know more about their own behaviour and financial reliability. Both parties may conceal relevant information about their future plans (as is the case with any long-term contract). Many of these information cost asymmetries, however, give rise to principle-agent

165 Merrill & Smith, infra note 229, pp. 800-801
problems: that is, the costs of one party’s choices are inevitably borne by the other party. For example, landlord responsibility for electricity service (i.e. “inclusive electricity”) eliminates an important incentive for tenant conservation; tenant responsibility to pay for electricity removes an equally-important incentive for landlords to ensure that appliances, windows and other physical features of the unit are energy-efficient.

Even where a landlord and tenant are able to price each other’s expected behaviour into the monthly rent, the possibility of assignment can undermine the original bargain. Landlords typically have the freedom to sell their property and/or hire independent property managers, suddenly creating new parties, practices and risks from the tenants’ perspective. Conversely, tenants may wish to sublet or assign their rental units to third parties who may represent new risk levels for their landlords. Unlike straightforward contracts for the delivery of a discrete good or service, the long-term, intertwined nature of residential tenancies and the inherent principle-agent problems on both sides make unilateral transfers to third parties problematic.

Finally, most tenants incur disproportionate costs when tenancies end – costs that are not easily shared with landlords, due to uncertain length of tenure. A tenant’s sunk costs in a specific tenancy can range from local school enrollment to the choice of whether to own a vehicle. While a tenant might be able to anticipate and ‘price in’ these costs for a fixed-term tenancy, lease renewal at the end of term may present a problem if the landlord can raise rent purely to take advantage of the tenant’s desire to avoid losses associated with moving. This is a variation of what economists have called a “hold-up problem” and may
require either regulatory intervention or creative lease bargaining by the parties – both discussed in Part III.¹⁶⁶

¹⁶⁶ Iacobucci, infra note 191, pp. 326-330
5. Geographic Differences

The highly uneven geographic distribution of rental housing supply is not a market failure *per se*, but an important feature that affects the design and implementation of many housing access policies. As a generally immovable service, housing markets may be characterized as somewhat separated by geography insofar as housing providers in discrete, far-apart municipalities are unlikely to compete with each other very much. Property values, costs of providing housing services and market rent levels obviously vary because no two physical units of housing are exactly the same (if only in terms of physical location). However, physical differences in housing units are often completely overwhelmed by differences in location.

Within a given municipality, proximity to employment, educational institutions, services and transportation corridors can have a dramatic impact on the price of certain types of housing. However, land use planning and building policy can direct the relative cost of housing in different neighbourhoods by imposing design specifications on approved construction. As a result, the local, physical distribution of low-income rental units in a given town or city may be attributed, in part, to planning decisions made by local governments.\(^\text{167}\)

Similarly, average rent levels between different municipalities differ – sometimes even more dramatically than the rents within each municipality. Moreover, these average rents trend in different directions and at different annual rates. These deviations may reflect

\(^{167}\) Suttor, *supra* note 34, p. 175
‘real’ market differences in land values, population growth and tenant demand. However, by allowing different rates of settlement area expansion through growth targets and land budgeting, provincial planning policy also directs these trends. Thus while it may not be surprising that the 2010 average rent for all apartments in the remote northern town of Elliot Lake was approximately half the average rent in Toronto, a more nuanced account may be required to explain why the average rent in Sarnia was less than 75% of that which was reported for Woodstock, considering that the former has approximately double the population of the latter.  

While the structural theory of the right to housing (elaborated in Part I) calls for public spending to compensate low-income persons for the ways in which public policy has infringed their (theoretical) housing freedom, it is nearly impossible to determine what component of local rent levels may be attributed to government action. In this respect, private land markets are essentially secondary markets that allow various exchanges, subsequent to an initial and ongoing allocation of land use rights to whichever parties happen to hold title to the specific land being designated. At root, the real estate economy is a planned economy wherein planning decisions are taken to direct secondary market outcomes. For this reason, the sensitivity of government housing assistance to locality – for example, whether it is adjusted for average rents by municipality – is inextricably tied to the same planning considerations.

6. Conclusion

The characteristics of Ontario’s low-income rental housing market are the result of several factors both general and specific. Certain market failures are typical of low-income consumers while others are intrinsic to residential tenancies. The province’s history of regulation in the fields of housing and land use planning has also contributed to a specific policy environment that affects market outcomes. As argued in Part III, many of these outcomes are unintended and/or perverse in light of the goals of housing access policy enumerated in Part I.

Nevertheless, Ontario’s housing policy makers are faced with a low-income housing market in which both supply and demand are somewhat inelastic. Market participants face significant challenges in their allocation of externalities, information and transaction costs. When attempting to overcome these problems, regulators must also contend with a highly uneven provincial landscape in which average rent levels vary widely by municipality, at least partially due to the province’s own planning decisions. The next Part discusses the ways in which effective housing access policy must attend to these market realities.
Part III: Housing Access Policy Choices

“If the misery of the poor be caused not by the laws of nature, but by our institutions, great is our sin.” – Charles Darwin

The accumulation of Ontario’s low-income housing access policies during the past several decades has left a long trail of programs and regulations, many of which have failed to cope adequately with broader countervailing trends of urbanization and growing income inequality. When the shortage of low-income housing emerged as a distinct poverty issue in the post-war period, public housing construction sought to provide shelter more cheaply than the private market. However, the spread of housing affordability problems to the broader working class prompted the heavy-handed imposition of rent and covenant controls on the residential rental market. These policies only served to constrain supply growth, prompting calls for even more subsidized housing, both through direct government provision as well as non-profit and co-operative construction.

Within the past two decades, governments have ceased to be willing to fund further social housing expansion, while partially lifting rent controls on the private rental market. The combination of these policies in the late 1990s placed extreme pressure on lower-income classes – particularly in large urban centres like Toronto where new immigrants continue to settle, downtown property values continue to skyrocket, provincial planning and environmental policies seek to curb urban sprawl and promote densification, and the

169 Hulchanski, supra note 151, p. 9
province’s manufacturing sector continues to decline. Steady increases in homelessness and housing need have prompted the federal and provincial governments to attempt a wide variety of new housing assistance programs, most of which are staggeringly inadequate in terms of sheer scale.

This Part charts a path to housing access reform that sweeps through a trail of abandoned and/or failed policy experiments. It begins with the promotion of a more efficient, competitive rental housing market through the further removal of rent controls and the replacement of mandatory lease covenants with a more flexible set of default rules.

Once the regulation of the private rental market is brought in line with efficiency rationales – and narrow attempts to transfer wealth between landlords and tenants are abandoned – a new approach to housing subsidies must be informed by the distributive and corrective justice rationales developed in Part I. The former principle – that housing assistance ought to implement a maximin strategy – requires that housing assistance prioritize allocations to the very worst-off. The latter principle – that government housing assistance is a remedial response to the prima facie exclusionary effect of public policy and private property on housing freedom – validates housing support that differs by municipality, sensitive to local market differences in affordability.

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170 Suttor, supra note 34, pp. 7-9
1. Rent Control

Many advocates for low-income tenants continue to view rent control as an essential regulatory guarantee of affordable housing. The common implication is that, left unchecked, greedy landlords will raise rent to squeeze every last dime from their vulnerable tenants. This view fundamentally rejects the market as a mechanism for setting rent prices.

It is indeed tempting, if not somewhat intuitive, to consider rent control as a type of distributive justice that limits the economic disparity between landlords and tenants. However, rent control also contributes to catastrophic rental housing supply inelasticities and shortages, preventing the market from responding to increasing housing need. In a context of reduced public investment in housing subsidy, the need to ensure a robust and competitive private rental housing market is paramount to low-income housing access.

The Current Statutory Framework

Immediately prior to the enactment of the *Tenant Protection Act, 1997*¹⁷² (“TPA”), Ontario exemplified one of the most extensive rent control regimes in North America.¹⁷³ Each and every physical rental unit in the province had been recorded in a rent registry, allowing the government to cap the maximum rental rate for any given unit, regardless of the individual landlord or tenant involved. While an annual increase guideline allowed landlords to raise rents by a given percentage each year, further adjustments to rent (owing, for instance, to capital improvements) required application to a Rent Review officer within the Ministry of Housing.¹⁷⁴ Jurisdiction over residential tenancy law was thus bifurcated between Rent Review and the Superior Court (General Division), which continued to hear applications for eviction, repairs, and other landlord and tenant remedies under Part IV of the *Landlord and Tenant Act*.¹⁷⁵

Delivering on one of its key 1995 election provinces, the Harris PC government replaced the rent control regime with a much simpler system of vacancy decontrol under the TPA. At the commencement of a new tenancy (i.e. with respect to a vacant rental unit), landlords and tenants are permitted to freely negotiate the rental rate (by definition, “market rent”) as part of the lease. However, during the course of a given tenancy, rent increases are ‘controlled’ by an annual guideline cap (indexed to inflation). Any further increases require either a new agreement between landlord and tenant, or application to

the Ontario Rental Housing Tribunal (“ORHT”, as it then was) – an administrative body that assumed unified jurisdiction over all residential tenancy matters, subject to appeal as of right to the Divisional Court.\textsuperscript{176} With tenancy disputes now dealt with on a case-by-case basis, the province eliminated its Rent Registry and associated bureaucratic supervision of the rental housing market.

The TPA also maintained many longstanding statutory exemptions to rent control, such as those units subject to rent-geared-to-income subsidies, student residences provided by post-secondary institutions, and newly-built units.\textsuperscript{177} The history of this latter exemption in Ontario is an interesting one: it has appeared in almost every rent control statute since the 1970s. Each statute (which has either implemented a particular aspect of rent control or merely updated the existing regime) fits a similar pattern. Governments recognize the vulnerability of low-income tenants as the primary argument in favour of rent control, but recognize that it is both politically unpopular with developers and landlords, and economically detrimental to the maintenance of existing and construction of new rental housing. Thus a date is set – generally one that coincides with the enactment of the legislation – and all rental units that have not been inhabited for residential purposes before that date are exempt from guideline caps on annual increases.\textsuperscript{178} The implied rationale for this exemption is that existing low-income tenants should have the alleged benefits of rent control, without creating any disincentive to the development of new rental housing supply.

\textsuperscript{176} TPA, \textit{supra} note 172, Parts VIII-IX
\textsuperscript{177} \textit{ibid}, ss. 4(2)
\textsuperscript{178} \textit{ibid}
However, successive rent control statutes have undermined this rationale by repeatedly moving up the cut-off date for the ‘new construction’ exemption. By repeatedly imposing the full weight of rent control on recent housing construction that had been built with the benefit of a previous exemption, the province has effectively signalled that rental housing suppliers cannot expect these exemptions to last far beyond a change in government. Just as observers have argued that the Canadian Radio and Telecommunications Commission must carefully balance consumer-focused expediency against fidelity to a “regulatory compact” with market incumbents by avoiding the exploitation of their sunk costs, governments greatly reduce the future efficacy of supply stimulus in the rental housing market when they undermine or reverse past stimulus measures. As it stands, the consensus in Ontario is that private supply response to the ‘new construction’ exemption will be predictably negligible because it is a non-credible commitment.

Interestingly, the Residential Tenancies Act, 2006 (“RTA”) did not follow the pattern of previous statutory rent control updates. By enacting the RTA, the McGuinty Liberal government repealed and replaced the TPA with largely similar legislation that maintained an identical scheme of vacancy decontrol, renamed the ORHT to the Landlord and Tenant Board, and also left the 1998 ‘new construction’ exemption intact without a date change. Whether or not this represents an attempt to restore the effectiveness of the exemption as a stimulant to rental housing supply, it now appears that

182 ibid, s. 6(2)
over 13 years of housing construction will remain completely exempt from rent control with no end in sight.\textsuperscript{183}

**Arguments For and Against Rent Control**

Conceptually, rent control belongs to a portfolio of price control instruments imposed by many welfare states in response to the global economic shocks of the 1970s. To proponents of central economic planning, uncontrolled rent increases can contribute to inflation by raising the price on goods/services that have not changed in substance. From a more market-focused economic perspective, inelasticities of both supply and demand (particularly in low-income urban rental housing, where multi-residential rental complexes are characterized by significant entry barriers and home ownership is not a realistic consumer alternative) may allow economic rent-seeking by landlords. Alternatively, rent controls may be an attempt to avoid a price-rationing of urban rental units that would exclude the poorest tenants.

Many liberal economists, however, view rent control as a paradigmatic policy failure. While some economists may question the true degree of supply and demand inelasticity in rental housing markets,\textsuperscript{184} even those who would accept this premise point out that rent controls are, in any event, among the least desirable of all possible regulatory responses;

\textsuperscript{183} Technically, uncontrolled unilateral rent increases under this exemption are nevertheless restricted to once every 12 months of a given tenancy, and require three months’ notice by the landlord (ibid, ss. 116-119). The author is aware of no legislative proposals to modify this exemption.

\textsuperscript{184} Walker, M.A. “A Short Course in Housing Economics” in Block & Olsen, supra note 77, pp. 38-46
presumably, attempts to directly increase the supply or demand elasticity of the market are superior means of ensuring competitive rent levels. One group of Canadian economists has gone as far as to suggest, provocatively, that the devastation of urban infrastructure resulting from rent control is like that of a military bombing campaign.

The primary criticism of rent control is that it limits (or altogether prevents) the supply of new rental housing in a given market. Conventional microeconomic theory holds that competitive prices result from the intersection of supply and demand curves. If rent control policy holds prices lower than those that the market would otherwise set, fewer units of rental housing will be supplied – despite an increase in demand. If and when this occurs, rent control has an outcome that is distributively perverse: while middle-income tenants either benefit from rent controls or exit the rental market and switch to owner-occupied residences, low-income tenants who neither find a rental unit nor afford to purchase housing will be ‘squeezed out’ of the market altogether. Tenants in the latter case may be forced to ‘double up’ (i.e. crowd into existing units with existing tenants or owners) or move to an otherwise less-preferable housing market (i.e. with lower rents and property values, further away from desired services and employment). In particular, this scenario allocates rental housing on a length-of-tenure basis: an outcome with the potential for distributive unfairness in terms of age, ethnicity and a host of other factors.

However, rent control is also criticized for making sitting tenants worse off through the physical deterioration of their rental units. Without adequate competition from new rental

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186 Block & Olsen, supra note 77, p. 320
187 Ault, R.W. “The Presumed Advantages and Real Disadvantages of Rent Control” in ibid, pp. 65-77
housing supply, existing landlords have little profit incentive to improve the quality of
their supply. Although rent control precludes economic rent-seeking behaviour in the
form of direct price gouging by landlords, little stands in the way of indirect rent seeking
through reduced expenditures on maintenance and other housing services. So long as
rental housing supply is held artificially below demand and price rationing is precluded,
the rationally self-interested landlord will spend as little as possible on existing
properties. In these circumstances, tenants who do not constantly litigate against their
landlords may expect to live in conditions that fall below the minimum health, safety and
maintenance standards set by law. Indeed, the most extreme cases may involve a
combination of incentives for landlords to allow physical deterioration of their properties
until condemnation, demolition or conversion to an altogether different land use is
warranted.\textsuperscript{188}

\textbf{Arguments For and Against Vacancy Decontrol}

The foregoing theoretical criticisms of rent control have been borne out by a variety of
empirical studies, and provide a partial explanation of the legislative history of rent
control in Ontario.\textsuperscript{189} As noted above, the traditional use of rent control exemptions for
new construction reflects an implicit understanding of the likely inadequacy of rental
housing supply growth without those exemptions. However, the inherently short-term and

\begin{footnotesize}
\textsuperscript{188} \textit{ibid}
\textsuperscript{189} \textit{supra} note 161
\end{footnotesize}
increasingly negligible utility of those exemptions rendered them an inadequate counterweight to the destructive nature of rent control. By the mid-1990’s, a rapid decline in state-sponsored construction of social housing (consistent with a general decrease in Canadian public program spending across federal and provincial levels of government) deepened the need for private markets to take the lead in supplying low-income urban housing.190

In this context, vacancy decontrol was chosen as a solution to decades of stagnation in Ontario’s rental housing market. Its justification (especially compared to total decontrol) is presented most notably in Edward Iacobucci’s 1995 article, “Rent Control: A Proposal for Reform.”191 Iacobucci outlines a potential market failure in residential tenancies arising from the asymmetric distribution of information, sunk costs, transaction costs and externalities related to moving from one rental unit to another. According to this account, a landlord unrestrained by statutory rent control may seek to set rents higher for sitting tenants than for new tenants, to exploit the tenant’s desire to avoid the cost of moving (insofar as it may exceed the landlord’s cost of finding a new tenant). Similarly, landlords may also impose elevated rent increases on difficult, undesirable or otherwise costly tenants in order to achieve ‘economic evictions’. Iacobucci argues that the externalized costs of tenant turnover – from the instability of children changing schools to administrative address changes – may justify regulation that promotes stable, long-term tenancies and that induces landlords and tenants to allocate future costs and risks in their negotiation of the initial rental price. His particular suggestion is legislation that creates

190 Layton, supra note 156, p. 7
an inflation-based annual cap on rent increases as a default term of leases for residential tenancies.\textsuperscript{192}

The TPA, enacted within a few years of Iacobucci’s article, implemented a similar framework – but rather than creating default rules, it imposed guideline increase caps (with no ability for parties to contract out) and specific, well-defined exceptions to that guideline. As the provincial government prepared legislation to continue this framework nearly ten years later, it noted that vacancy decontrol appeared to have had a positive effect on both new rental housing starts and vacancy rates.\textsuperscript{193} However, other empirical sources suggest that a large portion of new rental housing supply has derived from the rental of what were previously owner-occupied units, rather than purpose-built, multi-residential rental complexes.\textsuperscript{194} While this type of small-scale rental housing supply is inherently less stable, it may also represent a temporary correction as space in an over-supplied, owner-occupied housing market flows back toward an improved rental sector.

Proponents of the current statutory regime also note that, while average rents in Ontario experienced an initial spike after the introduction of the TPA, relative price stability has set in over time. An initial period of volatility in market rents is intuitively explained by the initial characteristics of the Ontario rental housing market immediately after the enactment of the TPA: with vacancies still relatively low and construction of new supply lagging the introduction of vacancy decontrol, intense consumer demand for relatively few vacant units caused rental rates to soar. This may have been especially compounded

\begin{flushleft}
\textsuperscript{192} \textit{ibid}, p. 330-332  \\
\textsuperscript{193} \textit{supra} note 161  \\
\textsuperscript{194} Hulchanski, J.D. \textit{Witness Statement & Report}, Lascelles Blvd. Appeal, OMB File Number S010050 (Toronto: Centre for Urban and Community Studies, 2006), pp. 7-12
\end{flushleft}
by large landlords’ desire to cross-subsidize any losses on controlled rents for long-term sitting tenants. But as tenant turnover and new supply have eventually blunted these effects, competition between landlords appears to have gradually slowed the rate of increase in average rents.195

Critics of vacancy decontrol – mostly in the tenant advocacy community – argue that the ability to raise rents between tenancies creates perverse incentives for landlords to end tenancies whenever possible and (sometimes) in bad faith.196 This may be somewhat less true where increased tenant turnover has closed the gap between ‘market rent’ and rent levels for sitting tenants, but remains a distinct concern in cases of eviction for landlord’s or purchaser’s own use, which rely primarily on the landlord’s evidence of his or her own intentions and are thus difficult for tenants to dispute. While the RTA currently provides tenants with monetary remedies for termination in bad faith on an ex post basis, those claims generally require vigilant investigation of landlords by their ex-tenants. Moreover, such remedies capture neither the complete asymmetric transaction costs experienced by the uprooted tenant, nor the externalized costs absorbed by third parties such as the state and community.

Critics of vacancy decontrol may not be receptive to the central economic argument against full rent control – that it prevents the market from adequately and affordably meeting the housing needs of low-income tenants. Many tenant advocates believe that the private market can never provide adequate, affordable housing and assert that low-

195 Smith, supra note 173, pp. 217-219
income housing needs must be met through direct public provision of social housing (as discussed later in this Part).\textsuperscript{197} If the same advocates believe that the landlord-and-tenant relationship is intrinsically exploitative, they may not view the creation of new private rental housing supply as a meritorious policy goal. Persons holding these views advocate a return to complete rent control as the preferred policy for Ontario. However, this view does not appear likely to influence government policy in the foreseeable future.\textsuperscript{198}

**Arguments For and Against Total Decontrol**

Other observers argue that Ontario’s current vacancy decontrol still constitutes too much intervention, and would prefer the relaxation or removal of regulatory caps on rent increases within tenancies, as without. The current position advanced by residential landlord industry representatives in Ontario recommends an approach similar to that which is employed by British Columbia: vacancy decontrol with annual rent increases (on sitting tenants) capped at inflation plus 2%.\textsuperscript{199} Academic observers, however, note that if the guideline exemption for post-1998 construction remains unchanged in Ontario,

\textsuperscript{197} See Shapcott, M. “State of the Crisis, 2003: Ontario housing policies are de-housing Ontarians” Ontario Alternative Budget Technical Paper #2 (Toronto: Canadian Centre for Policy Alternatives, 2003)

\textsuperscript{198} The 2011 Ontario Liberal, Progressive Conservative and New Democratic Party election platforms make no reference to rent control. However, Parkdale-High Park MPP Cheri DiNovo did introduce a private member’s bill in 2010 that would have applied rent increase guidelines to vacant units. This bill did not proceed past first reading before it died on the order paper. See 39:2 Bill 112, Residential Tenancies Amendment Act (Tenants’ Rights), 2010, s. 3 (Toronto: Ontario Legislative Assembly, 2010, http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2408&isCurrent=false&detailPage=bills_detail_the_bill&Intranet=)

\textsuperscript{199} See CBC article, supra note 171
all residential rental housing will eventually be free of rent control. On this view, vacancy decontrol is a transitional policy designed to increase the fiscal viability of pre-1998 rental housing stock without allowing the unrestrained price shocks that would surely befall tenants suddenly exposed to complete decontrol.

The arguments in favour of total (eventual) decontrol are largely those against traditional rent control, plus additional responses to Iacobucci’s specific case for vacancy decontrol. The first is that, while the dissolution of tenancies may often represent a far greater cost to tenants than to landlords, tenants are nevertheless in the best position to estimate their personal levels of risk-adverseness and future sunk costs when entering a tenancy. If allowed to negotiate accordingly, one might expect different tenants to purchase different levels of rent increase security from landlords, in ways that more closely reflect each tenant’s needs. Just as homeowners can choose between fixed and variable rate mortgages (or some combination thereof), and purchase price protection for their electricity and natural gas utilities, so too should tenants have the choice to give up long-term price security in exchange for lower initial rent levels.

Moreover, it is unclear that an adequately supplied rental housing market would lead to the kind of in-tenancy gouging on rent increases that is contemplated by guideline caps. As the vacancy rate increases, a landlord’s expected cost of tenancy dissolution increases – and so too does the landlord’s interest in having existing tenants stay on. As such, adequate supply may be expected to limit even uncontrolled, in-tenancy rent increases –

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200 Smith, supra note 173, p. 216
201 Or, as the case may be, varying lease clauses, such as greater limits on liability for prospective rent if the tenant abandons the unit. See proposed increases to freedom of contract later in this Part.
in much the same way that competition between telecommunication providers induces them to offer a mixture of loss-leading discounts for new users and periodic incentives to retain existing customers.

A second response to Iacobucci’s argument is to question whether uncaptured externalities arising from tenancy turnover/circulation are a more significant market failure than the net efficiency losses associated with vacancy decontrol. By rewarding tenants for their decision to remain in the same rental unit rather than move, the current regime entails inefficiencies associated with tenants who might otherwise have chosen to move for reasons ranging from a change in employment to personal acrimony with neighbours. Absent this type of distortion, tenancies have the advantage of being a highly flexible form of shelter (compared to owner-occupied premises, whose purchase and sale typically generate greater transaction costs than the creation and dissolution of tenancies). In jurisdictions where rent control is applied to longstanding tenancies only – perhaps most infamously, New York City – analysis estimate significant social costs associated with tenants who stay in old buildings because they do not wish to ‘give up’ their rent control.202 As employment markets demand greater flexibility and urban planners attempt large-scale renewal, long tenancies may not be the unqualified goods that they once were.

One Statute, Three Visions

In Ontario, the RTA contains the legislative raw material for all three perspectives regarding rent control. Some tenant advocates view vacancy decontrol as a momentary excess of neoconservative zeal that might be easily corrected through a return to annual guideline controls on vacant units. Their moderate counterparts view the current system of vacancy decontrol as basically appropriate over the long term, perhaps with only minor tweaks needed to ensure the correct allocation of future costs in the setting of initial ‘market rent’. However, should the current guideline exemption for post-1998 construction remain unchanged, others may rightly view vacancy decontrol as a purely transitional policy aimed at the eventual absence of rent control for all rental housing stock.

While a framework limiting annual rent increases to inflation may represent the type of arrangement preferred by most tenants, the recurrence of a new construction exemption in Ontario’s rent control legislation represents a tacit admission that this type of rent control – even in the form of vacancy decontrol – stifles the construction of new rental housing supply. This phenomenon is taken to represent a lack of investor confidence that the cost of providing rental housing will remain constant over long tenancies, adjusting for inflation. Other residential land uses, such as condominiums, allow parties to more adequately allocate the risk of future cost increases (through changing maintenance fees) and the risk of changing demand (monetized through changes to property values).

203 supra note 171
204 Smith, supra note 173, p. 216
Recommended Reforms

The foregoing analysis suggests the eventual and complete phase-out of rent control – subject to a few default rules about the permitted frequency of increases – in favour of price structures determined on a market-driven basis. The promotion of stable, long-term tenancies may be a communitarian value, but it is not necessarily a Kaldor-Hicks efficient goal – especially if accomplished by imposing high rents and rental housing shortages on other tenants. Neither is it true that distributive or corrective justice goals would support attempts to transfer wealth from landlords to tenants specifically; the maximin strategy contemplates housing support based on transfers throughout a given jurisdiction – from those who have and can afford affordable housing, to those who do not and/or have not. Rather, distributive justice clearly favours measures to promote a robust rental housing market in order to increase the supply of the type of housing demanded by low-income and/or under-housed persons.

A key obstacle to the full removal of rent controls appears to be the degree to which the low-income rental housing market has sufficient supply elasticity and vacancy rates. Thus, the transition to a decontrolled market requires a variety of subsidies and incentives to increase vacancy rates and maintain affordability. Within the realm of direct tenancy regulation, legal strategies to shift the costs of tenancy termination away from tenants and onto landlords would also seem to help counteract economic rent-seeking in the form of mid-tenancy rent increases. This may include more explicit permission for the tenant to take back his or her rental deposit as soon as notice of termination is given (reducing the landlord’s security, cash on hand and leverage while providing the tenant with the funds
needed to pay the rental deposit on a new tenancy elsewhere). The statutory notice period for unilateral tenancy termination by tenants – currently requiring two clear months’ notice by the tenant in writing – might be reduced to a single month, and/or permitted on a rolling 30-day basis, allowing the tenant to pro-rate the final, partial month’s rent. Permitting tenants to begin and end tenancies on irregular dates would increase the likelihood of at least a partial month’s vacancy loss for landlords when their tenants decide to end the tenancy. Such a practice may also allow tenants to arrange for some overlap between old and new tenure to reduce moving costs and risks; a short-term unit vacancy may also leave the landlord with an opportunity to perform maintenance, repairs and/or upgrades on the unit between tenants. Ultimately, a more equitable sharing of the costs of lease termination between landlord and tenant will improve the tenant’s bargaining position vis-à-vis the landlord who is thinking about raising the rent.

The degree to which landlords and tenants can customize the allocation of risk of future rent increases during the negotiation of the lease is closely linked to broader questions about the appropriate extent of freedom of contract between landlords and tenants generally. As discussed below, increased flexibility to stimulate competition remains a theme in proposals for residential tenancy reform.

\[205\] While this may represent the intuitive assumption of most tenants, the RTA currently permits the landlord to retain the deposit until after the tenant gives up vacant possession – see supra note 181, ss. 105-106.

\[206\] ibid, ss. 44, 47
2. **Covenant Control**

The foregoing discussion of rent control focuses on a subset of a broader regulatory problem: freedom of contract and the degree to which it is permitted in residential tenancies. Aside from setting limits on the amount of rent that landlords can charge tenants, regulation also controls the content of the lease agreements that landlords and tenants are permitted to make. While such regulation is generally understood to be a form of tenant protection, it also constrains the variety of residential tenancies – and, by extension, housing options – available to tenants.

At common law, all tenancies were traditionally viewed as interests in property that were conveyed through lease agreements. In the same way that outright ownership of real estate is conveyed by agreement of purchase and sale, tenancies were not themselves treated as contracts but as property rights that were transferred from landlord to tenant by lease agreement. It is important to recall that while the common law of contract generally gives legal effect to whatever particular terms were reached between a given set of parties, the common law of property severely limits the types of customizations and/or changes that can be made to property interests through conveyance.

As such, traditional leases had only to specify the physical rental unit, the parties, the agreed upon length (or term) of the lease, and the amount and method of rent payment from the tenant to the landlord. These particular covenants (clauses of the lease agreement) were considered independent – that is, the breach of one clause did not negate the rights of any party under the other clauses. A tenant’s failure to pay the landlord in
the agreed amount and at the agreed time – and as such, commit a breach of the tenant’s covenant to pay rent – gave rise only to a debt claim by the landlord, and did not disturb the tenant’s right to live in the rental unit for the remainder of the term of the tenancy. The particular independence of this right was otherwise known as ‘security of tenure’.

Similarly, the common law created a number of implied covenants that were automatically included in all tenancies. These included the tenant’s exclusive possession of the unit, the tenant’s quiet enjoyment of the unit, and a covenant against waste – that is, an agreement that the tenant would return the rented property to the landlord in the same condition in which tenant originally found it, less any reasonable wear and tear. This covenant, combined with the legal maxim of caveat lessor, allocated most repair and maintenance responsibilities to tenants.

**The Current Statutory Framework**

Ontario’s departure from the property-based approach to residential tenancies in the mid-1970s mirrored similar developments in many North American jurisdictions and was influenced by several parallel developments. In general, advocates for tenancy reform argued that the common law of leases had developed from the standpoint of the feudal order and (predominantly) rural land, both of which contrasted sharply with the increasing urbanization of the post-war period. American legal activism in this area centred on the advancement of an implied covenant of habitability to replace caveat
lessor – a doctrinal shift that took eventual root in most jurisdictions. Moreover, reformers argued that the covenant of habitability ought to be directly linked to the tenant’s obligation to pay rent; this approach contemplated the kind of interdependence of covenants that is characteristic of contract law. This shift to the use of contractual principles was mirrored by the Ontario courts in the *Highway Properties* case, which introduced mitigation of damages and breach-of-contract principles into the law dealing with abandonment of tenancies.

These trends culminated in the release of recommendations by the Law Commission of Ontario for broad reform of residential tenancies law, implemented through 1975 legislation that added Part IV to the *Landlord and Tenant Act*. These provisions effectively re-categorized residential leases as contracts with interdependent covenants and duties of mitigation. At the same time, the statute continued mandatory covenants of non-interference by tenants, exclusive possession, quiet enjoyment, and maintenance by landlords – declaring that all lease clauses that were inconsistent with the statute were void *ab initio*.

This new framework also sought to balance security of tenure with the interdependence of tenant covenants (i.e. to pay rent) and landlord covenants (i.e. to permit tenant occupancy until lawful termination of the tenancy). Most importantly, the statute featured a general prohibition on the recovery of possession of rental units by all persons and

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207 Merrill & Smith, *infra* note 229, pp. 820-823
210 LTA, *supra* note 175
211 *ibid*
methods except by the Sheriff’s Office enforcing a writ of possession issued by the Superior Court. In turn, a writ of possession for a rental unit – the prerogative common law forerunner to the modern eviction order – could only be granted upon successful application by landlords under grounds enumerated in the statute.\(^\text{212}\) The statute also provided that tenancies automatically renew and continue on a month-to-month basis until they are terminated by agreement between the landlord and tenant, unilateral notice by the tenant, or writ of possession sought by the landlord. Thus, a tenant that paid rent and complied with all other statutory covenants could expect to retain exclusive possession of his or her rental unit in perpetuity, subject to a few narrowly-defined grounds of no-fault termination (e.g. demolition) requiring notice, judicial process, and (often) compensation.\(^\text{213}\)

Ontario’s statutory management of residential tenancies as restricted contracts has continued in the manner described above, with little modification, to the present day. Paired with various incarnations of rent control (discussed earlier in this Part), this regulatory approach attempts to standardize all residential tenancy agreements, removing all but a few factors from market-based determination. Once the requirements of the statute (currently the RTA) are met, all that remains open to competitive bargaining is (a) the physical location, appearance, services and features of each rental unit (beyond the constraints already imposed by land use planning instruments and municipal property standards), (b) the identity of each tenant (beyond the constraints imposed by human

\(^\text{212}\) ibid
\(^\text{213}\) ibid
rights law) and (c) the initial rental price for each tenancy (for tenancies commenced since the advent of vacancy decontrol).

In this sense, residential tenancies have hardly achieved the ‘contractual’ character ascribed to them by reformers and contemporary commentators;\(^\text{214}\) residential leases are, arguably, no more customizable than the sale and purchase of residences for owner occupation. The absence of contract principles in modern residential tenancy law also extends to the regime of tenant remedies originally instituted by the 1975 statutory reforms, which emphasize injunction, rescission (i.e. ‘rent abatement’) and reliance damages (i.e. ‘out of pocket expenses’).\(^\text{215}\) By largely avoiding expectation damages for tenants – even in cases where the landlord-tenant relationship has experienced irreparable damage – the Ontario statutory regime fails to affirm voluntary leases as Pareto efficient bargains. Indeed, the most straightforward critique of the aforementioned restrictions on freedom of contract between landlords and tenants is that they are inefficient in at least some cases, because they force lease parties to enter agreements that are different from the ones they might ideally negotiate. The \textit{prima facie}, aggregate consequences of such restrictions are that tenants pay higher rent and/or receive less optimal housing. Worse, some landlords may supply fewer rental units than they would at lease terms inconsistent with the legislation; likewise, some persons may not consume rental housing that they otherwise would have under a lease agreement inconsistent with the legislation.

\(^{214}\)参考 \emph{Re Amendments to the Residential Tenancies Act (N.S.)}, [1996] 1 S.C.R. 186 at 103

\(^{215}\) RTA, supra note 181, ss. 30-31
Arguments For and Against Minimum Standards

As outlined in Part I, however, a variety of rationales may justify regulatory infringement of freedom of contract. The first (and perhaps most common) argument for the ‘no contracting out’ provisions of the RTA is the apparent inequality of bargaining power between most landlords and most tenants. On this account, the economic disparity between the parties – combined with the tenant’s more urgent human need of shelter – allows landlords to ‘bully’ tenants into accepting bargains that are unfair, unjust and/or inefficient. While this argument shares much in common with the doctrine of unconscionability in the common law of contract, its economic meaning is unclear. One possible interpretation is that, on the premise that rental housing markets are characterized by inelasticities of both supply and demand, statutory covenant control performs the same function as rent control: a strategy to prevent economic rent-seeking by landlords.

Of course, this rationale contemplates a lack of competition by landlords and, in any event, is probably inferior to measures that might directly increase the elasticity of either supply or demand for rental housing. Sufficient market competition may be expected to induce landlords to offer the types of lease options demanded by their customers, in sufficient variety to meet the individual preferences of most tenants. Notwithstanding those objections, however, covenant control is at least notionally consistent with complete rent control. The latter sets a maximum monthly rental charge for each unit

216 Barber, infra note 221 at 12-14
217 See Treblicock, supra note 9, pp. 119-120
(adjusted for inflation each year); the former sets minimum standards for the ‘product’ that the tenant may purchase with the (capped) monthly rent.

If statutory covenant control does share the policy rationale of full rental control, it becomes necessary to address similar distributive justifications. Claims that this regime might accomplish distributive justice between landlords and tenants can be dismissed insofar as landlords do not represent all real property owners and are thus an incomplete class to target with maximin strategies. Moreover, minimum lease clauses do not transfer wealth or housing in a sufficiently competitive market – at best, they reflect the leases that some tenants would have demanded anyway; at worst, they force tenants to purchase a more expensive tenancy than demanded. Finally, the market outcome – a probable reduction in rental housing supply – is distributively perverse, since owner-occupied housing is often the only alternative option.  

Similarly, there is little intuitive basis for the proposition that communitarianism motivates the current regime of covenant control in Ontario. While a few individual guarantees – such as the tenant’s right to pets and exclusive possession (e.g. the freedom to have visitors) – might derive, in part, from social values of individual control over one’s household, such guarantees are more forcefully explained by commitments to freedom and legal personality within the realm of corrective justice (as discussed in Part I). Other communitarian commitments manifest in local community by-laws – for example, regarding a daily schedule of acceptable noise levels or required upkeep of the

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218 Another option, of course, is for low-income tenants to accept de facto illegality (either knowingly or otherwise) in the tenancy.
219 RTA, supra note 181, ss. 2(1) and 14
external physical features of residential structures – do not readily explain the particular allocation of responsibility for compliance as between landlord and tenant.\textsuperscript{220}

In any case, the aforementioned explanations for covenant control imply a policy that creates minimum protections for tenants, leaving them to bargain for more when negotiating their residential leases. However, this is not the form of covenant control that currently exists in Ontario.

\textbf{Strict Judicial Characterization of Covenant Control}

The Ontario courts have taken several opportunities to clarify the precise meaning of the ‘no contracting out’ provisions of the TPA and RTA, and in doing so, have arguably surprised the very advocates of a minimum standards approach to covenant control. Rather than interpreting these statutes in light of presumed concerns about inequality of bargaining power and/or rent-seeking in an inelastic market, the courts have adopted a different and somewhat formal approach such that the RTA, as currently applied, imposes lease clauses that are the minimum and maximum tenancy rights from the perspective of either party. The cumulative effect of these decisions has thus been to undermine the aforementioned arguments (i.e. protection of the systematically weaker party) supporting the current regulation.

\textsuperscript{220} RTA, \textit{supra} note 181, ss. 20, 33-34
One such decision, 1086891 Ontario Inc. v. Barber, involved a dispute over the enforceability of the landlord-applicant’s promise to forego annual rent increases for the remainder of the tenant-respondent’s tenancy. Although the landlord’s promise was clearly made for the purpose of inducing the tenant to continue renting from the landlord, a majority of the Divisional Court panel held that the promise was nevertheless inconsistent with the landlord’s statutory “right” to annual guideline increases under the TPA. By characterizing the statutory rent increase rules as inalienable landlord rights – analogous to the tenant’s right to have the rental unit maintained in a safe and habitable state by the landlord – the Barber decision rejected the argument that the TPA (and, presumably, the RTA after it) should be interpreted as remedial market regulation that counteracts inequalities of bargaining power and protects tenants. In the closing paragraph of his dissenting opinion, Cumming J. criticized the majority’s position as insensitive to the possibility of a competitive tenancy market:

I conclude with the following observation. It would not seem uncommon in a period when the vacancy rate for residential rental housing is significant (given increased supply) for landlords and tenants in the competitive marketplace to negotiate and agree upon increases of rent on lease renewals that are less than the maximum rent allowed under the TPA. In my view, it would be contrary to the TPA, its underlying policy, and the reality in practice, to conclude that a landlord would have the statutory “right” (because of s. 2(1)) to later renege upon this agreed-upon

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221 1086891 Ontario Inc. v. Barber, 2007 CanLII 18734 (ON SCDC) at 1-5
222 ibid at 17-19
rent (if the market later changed such that a higher rent – up to the maximum rent allowed under the TPA – could now be obtained from a prospective new tenant) within the still continuing renewal term at the agreed-upon fixed rent.223

On its own, the Barber decision gives little explicit guidance as to whether a lease may contain any lawful clauses other than a simple copy of the relevant statutory provisions. The facts of the case, however, are certainly paradigmatic of a tenant attempting to bargain for something only slightly better than the minimum guarantees of the RTA. If the statutory provisions relating to rent represent both the inalienable right of the landlord to seek annual increases and the inalienable right of the tenant against increases that are either above the annual guideline or occur less than 12 months apart, one finds no middle ground within which the parties might negotiate or be subject to market discipline. At the very least, the Court could have adopted a purposive ‘tenant protection’ approach in Barber. This is because, against the backdrop of an existing tenancy, agreements and modifications to the lease lend themselves to an exposition of the precise consideration that flows to each party (e.g. the addition or removal of services and facilities). In these circumstances, the Court could have only invalidated bargains where the tenant purports to give up a right under the statute.

Where lease clauses are negotiated at the beginning of the tenancy together with the rental amount, however, it is far less clear which departures from statutory clauses represent a bargain that is ‘better’ or ‘worse’ for the tenant – rendering even a minimum

223 ibid at 33
protection approach difficult to sustain. Indeed, clauses voluntarily agreed to by an informed tenant presumably reflect what is available, to borrow Cumming J.’s language from *Barber*, “in the competitive marketplace” and reflected in the rent.\footnote{ibid} This conflict between the efficiency of free contracting and the paternalism of minimum protection regulation arguably animates the recent decision of the Court of Appeal in *Montgomery v. Van*.\footnote{Montgomery v. Van, 2009 ONCA 808 (CanLII)}

The *Montgomery* case dealt with the enforceability of a lease clause purporting to make snow removal on steps and walkways the responsibility of tenants in a small rental complex of six units. While walking on the steps to her basement apartment during winter, the tenant slipped on accumulated ice and fell while holding a glass juice bottle, causing irreparable tendon and nerve damage to her left hand. The tenant sued her landlord for negligence. The landlord’s defence pleaded the lease clause that made snow removal the tenant’s responsibility; the tenant replied that the clause was void as inconsistent with the RTA, which provides that the landlord must maintain the rental unit and complex in a good state of repair.\footnote{ibid at 2-8} The question of law before the Court in *Montgomery* was, therefore, whether a landlord can delegate all or part of its maintenance duties to a tenant (in the same way that a landlord might hire a maintenance contractor).

The Court of Appeal found in favour of the tenant-plaintiff, noting that the specific lease

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\footnote{ibid}
\footnote{Montgomery v. Van, 2009 ONCA 808 (CanLII)}
\footnote{ibid at 2-8}
clause in question was indeed void because it was overbroad and not severable from the lease as a freestanding contract with certainty and consideration.\textsuperscript{227}

This result is somewhat confusing, particularly because the decision contemplates that a landlord and tenant may indeed ‘contract out’ of certain provisions of the RTA so long as the parties do so in a carefully formal manner. Applying the ratio of \textit{Montgomery} to the facts in \textit{Baber}, for example, might have permitted the landlord and tenant in that case to reach a valid agreement to “freeze” the rent in the following manner: by entering a separate contract in which the landlord promises to refund any excess rent paid by the tenant over a given amount, so long as the tenant does not terminate the tenancy. Therefore, \textit{Montgomery} appears to stand for the proposition that any statutory allocation of risk, responsibility, right or duty between landlords and tenants under the RTA can be modified through a creatively-drafted side agreement that is enforceable as a separate contract.

As a practical matter, the monthly rental payments (in a competitive market) might be expected to reflect the tenant’s assumption of snow removal duties, regardless of the language used in the relevant lease clause. This underscores a central liberal critique of the minimum standards approach: who is to say that the tenant in \textit{Montgomery} was not better off shovelling her own steps in winter rather than covering the landlord’s cost of doing so as part of the monthly rent? If a tenant is informed about the relevant lease clauses and agrees to them freely, it is difficult to say which – if any – clauses have made the tenant worse-off compared to the allocation imposed by the RTA. \textit{Montgomery}

\textsuperscript{227} \textit{ibid} at 13-16
affirms that landlords and tenants can indeed modify this allocation, albeit with a considerably greater procedural burden that will not necessarily require greater awareness of the agreement by the tenant.\textsuperscript{228} As the foregoing analysis demonstrates, however, it is this awareness that should be the focus of the rule’s concern.

**Efficient Selection of Rights Strategies in Property and Contract**

As it happens, compelling efficiency grounds do exist to justify some degree of legal covenant control for residential tenancies, albeit something quite different from the status quo combination of the RTA, Barber and Montgomery decisions outlined above. This justification arises from the information cost asymmetries identified in Part II and their interaction with the theoretical nature of property and contract rights. Therefore, a brief and somewhat abstract review of the relevant theory is needed at this juncture.

Most observers accept that tenancies are, by nature, a kind of legal hybrid between pure models of contract and property. In their 2001 article entitled “The Property/Contract Interface”, Thomas Merrill and Henry Smith advance a descriptive and normative theory that relates the nature of private rights to information costs and asymmetries.\textsuperscript{229} Applying this framework to four areas of law at the intersection between traditional contract and property regimes – including tenancies – the authors outline the Kaldor-Hicks efficient

\textsuperscript{228} At no point in the Court’s decision does the issue of tenant awareness arise; indeed, the Court’s comments imply that the landlord must merely draft its clauses more carefully, i.e. according to the directions provided by the Court.

\textsuperscript{229} Merrill, T.W. & Smith, H.E. “The Property/Contract Interface” 101 Col. L. Rev. 773
conditions for regulatory departure from the Pareto efficiency conventionally associated with freedom of contract.

Merrill and Smith build their framework on the work of Wesley Hohfeld, the early 20th century American jurist – specifically, his formal account of rights *in rem* and *in personam*. Hohfeld challenged the common view that these civil law categories are qualitatively distinct (with *in personam* rights being between individuals and associated with contract, while *in rem* rights attach to things and are associated with property). Instead, Hohfeld asserted that the only real distinction between these types of rights is one of quantity: *in personam* rights may be held as against one or a few persons, and *in rem* rights are claimed as against many persons (i.e. the whole world). Thus Hohfeld preferred to term *in personam* (i.e. contract) rights as “paucital” rights, and *in rem* (i.e. property) rights as “multicital” rights, asserting that the complexities of the latter category derive primarily from the greater number of persons involved.\(^{230}\)

In addition, Merrill and Smith adopt a specific objection to Hohfeld’s work raised by Albert Kocourek, which adds an additional dimension to the comparison of property and contract. Kocourek argued that property rights are not only characterized by a large class of associated duty-holders but, in many cases, an indefinite class as well.\(^{231}\) Without necessarily agreeing with Hohfeld and Kocourek’s assertions about the character of *in rem* rights, Merrill and Smith nevertheless integrate the work of both theorists to develop

\(^{230}\) *ibid*, pp. 780-783  
\(^{231}\) *ibid*, pp. 783-785
a taxonomy of private rights based on two binary variables: number and indefiniteness of duty-holders.\footnote{ibid. pp. 785-786}

Thus, the simple or paradigmatic contract creates rights that are held against a small number of definite persons; simple or paradigmatic property rights are held against a class of persons that is both large and indefinite. Yet for Merrill and Smith, the combinatorial possibilities of these variables lead to two additional, “intermediate forms” of rights between in personam and in rem categories. Rights for which the class of duty-holders is large yet definite (e.g. identifiable) are termed “compound-paucital” rights, while those for which the class is small yet indefinite are termed “quasi-multicital”.\footnote{ibid}

Having identified these four types of rights, Merrill and Smith observe that the relative size and indefiniteness of rights contribute to specific types of (asymmetric) information costs. The authors predict that four unique legal/regulatory strategies will be efficiently deployed to best deal with each type of right. For in personam rights, a “governance” strategy allows parties to freely customize their legal relationship in a way that is likely to be Pareto efficient. However, in rem rights are generally regulated by a “control” strategy – that is, one that invests the rights-holder (i.e. owner) with a general right of exclusive use and imposes a correlative, well-known duty of non-interference on the public. In this way, the large and indefinite class of persons who encounter objects in the world may

\footnote{ibid}
remain rationally ignorant of the owner’s identity and personal preferences in order to respect that owner’s property rights. 234

In the case of compound-paucital rights, Merrill and Smith argue that the law will or should adopt a “protection” strategy. Typified by the standard-form contracts provided by one party (e.g. supplier) to many individuals (e.g. consumers), these rights carry a high risk of market failure where persons in the large class may be rationally ignorant about the terms of the bargain (e.g. the ‘fine print’), creating an incentive for the single party to create unbalanced terms that are not jointly welfare-enhancing for the parties. In such cases, the law should impose a set of default or implied contractual terms that are welfare-enhancing in the majoritarian case and require clear, well-informed consent from members of the smaller class who wish to deviate from those default terms. 235

Yet with regard to quasi-multicital rights, Merrill and Smith predict and recommend a “notice” strategy. For example, in bilateral transactions where one side may typically or frequently assign his or her rights to an unspecified third party, regulation can compel the knowledgeable (e.g. transferring) party to disclose certain types of information that he or she may otherwise have no interest in disclosing. A disclosure mechanism may prevent market failure by, in this example, allowing the non-transferring party to make an informed decision about (efficient) breach depending on the relevant information.

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234 ibid., pp. 799-803
235 ibid., pp. 805-808
received. It also ensures that the party that stands to benefit from the transfer properly internalizes the new information costs arising from the transfer.\textsuperscript{236}

In addition to its remarkable descriptive strength,\textsuperscript{237} Merrill and Smith’s framework expediently translates normative questions of legal theory (i.e. the nature of rights) into economic questions of information cost. Under this framework, the cost asymmetries associated with residential tenancies imply a menu of efficient regulatory responses to each.

\textbf{Regulation of Lease Clauses: the Optimal Mix}

As discussed in Part II, each of Merrill and Smith’s four categories of rights and associated information asymmetries exist in residential tenancies. Yet a strict regime of mandatory covenants (like that envisioned by the RTA and the \textit{Barber} decision) adopts a “control” strategy for most landlord and tenant rights under the lease, inflexibly assigning specific rights and duties to each party as though all of those rights were associated with the kind of insurmountable information costs that justify the \textit{in rem} treatment of property.

Some, but not many, of the rights that comprise a lease agreement satisfy the Hohfeld-Kocourek characteristics of \textit{in rem} rights and may thus justify a “control” strategy of rigid statutory allocation to a clear party. The tenant’s exclusive possession of the rental

\textsuperscript{236} \textit{ibid.}, pp. 808-809
\textsuperscript{237} \textit{ibid.}, pp. 849-851
unit and the landlord’s exclusive possession of the remainder of the rental complex (subject to a broad easement for tenants) are consistent standards that enable everything from trespass laws and general civil liability where the public is concerned. Similarly, tort-like nuisance rules governing the rights between tenant neighbours, particularly in large rental complexes, contemplate rights and duties held, from the perspective of the tenant, against a large and indefinite class of fellow tenants. As noted above, corrective justice and communitarianism may also justify the inalienable right of tenants to a degree of physical control over their own homes and a reasonable expectation of non-interference by other tenants.

Similarly, the RTA currently provides a largely satisfactory approach to quasi-multital rights. While the landlord is compelled to provide its legal name and address for service to tenants within one month of the commencement of the tenancy, perhaps the statute should impose similar notice requirements on successor landlords and mortgagees in possession. Where tenants are concerned, the RTA provides an elaborate and well-defined process of notice and approval for subletting and assignment of the tenancies to third-party tenants.238

What remains, therefore, is the crucial distinction between in personam and compound-paucital rights that relate to most of the clauses comprising residential leases. Urban multi-residential rental complexes immediately fall into the latter category, and their experienced corporate landlords have an incentive to develop lengthy, standard-form lease agreements that most tenants will not read in detail. Even in the case of smaller

238 RTA, supra note 181, ss. 12, 95, 97
landlords administering fewer rental units, accumulated experience with different tenants over time may realistically generate an information advantage for the landlord with respect to the rental unit and associated services. Merrill and Smith note that in such cases, both the size of the duty-holding class and the majoritarian strength of the default rule (that is, the size of the class majority for which a proposed default rule is welfare-enhancing) will inform the strength of the default rule (i.e. the transaction cost imposed on parties who wish to contract around it). 239

While the Montgomery decision does appear to allow limited contracting around many of the provisions of the RTA through secondary agreements, its adherence to Merrill and Smith’s “default rule” strategy is neither explicit nor reliable. Because the Court of Appeal placed severability and separate consideration at the forefront of its analysis, there is a significant risk that landlords may simply redraft their standard-form lease clauses in a way that meets those formal requirements without necessarily alerting tenants to deviations from the provisions of the RTA.

While a more explicit “default rule” strategy is required, the appropriate judicial strength of default tenancy clauses is unclear. Secondary rental suppliers and landlords of small rental complexes may face equally informed and experienced tenants with whom any bargain is likely to produce in personam rights. For example, the right to evict a tenant for personal, family or purchaser’s own use is currently guaranteed to all landlords and

239 supra note 229, pp. 806-807
purchasers except large or multi-shareholder corporations. The beneficial majoritarian default rule for all landlords may indeed be one that excludes this form of eviction, insofar as primary rental supply is, by definition, dedicated to rental and not owner-occupancy. However, even when the class of landlords is narrowed to individuals and individually-held corporations, the benefit of this right is still heavily dependent on the future intentions of the landlord. Rather than treat own-use evictions as an in rem or quasi-multital right, the RTA might more efficiently limit those forms of eviction to landlords of rental complexes containing, say, fewer than six rental units and where the option is explicitly included as a lease clause.

Moreover, the majoritarian strength of landlord responsibilities for maintenance and repair is moderate and highly variable. Tenants who rent individual houses will often be the least-cost avoiders of some, if not all, maintenance risks; long-term tenancies within multi-residential complexes may create principal-agent problems where the risk of repair costs are largely subsumed by the tenant’s behavioural ‘wear and tear’ on the physical unit.

While the postwar majoritarian tenancy shift from rural and single-family structures to urban apartment buildings provided the original rationale for the American implied covenant of habitability and its Ontario equivalent under the RTA, several additional factors weigh in favour of a weakened default rule allocating maintenance responsibility.

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240 RTA, supra note 181, ss. 48-49 – while corporations cannot normally exercise these “personal” rights, s. 202 permits the decision makers to pierce the corporate veil and allow eviction for personal use if the corporate landlord or purchaser is substantially owned and operated by a single individual or family.

241 That is, landlords providing primary rental supply, by definition, have no interest in personally occupying the premises and would benefit from rents that reflected this particular lack of risk to the tenant.
As noted in earlier in this Part, a disproportionate supply of Toronto’s new rental housing starts have come from secondary rental supply. Second, no default rule currently exists with respect to utilities – including the vital services of water and electricity.\textsuperscript{242} Third, condominium legislation does not assign in-unit maintenance responsibility to condominium corporations, despite the compound-paucital nature of typically large condo towers.\textsuperscript{243}

Given the overall need to increase rental housing supply while lowering rent costs, it is at least conceivable that a significant number of tenants may prefer to maintain their own rental units (and/or self-insure against the cost of hiring an independent plumber, for example, when the drain is clogged). Were this possible, it is reasonable to expect that the housing market would supply a greater variety and number of rental units with the option of unbundling certain maintenance services. This unbundling should be permitted in a clear, straightforward manner that ensures tenant awareness of the clause – as opposed to the complex and unnecessary severability requirements set out in \textit{Montgomery}.

**Recommended Reforms**

The current level of statutory control over lease covenants is an inappropriate hold-over from the days of complete rent control in Ontario, and is inconsistent with the promotion

\textsuperscript{242} RTA, \textit{supra} note 181, ss. 123 and 125  
\textsuperscript{243} The \textit{Condominium Act, 1998}, S.O. 1998, c. 19, ss. 90-91 creates a default rule of tenant responsibility for in-unit maintenance, subject to modification in the condominium declaration.
of a competitive rental housing market. Rather than protecting tenants, the rigidity of the ‘no contracting out’ provisions of the RTA (and their interpretation in Barber) has merely outlawed the voluntary bargains that some landlords and tenants would otherwise reach freely. By forgoing these efficient bargains, the current approach is ultimately exclusionary and is therefore inconsistent with the distributive and corrective justice goals of housing access regulation.

While the Montgomery decision offers a rather convoluted way for landlords and tenants to modify some of the allocations of rights provided by the RTA, straightforward reform is needed to limit the no contracting out provisions to only those rights which have a truly in rem character (discussed above). Most of the other clauses currently imposed by the RTA – including allocation of maintenance responsibility, rules about rent and termination – should be recast as strong defaults that can be overridden through unequivocal tenant consent. In that regard, the government may play a leadership role in developing the kinds of standard-form leases that are clear, simple and guaranteed to be enforceable if filled out properly. This is the current approach of the Landlord and Tenant Board with respect to procedural forms under the RTA – while substantial compliance is permitted, parties that use the Board’s standard forms are rewarded with increased certainty of future litigation outcomes.244 The Court of Appeal’s recent holding with respect to invalid clauses in standard-form applications to lease, for example, demonstrates the risk associated with ex post judicial supervision of standard forms

244 RTA, supra note 181, ss. 212
produced by private associations – and the likely superiority of *ex ante* form design by regulatory bodies.\(^{245}\)

Finally, some of the existing allocations of rights under the RTA – specifically, those regarding maintenance and repair – may not represent strong majoritarian default rules. Possible modifications may include a landlord’s warranty of good repair for the first year or two of a tenancy, after which some limited repair responsibilities (internal to the unit) fall to the tenant. Again, these options could be effected through regulatory provision of clear, easy-to-read lease forms presenting a menu of optional clauses and requiring the tenant’s separate initials next to non-default selections.

\(^{245}\) See *Musilla v. Avcan Management Inc.*, 2011 ONCA 502 (CanLII)
3. Social Housing

In light of the current supply and affordability issues facing the low-income tenancy market, housing activists have continually called for the government to provide housing to low-income households at rates that those households can afford. Traditionally, multiple levels of government have delivered subsidized housing under a patchwork of funding programs including public housing (owned and operated directly by governments), non-profit and co-operative housing (supervised and subsidized by governments in an arm’s length relationship). These programs are collectively known as “social housing”.

The funding and service levels of Ontario’s social housing programs, however, have been somewhat stagnant over the past two decades, despite a steady increase in the population’s low-income housing needs. Whether due to political budget constraints at the federal and provincial levels or, perhaps, due to a growing policy preference for market-based solutions (discussed later in this Part), social housing has approached a point of structural incoherence wherein traditional distributive justice rationales no longer justify its status quo operation.
Direct Public Delivery

Much of the construction and operation of public housing in Canada began in the immediate post-war period. Low-income veterans of World War II faced difficulty securing adequate urban housing; thus early social housing investment was informed by the rhetoric of emergency/disaster response, much like the other types of public entitlement programs across the developed world that had been instituted either as a response to the depression or the war. A patchwork of federal and provincial programmes eventually came to support the construction of thousands of new social housing units each year in Ontario.\textsuperscript{246}

While government agencies operated these projects primarily as rental housing, the tenants were typically charged subsidized rent. Subsidy formulae consisted of a number of variations on a funding model called Rent-Geared-to-Income (“RGI”), under which tenants are not required to spend any more than a given percentage of their household income on housing costs. On a per unit basis, this means that the monthly cost of subsidy is directly proportional to the theoretical or “market” rent required to provide the unit, and inversely proportional to both household income and the rent-to-income ratio used by the formula.

Federal government agencies – such as Statistics Canada and the Canada Mortgage and Housing Corporation (“CMHC”) – have used the same rent-to-income ratio to officially define national measures such as “housing affordability” and “core housing need”,

\textsuperscript{246} Hulchanski, supra note 151, pp. 5-10
currently set at 30% of gross household income. Thus households who spend greater than 30% of their income on housing expenses are defined as being in “core housing need” and, if a given household receives RGI subsidy, its monthly rent will not exceed 30% of gross monthly household income.\textsuperscript{247} Since RGI subsidies are targeted at the class of all households who are in core housing need (by definition), the construction and provision of social housing implies the elimination of core housing need as an ostensible public policy goal.

However, the past two decades have featured radical changes to public investment in and provision of social housing that have placed such a laudable goal in serious doubt. In the early 1990s, Ontario’s social housing construction slowed to a near stand-still, such that the majority of new annual demand for low-income housing has since been supplied by private sector rental housing starts.\textsuperscript{248} Massive cuts to federal-provincial social transfer payments in the mid-1900s precipitated provincial spending reductions and service realignment generally; housing was no exception to this. Through an agreement reached between the Chretien federal and Harris provincial governments in 1999 (the Canada-Ontario Social Housing Agreement, or “SHA”), Ontario consolidated the province’s public housing programs and devolved them to municipal control, along with supervisory responsibility over all non-profit and most co-operative housing projects.\textsuperscript{249} The province now serves as risk manager, ensuring that municipalities maintain existing ‘service levels’ without increasing Ontario’s contingent liability to the federal-level financiers of

\textsuperscript{248} supra note 161
\textsuperscript{249} Ontario Social Housing Primer (Toronto: Social Housing Services Corporation, 2008, http://www.shscorp.ca/content/rc/doc/shprimer.pdf), p. 6
individual housing projects. This relationship, as well as rules regarding the chain of RGI subsidy delivery and broader governance requirements, is codified in the *Social Housing Reform Act, 2000* ("SHRA").

In Toronto, public housing units are in high demand but questionable repair. Central waiting lists for RGI subsidies (which cover units in public, non-profit and co-operative housing) in Southern Ontario include households that have been waiting since the early 1990s. Conservative estimates suggest that subsidized public housing units are currently allocated to far fewer than half of the Toronto residents in core housing need.

Wait times for subsidized units are not uniform, however; a number of specific populations are regularly moved to the front of the line. The SHRA mandates that first priority for all subsidized units must go to victims of domestic violence. Toronto’s local rules give subsequent priority to persons suffering from terminal illnesses. Finally, the city’s rules also specify that at least one out of every seven RGI subsidy allocations must go to so-called “hard to house” persons, such as those who were formerly homeless and those who suffer from mental health or addiction issues. Meanwhile, the number of eligible households on Toronto’s central waiting list has climbed to record levels – approximately 135% of the total number of social housing units owned by the city.

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250 *Social Housing Reform Act, 2000*, S.O. 2000, c. 27 (“SHRA”)  
251 “Report No. 4 of the Community and Health Services Committee, April 21, 2011” (York: Regional Council, 2011)  
252 *Perspectives on Housing Affordability* (Toronto City Planning, 2006), p. 11  
254 See *Quick Facts* (City of Toronto Shelter, Support & Housing Administration, 2011, http://www.toronto.ca/housing/pdf/quickfacts.pdf) and “Sell-off of 900 TCHC homes: Facts and options (Updated)” (Toronto: Wellesley Institute, 2011)
present, approximately 2000 of Toronto’s public housing units are vacant and awaiting repair due to a $600 million capital maintenance backlog.\textsuperscript{255}

Many low-income housing activists have called for the preservation and expansion of existing social housing programs to deal with the now-steady increase in core housing need. Some have gone on to assert (with little explanation) that the private market will always be an unreliable and inadequate source of affordable housing.\textsuperscript{256} The economic claims implied by this statement, however, may be twofold: first, inelasticity of both supply and demand always prevents market competition and allows landlords to seek economic rents by providing inadequate, overpriced housing; second, the competitive price of housing (i.e. priced at marginal cost) is still unaffordable for a significant number of citizens. If the latter claim is true, many persons will need housing subsidies regardless of how the market is regulated. However, the former claim suggests that the use of RGI subsidies in the private market would create a perverse incentive for landlords to simply raise their rents and turn any new demand-side subsidies into profits.

Advocates have also treated RGI as a paradigmatic feature of the (positive) ‘right to housing’ – by implication, a policy that is distributively just.\textsuperscript{257} This view argues that once a minimum standard of adequate housing is defined, a fair distribution ought to ensure that it cost no more than 30% of any household income. Even if this were normatively true, the lengthy waiting list for subsidized housing in large cities like

\textsuperscript{257} Hulchanski, supra note 247
Toronto betrays an overwhelming failure. Perhaps more troubling is the fact that 30% is an arbitrary fraction, historically based on the empirically incorrect belief that income and basic needs spending have a naturally linear relationship. Hulchanski has observed the use of this percentage as a political tool that, when increased by previous federal governments, has only served to exclude millions of Canadian residents from various forms of housing assistance.\textsuperscript{258} Trebilcock and Daniels have also pointed out that the necessary companion to RGI – a physical definition of minimum adequate housing – appears to be heavily influenced by culture (that is, local community values).\textsuperscript{259}

Ultimately, neither the physical standards of public housing nor the income ratio used in RGI subsidies are part of a maxmin strategy of housing distribution in Ontario, because neither describe the minimum entitlement of those who are qualitatively worse-off. Many low-income families on the central RGI waiting list in Toronto are effectively shut out of public housing and forced to rent in the private market, where they spend far more than 30% of their incomes to rent units that may be physically smaller and/or lower quality than their social housing counterparts. Their failure to have been poor at the ‘right’ time (i.e. decades earlier when waitlists were shorter) or to have the ‘right’ characteristics (domestic violence, chronic illness or the ‘hard to house’ label) has distributive ripple effects: for example, many low-income community legal aid clinics in Toronto limit their tenant housing law practice to occupants of public housing. Whether or not the distributive injustice of Ontario’s current social housing and RGI subsidy policy can be blamed on a lack of public spending, the pragmatic truth is that a maximin strategy can

\textsuperscript{258} ibid
\textsuperscript{259} supra note 185
and must always direct any level of government assistance at those who are truly worst-off – something RGI fails to accomplish when it is rationed through a waiting list.

Moreover, if funding for social housing continues at current levels, there are several reasons to doubt that government is the most efficient landlord. The astounding disrepair of the rental housing stock owned by Toronto Community Housing Corporation (“TCHC”, Ontario’s largest public housing landlord) is but one manifestation of the conventional, theoretical critique of public enterprise failing to harness profit incentives or the ‘ownership effect’ to discipline its decisions. As Robert Ellickson notes, the notorious stigma, poverty and crime associated with large public housing projects across America has led housing providers to demolish and rebuild the same residential complexes at great expense, albeit with changes that reflect the latest vogue in public policy circles. Thus the popular North American transition from concentrated income to mixed-income projects (reflected locally in Toronto’s Regent Park redevelopment, for example) represents a policy experiment that invests overwhelming resources to serve perversely fewer low-income persons than in a strictly low-income development – in a format that already appears to be less efficacious than private market solutions (as discussed later in this Part).

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Independent Delivery

Throughout Ontario’s history of building public housing projects, governments have also encouraged the creation of non-profit and co-operative housing as an alternative vehicle for the delivery of RGI subsidy programs. Non-profit corporations (or “non-profits”) typically operate rental housing projects for tenants who are either predominantly low-income, mixed-income, or a more specific group (such as senior citizens of a particular cultural background). Non-profit housing co-operatives (or “co-ops”), are also non-equity projects whose occupants (or “members”) exercise democratic control of the project, frequently volunteer their personal labour and expertise to the specific operation of the project, and pay monthly housing charges to cover the project’s expenses.261

While these two types of independent social housing projects have been built and operated under a variety of federal and provincial programs, their subsequent consolidation under the SHRA permits a relatively consistent contemporary description. The vast majority of these projects are established with a CMHC-guaranteed mortgage on favourable terms. The mortgage funding is secured through an operating agreement between the project and the relevant level of government (now municipal in most cases, with residual provincial and federal rights managed through the SHRA and the SHA) that constrains the governance, financial and operational decisions of the project.262

261 Co-operative Corporations Act, R.S.O. 1990, c. C.35, s. 171
Most importantly, RGI subsidies are delivered through governments and administered by each social housing project under the terms of the operating agreement; usually, RGI funds represent a portion of the project’s mortgage payments that it may divert to a subsidy pool, from which the rent and/or housing charges of the relevant households are topped up. As subsidized units become available, non-profits and most co-ops are required to accept occupants from a central waiting list maintained by each municipality – the same list used for public housing units, with the same priority rules (discussed above). The sole exception to this rule is a subset of co-ops across Ontario established under the *National Housing Act*, which were excluded from the SHRA services realignment and remain under direct federal supervision. These co-ops are permitted to maintain their own independent waiting lists for general occupancy as well as subsidy.\(^{263}\)

There are several ways in which these arm’s length projects offer significant advantages over the comparatively ‘pure’ public provision of municipal housing corporations. As a matter of general policy, public choice theory suggests that arm’s length independence is often preferable to direct government management.\(^{264}\) Non-profits can also attract the private talent and synergy of third-party organizations like the United Way, developing specialized expertise within targeted local mandates. While both non-profits and co-ops lack the “profit motive” (that results in weakened discipline while protecting the delivery of RGI subsidies), co-ops stand apart as legitimately disciplined by the “ownership effect” – accountable to the democratic control of the very members who pay housing

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\(^{264}\) Trebilcock et al. *The Choice of Governing Instrument* (Ottawa: Minister of Supply and Services Canada, 1982), pp. 89-91
charges. This can motivate co-ops to make cost-efficient decisions that limit monthly housing charges, which consequently limits the cost of RGI subsidies.

In general, non-profits and co-ops can be characterized as points on a spectrum between government and private control. This spectrum is multi-dimensional, and comprises the possible answers to several key policy questions. During the start-up or initiation of a housing project, what is the appropriate level of public financing? During the life of a housing project, what is the appropriate level of government oversight? With respect to RGI programs, what proportion of the project’s units should be subsidized? Ontario’s independent social housing projects currently represent a diverse set of responses to these dilemmas.

The relative efficiency of co-ops over public housing appears to depend largely on this public investment/oversight balance, as well as the ability of individual co-ops to ensure that project independence translates into the ownership effect and its associated discipline, competence and cost savings. In the aggregate, there is some evidence that cooperatives appear to outperform other forms of social housing in terms of safety, repair and occupant satisfaction. More specifically, it appears that some of the oldest and most financially viable co-ops in Ontario begin as low-density structures that are often built or purchased by a consortium of founding members and can be maintained with a

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265 A Place for Co-op Housing in Ontario’s Long-Term Affordable Housing Strategy (Toronto: Co-operative Housing Federation of Canada, Ontario Region, 2009, http://www.chfcanada.coop/eng/pdf/ontdocs/LTAHS_Submission.pdf), Appendix A
significant degree of independence.\textsuperscript{266} Other projects, sometimes consisting of high-density structures built on comparatively scarce urban space, impose significantly greater entry and maintenance costs – requiring a greater quantum of public funding for construction and maintenance – and may not always realize the same level of cost savings through internal volunteer labour and expertise. Indeed, many of Toronto’s housing co-ops contract most of their operational functions to full-service companies.\textsuperscript{267} These patterns mirror the differences in efficient allocation of maintenance duties between low-density suburban structures and high-density stacked urban buildings (discussed earlier in this Part). In the latter case, however, urban co-ops with external management and maintenance risk eliminating opportunities for direct member participation, ultimately weakening the discipline associated with ownership and potentially rendering the project indistinguishable from non-profit rental.

Two recent extremes of innovation and destruction highlight the varying potential optimality of co-op housing delivery. At the positive extreme, TCHC has had well-documented success transitioning one of its Alexandra Park public housing projects to co-operative management by the residents themselves.\textsuperscript{268} This project, like the surrounding residential structures, consists of low-rise townhouse and apartment-style units, nearly all of which contain households receiving RGI subsidies. Perhaps inspired by the neighbouring, long-standing and well-functioning Alexandra Park Co-operative, TCHC has partnered with residents to operate and maintain one of the projects through a

\textsuperscript{266} A few examples of these types of member-built projects include the Bain Co-operative Apartments Inc. (Toronto, ON), Beaver Creek Housing Co-operative (Waterloo, ON), Campus Co-operative Residence Inc. (Toronto, ON) and Waterloo Co-operative Residence Inc.

\textsuperscript{267} For example, Ontario Property Management Group Inc.

\textsuperscript{268} Sousa, J. & Quarter, J. “Atkinson Housing Co-operative: A Leading Edge Conversion from Public Housing” (2005) 20(3) Housing Studies 423
democratic system of volunteer committees mirroring that of a typical co-op. Residents have renamed the project “Atkinson Co-operative” and, together with TCHC, have sought provincial approval to formally separate the co-op from TCHC under the SHRA. At the time of this writing, however, there appears to be no legal mechanism that would accomplish the residents’ request without threatening the existing basis for RGI delivery – a remnant of the many separate social housing programs that preceded the SHRA.\textsuperscript{269} Regardless, TCHC’s continuing use of this alternative service delivery format at Atkinson underscores the superior efficiency of co-ops in such circumstances – especially in light of a broader planned redevelopment of this neighbourhood by the City of Toronto.\textsuperscript{270}

At the opposite extreme, however, is the unfortunate fate of Thornhill Green Co-operative Homes. Located in the increasingly low-income inner suburbs of York Region – along Yonge Street and just south of Highway 407 – Thornhill Green was a co-op established through the purchase of a pre-existing private rental complex in 1991. As a partial result of refusing to raise housing charges to pay for required structural maintenance and renovation, the members allowed their project to fall into severe disrepair. After receiving millions of dollars in capital repair loans from York Region (the municipal service manager with carriage of the co-op’s operating agreement), the co-op’s failure to pay its municipal tax bill led to court-appointed receivership and, ultimately, the approval of a transfer of the project’s assets to Housing York Inc. (the municipality’s

\textsuperscript{269} Ontario’s current consolidated regulations to the SHRA do not presently show any amendments regarding the project at 71 Augusta Avenue, Toronto, which remains listed as public housing owned and operated by TCHC under O. Reg. 369/01

\textsuperscript{270} “Building a Plan in Alexandra Park” (Toronto Community Housing Corporation, 2010, http://www.torontohousing.ca/investing_buildings/alexandra_park)
local public housing corporation) – dissolving the co-op and transforming its members into public housing tenants. Several judicial decisions throughout this process imposed considerable procedural burdens on governments who wish to transform struggling co-ops into public housing or arm’s length non-profits – in large part, due to the legitimate expectations that arise from the democratic membership rights of co-op members.

**Recommended Reforms**

The increasing failure of Ontario’s current public housing programs to accomplish their distributive justice goals requires a measure of policy realism, particularly from those who might otherwise hope for an immediate doubling of the province’s public housing stock. Current service levels, combined with the priority rules that shape lengthy waiting lists, stand to gradually transform generic, low-income public housing projects into de facto supportive housing for priority groups. By recognizing direct, government-supplied housing for what it is (or will become, as incumbent tenants age and exit), policy-makers can work to more effectively target service delivery while clarifying a shared understanding the future role of public housing.

Several new, subsidiary questions arise from the reconceptualization of public housing as supportive housing – questions that must no longer be ignored. First, do victims of

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271 York (Regional Municipality) v. Thornhill Green Co-operative Homes Inc., 2010 ONCA 393 (CanLII)  
domestic violence, chronic illness, mental health conditions and homelessness comprise the normative priority groups for direct provision of housing by municipal governments (and in that order)? Second, which (if any) of these groups ought to be housed together? It may be the case that supportive housing for some of these groups can be provided most efficiently by government, if only to coordinate the delivery of related government services. For example, supportive housing for low-income persons with chronic illnesses may be best integrated with palliative care services offered by Community Care Access Centres within Local Health Integration Networks. Some of the current public housing projects that are dominated by low-income seniors might be the most appropriate settings for these types of services. However, there may be very few types of specialized supportive housing services that cannot be provided by independent non-profits under municipal supervision.

Ultimately, however, the SHRA framework has already delinked the particular choice of social housing delivery format from the central administration and delivery of RGI subsidies. Once governments have decided how much public housing ought to be set aside for priority groups (i.e. as supportive housing), it would appear that remaining social housing stock should be converted to co-ops wherever possible – on the understanding that co-ops which fall short of specific performance metrics will revert back to non-profit rental projects. Legislation and operating agreements should be amended to contemplate a straightforward process for both types of conversion. Likewise, any additional future public investment in social housing ought to prioritize loan support for the development of new co-ops that meet sufficient levels of private
initiative (e.g. fundraising) – not only as a mixed-income setting for RGI subsidy delivery, but as an important counterweight to the low-income private rental market.

Restructured supply notwithstanding, the most important challenge to social housing delivery appears to be the delivery of RGI subsidy. So long as the RGI formula remains significantly out of step with the realities of the private rental market, its distributive justice rationale is undermined. At first glance, a maximin strategy requires that the RGI income ratio be raised until the number of households that qualify approaches the number of subsidized units that can be allocated. In this way, one might expect subsidies to flow to those who are truly worst-off within a given jurisdiction.

However, this apparent solution ignores lingering problems with the theoretical design of RGI itself. Housing affordability is a far more complex distributive and corrective justice problem than a national average rent-to-income ratio. For the poorest households, adequate housing is affordable when its cost leaves the household with enough funds to pay for other basic needs (i.e. food and clothing). In Northern Ontario, for example, the relatively low cost of housing may be offset by the high cost of food and other imported goods, diminished economic opportunities, etc. Thus the arbitrariness of setting a linear RGI ratio at 20%, 30% or indeed 50% is two-fold: (a) it may overstate the availability of subsidized social housing units and create a lengthy waiting list of tenants who face greater rent-to-income ratios in the private market, and (b) it cannot account for the complex range of factors that affect housing affordability for specific households in specific regions, undermining the assumption that one’s relative housing need is ordered by one’s rent-to-income ratio.
Regulatory alternatives do exist, of course, to the pairing of RGI subsidies with social housing units as a means of raising minimum access to housing. Many of these alternatives lie in the regulation of the private rental market – whether by expanding it through more efficient tenancy rules (as discussed earlier in this Part), or by channeling subsidies directly to participants on the supply and demand sides of the market. These regulatory tools aim to improve outcomes for the growing majority of low-income tenants in a way that conforms more closely to the goals of housing access policy than the current social housing regime.
4. Market Subsidies

Anticipating the end of social housing investment as a viable or preferable means of meeting low-income housing need, Canada and Ontario have implemented various types of market subsidies in an attempt to improve the private market's ability to meet housing need. The available tools vary in their resemblance to either social housing or purely private market regulation.

However, the normative priority of these options stems from the overarching goals of subsidizing the low-income housing market. Increased supply elasticity, combined with increased demand-side vouchers for housing, should provide relief to tenants who are already attempting to afford housing in the private market – and currently failing due to low incomes and a lack of alternatives.

Supply-Side Subsidies

After the federal transfer cuts of the mid-1990s prompted Ontario to halt construction of new social housing stock and realign service delivery at the municipal level, an eventual surplus in the federal budget created an opportunity for new federal investment in low-income housing. However, the province’s implementation of vacancy decontrol had

already marked a broader policy shift to increasing reliance on the rental market to provide low-income housing.

Within this market-focused policy context, the federal and provincial governments entered an agreement to administrate the Canada-Ontario Affordable Housing Program ("AHP"). While the AHP agreement contemplated several different shared funding instruments to provide housing assistance, most of the funding was committed under the Rental and Supportive Component, which subsidized the renovation, conversion or construction of new low-income rental housing units across the province. Private landlords – including both for-profit and non-profit corporations – entered operating agreements to receive technical assistance, forgivable capital loans and monthly mortgage payment assistance for 20-year terms. In exchange, proponents agreed to provide rental housing units of a specified size, quality and price over the same period. Subject to local rules targeting specific groups of tenants for assistance, AHP units are assigned an income cut-off (above which prospective tenants’ incomes would disqualify them) and initial rents must be set below the higher of either 80% of the local average market rent (as determined by CMHC) or 105% of the local welfare shelter allowance (discussed below).\footnote{Canada-Ontario Affordable Housing Program Rental and Supportive Guidelines (Toronto: Ministry of Municipal Affairs and Housing, 2006)}

Although the AHP has provided commendable flexibility to municipalities in the specific allocation of funding, its design as a supply-side subsidy raises several concerns. First, the funding is of an inherently temporary nature – while the initial 2005 program

\footnote{Canada-Ontario Affordable Housing Program Rental and Supportive Guidelines (Toronto: Ministry of Municipal Affairs and Housing, 2006)}
agreement was extended in 2009 as a political compromise to pass the federal budget in a minority parliament, its public rationale has been primarily one of economic stimulus – and the AHP is set to expire in spring 2012.275 Second, the intricate detail of the program – engaging three levels of government under numerous program funding categories – is reminiscent of the regulatory models used to provide social housing. While private landlords are engaged in the delivery of affordable housing, the units themselves are highly segregated from the rest of the rental housing market, marked and allocated for a 20-year commitment to relatively fixed rent levels.

Thus AHP subsidies are perhaps more properly characterized as a public-private partnership for the delivery of a hybrid form of social housing. While AHP-funded projects will increase low-income housing supply in the near term, they will do so in a way that is minor and yet blunt. Presumably, the restrictive detail of the AHP agreement is designed to target the flow of subsidy dollars to housing for those most in need of assistance. However, this potential distributive justice rationale is undermined by the scale of the program. New rental units provided under AHP in Ontario represent a small fraction of the number of persons on the RGI waiting list for social housing; by assigning a high income cut-off and offering an effective 20% rental discount from the local market average, there is little assurance that these units will be allocated to the worst-off tenants.

275 Affordable Housing Program Extension (2009) and Social Housing Renovation and Retrofit Program (SHRRP) (Toronto: Ministry of Municipal Affairs and Housing, 2009, http://www.mah.gov.on.ca/Page6602.aspx)
Like social housing in its current form, the small scale (relative to population eligibility) of AHP spending increases its likely arbitrariness.\(^{276}\)

Tax expenditures – through allowable deductions and credits – are a more conventional form of supply-side market subsidy that can encourage low-income housing supply and, when correctly targeted, increase supply elasticity. Economists have pointed to the loss of several landlord-specific deductions in the federal income tax system as a reason for stagnation of rental housing supply construction.\(^{277}\) At the municipal level, property tax assessment of multi-residential rental complexes on an income basis – rather than purchase value – imposes a unique burden on tenants whose landlords must pass along higher municipal taxes through elevated monthly rent.\(^{278}\)

The proper frame of reference for a critique of tax support (or lack thereof) of low-income housing does not merely include an inquiry into the freestanding levels of government support for a particular (i.e. rental) housing sector. Rather, a comparison of government tax spending on different land uses is needed to anticipate the effects on a given market. Most significantly, public subsidy of owner-occupied housing will restrict rental housing supply to the extent that it makes the former type of housing more profitable to developers. At first glance, one might describe Canada’s approach to this area of tax policy as relatively enlightened, given the absence of a home mortgage

\(^{276}\) The AHP Rental and Supportive component allocated funds for the construction of approximately 1,135 rental units in Toronto (\textit{supra} note 274, Appendix A), which is less than 1.5% of the over 78,000 households currently on the city’s central RGI waiting list (Wellesley Institute, \textit{supra} note 254)

\(^{277}\) “Affordable Housing in Canada: In Search of a New Paradigm” TD Economics Special Report (Toronto: TD Bank Financial Group, 2003), pp. 8-10

interest tax deduction (estimated to have cost the U.S. government approximately $100 billion in 2010, or double the entire budget outlay of the Department of Housing and Urban Development).\(^{279}\)

The current tax environment in Ontario, however, is one that must be characterized as anti-tenant. Frank Clayton estimates that of the total private housing subsidies from all three levels of government in Ontario in 2008-09 – excluding social housing and welfare, but including both supply-side and demand-side forms of program, grant and tax spending – approximately 93.7% went to homeowners, compared to 6.3% to private renters.\(^{280}\) Given that private renters account for over 30% of market households, this results in the average owner-occupied household receiving nearly seven times more subsidy than the average rental household. Clayton notes that this “massive” difference exists despite the fact that the average household income for homeowners is over double that of renters.\(^{281}\) An analysis of the ways in which this disparity violates practically every conception of distributive justice is left to the reader.

Similarly, land use planning decisions can serve as an important source of indirect supply-side subsidies to housing markets. While a skeletal account of the Kaldor-Hicks efficiency of constraining residential land use is provided in Part I, planning instruments have a more specific effect on the relative profitability of different forms of housing. Greg Suttor’s analysis of recent low-income settlement trends in Toronto, for example, 


\(^{281}\) ibid., p. 9
emphasizes the need to plan for affordable rental housing throughout metropolitan areas as a means of counteracting contemporary market patterns. Suttor notes that Toronto, like many large cities, is experiencing intense concentration of low-income communities along the ring of “inner suburbs” – pushed out by the gentrification of the downtown core, but excluded by the cost of the newest homes in outer suburban communities. By failing to encourage a broader geographic distribution of low-income rental options, cities risk a variety of disastrous results; for example, the distance between low-income housing and new low-income employment centres in the outer suburbs can contribute to sharp rises in unemployment once it exceeds the commuter transport options available to tenants.

While a full account of the interaction between land use planning and housing markets is beyond the scope of this thesis, there are numerous straightforward means of subsidizing low-income housing supply through adjustments to planning instruments. For example, cities that ‘checkerboard’ or create minimum distance restrictions between permissible rooming houses (that is, rental accommodations where kitchen, bathroom and other basic common elements are shared by multiple unconnected tenants renting individual rooms) clearly restrict the supply of this type of low-income housing. Contrasting measures include recent amendments to the Planning Act requiring municipalities to permit a wider class of homeowners to supply basement and garden suites (i.e. secondary rental) to third-party occupants. Finally, planning policy can target the minimization of high market entry costs for primary rental supply through expedited zoning and construction

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282 Suttor, supra note 34, p. 175
283 ibid, pp. 22-27
284 Planning Act, supra note 18, s. 35.1
approvals and/or waiver of development charges. The latter policy tool is particularly
cogent, given that the recognized purpose of levies under the Development Charges Act,
1997 is the fair allocation of costs for expanded municipal services. The salutary
effects of new low-income rental supply on municipal service budgets – if only to reduce
burdens on the social housing waiting list – can and should be reflected in reduced
development charges.

Demand-Side Subsidies

The primary form of demand-side subsidy to Ontario’s low-income housing market is the
shelter allowance delivered through income security programmes. Apart from federal
delivery of Employment Insurance, Canada Pension Plan and Old Age Security to
specific segments of the population, the primary forms of income security in Ontario are
welfare (Ontario Works or “OW”) and public disability (Ontario Disability Support Plan,
or “ODSP”). These programs are mutually exclusive, with the former targeted at
households who suffer primarily from long-term unemployment or under employment,
and the latter targeted at those whose health conditions are expected to prevent them from
working. Thus while both programs share many normative characteristics, only OW need
be concerned with work incentives.

285 Using Development Levies (Ottawa: Canada Mortgage and Housing Corporation, 2011,
286 S.O. 1997, c. 27; the purpose of this legislation is suggested by “The New Development Charges Act,
1997: A balanced framework, Technical Information Bulletin” (Toronto: Ministry of Municipal Affairs and
OW and ODSP program eligibility is automatically extended to all Ontario households with sufficiently low incomes. A household’s family composition (e.g. number of adults, children and special characteristics) determines a basic monthly benefit anywhere in the province, from which gross monthly household income is deducted (and eligibility terminated where income exceeds benefits). This automatic qualification and linear income-benefit allocation means that there are no waiting lists – a household with sufficiently low income will immediately qualify for and receive monthly OW payments, unless the applicant has been found to meet the eligibility requirements for ODSP (which generally entails higher payments). From a distributive justice perspective, OW and ODSP benefits can be said to form a more coherent maximin strategy than any of the policy instruments reviewed thus far, assuming relative fairness between the allocations to each program and between different types of households.

In addition to a basic needs component that may be spent at the discretion of the recipient household (presumably on food, clothing, transportation and other costs), OW/ODSP payments also include a dedicated shelter component, which sets a maximum monthly amount that the recipient may claim for the reimbursement of housing costs (i.e. rent or co-operative housing charges, as the case may be). Recipients are free to spend more than this allowance on housing, drawing the excess costs from their basic needs component and/or other income sources. However, if a recipient’s monthly housing costs fall below his or her shelter component, he or she cannot pocket the difference. As a result, OW

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288 *ibid*
and ODSP recipients may be reasonably expected to “bid up” rents toward the local maximum shelter component for a given type of unit in a given market. However, the initial spike in average rents caused by Ontario’s implementation of vacancy decontrol in the mid-1990s created a sudden gap between the shelter component and rent, such that ‘bidding up’ is unlikely to have occurred in high-demand urban regions like Toronto.289

From a distributive justice perspective, the superior targeting of OW and ODSP over other forms of housing access spending is matched by the superior flexibility and efficiency of demand-side subsidies in sufficiently competitive markets. Every dollar of increased housing allowance levels through additional public spending satisfies the maximin function by (a) raising the allocation of housing to the worst-off, and (b) increasing the number of eligible recipients in a manner entirely ordered by income.

Allowing OW and ODSP recipients to direct their housing allowances to the landlords of their choice requires landlords to engage in continuing competition for those funds, bidding rents down and prioritizing tenant choice in a Pareto efficient manner.

However, the OW/ODSP shelter component is problematic from a corrective justice perspective primarily because it sets a single, province-wide rate for each family size, and does not appear to set the rates high enough for recipients to afford housing in any case. This policy fails to account for the wide differences in housing prices between various municipalities. The 2010 average rent for a two bedroom apartment in the Toronto Census Metropolitan Area was $1,123 but only $752 in Windsor; a single parent OW

289 Rental Housing in Toronto: Facts and Figures (City of Toronto Shelter, Support & Housing Administration, 2006), pp. 7-9
recipient with three children receives a maximum $344 basic needs component and $681 housing allowance – in either city. Given the fact that these benefits are administered and distributed by municipalities, it is unclear why an adjustment could not be made to reflect local price differences.

Setting the appropriate levels of minimum income and housing benefits, however, is a far more complex exercise than simply endorsing their use. The presently disproportionate levels of homeownership subsidies suggest an abundance of public housing finance that could be more fairly targeted to the lower-income rental sector. Moreover, the corrective justice principles outlined in Part I require that the state ensure some minimum level of shelter for every person commensurate with the loss of their ability to shelter themselves. The specific policy design challenge would seem to include setting the shelter component immediately behind the local rent curve for a given type of unit (lest “bidding up” shift the curve forward in the form of economic rent-seeking by landlords), while ensuring that the basic needs component is large enough to fund some variable level of additional housing expenditure needed to meet rents within the local market. All of this must be accomplished, however, while attending to the work incentive concerns that arise from raising OW benefits. At the very least, it seems that the shelter component and some part of the basic needs component of both OW and ODSP could be raised to account for the post-1998 increase in average rents, and ought to rise and fall with the annual change in local average rent levels, as measured by CMHC.

290 supra note 168
So long as broader income distribution policy (beyond the scope of this analysis) limits the complete assurance of housing affordability through income security programs, additional housing demand subsidies must target a wider range of recipients including the ‘working poor’ – persons who may struggle to afford housing while earning enough income to limit or eliminate their eligibility for OW benefits. Another benefit of these subsidies may be to maintain work incentives by using an allocation formula that does not withdraw assistance too rapidly as income increases.

Ontario currently delivers two of those additional types of demand subsidies to the low-income housing market. One of them is the Strong Communities – Rent Supplement Program, which allows municipalities to contract with private landlords, non-profit and co-op projects to provide long-term RGI subsidy with respect to specific units, matching qualifying households to those units from the centralized social housing waiting list, or from referrals by OW, ODSP and other social service agencies. This program is the demand-side equivalent to the AHP rental and supportive component on the supply side, discussed above – a basic extension of social housing with limited private landlord participation, but using a framework that segregates specific units from the broader rental market. It also bears striking similarity to the Housing Choice Voucher program operated by the U.S. Department of Housing and Urban Development. Ellickson’s comparative study of that program suggests that tenant choice – for example, by allowing landlords to “accept” vouchers from specific tenants without much administrative difficulty – may lead to superior efficacy over traditional low and mixed-income social housing projects.

291 Strong Communities Rent Supplement Program (Toronto: Ministry of Municipal Affairs and Housing, 2004, http://www.mah.gov.on.ca/Asset952.aspx)
In addition to reviewing various operational deficiencies in subsidized housing projects, Ellickson notes that “developers and funding governments typically spend an average of about $1.60 (although perhaps as little as $1.20) to produce $1.00 of rental value” but suggests that governments need only spend approximately $1.10 to transfer the same value to a tenant.\textsuperscript{292}

The province’s final and more recent attempt at demand-side housing subsidy is the Rental Opportunity for Ontario Families (“ROOF”), a form of transitional assistance designed to fill specific gaps between existing programs. ROOF was designed in 2007 to provide a 30% RGI supplement, capped at $100, to working families with children under 18, who do not receive any other form of housing assistance and make between $5,000 and $20,000 per year holding no more than $10,000 in household assets – for a maximum of five years.\textsuperscript{293} While this highly targeted design complements income security benefits by providing modest assistance to those families immediately above the income cut-off for OW eligibility, its criteria were evidently too narrow in that not enough families signed up to exhaust the funding commitment. As a result, the province recently announced an expansion of the program to provide greater maximum supplements ($300) to a broader class of recipients.\textsuperscript{294}

The government’s cautious, incremental approach may be necessary to avoid the creation of a waiting list; indeed, ROOF funds are often allocated to households already on the

\textsuperscript{292} Ellickson, supra note 260
\textsuperscript{293} \textit{$185 Million ROOF For Ontario Families} (Toronto: Ministry of Municipal Affairs and Housing, 2007, http://www.mah.gov.on.ca/Page4896.aspx)
central waiting list for social housing. The comparison between ROOF and previous rent supplement programs is a difficult one. ROOF’s clear superiority is that it enables recipients to participate in the private market, applying subsidy dollars to the landlord who most effectively competes for that recipient’s funds. However, the direct flow of demand subsidies into the private rental market always carries the risk of bidding up rents—particularly if the market is not sufficiently competitive. The efficacy of demand-side subsidies in the low-income rental market depends, in part, on targeted supply-side subsidies that reduce the entry costs that contribute to inelasticity of rental housing supply. 295

In light of the apparent limits of these programs, several landlord’s industry associations and non-profit groups have proposed a province-wide housing benefit that would integrate many of the features discussed above: geographic sensitivity, scaled targeting across OW/ODSP recipients and the working poor, and a ‘gap coverage’ approach that would cover 75% of the difference between actual rent and the relevant affordability metric (either the shelter allowance for OW/ODSP recipients, or some contribution rate for the working poor, e.g. 30% of income). 296 As the authors note, four other provinces have operated these types of programs for over 25 years, but their efficacy is difficult to evaluate where governments have allowed maximum coverage levels to fall behind average market rents. In any event, the same authors criticize the ROOF program as too limited and narrowly defined, and seem unimpressed by the performance, scope and

295 Daniels & Trebilcock, supra note 185
design of voucher programs in the U.K. (too costly), Australia (geographically insensitive) and U.S. (too narrow).297

**Recommended Reforms**

Ontario’s AHP rental and supportive component and the Strong Communities Rent Supplement Program comprise, on the supply and demand sides respectively, the weakest types of market subsidies that only serve to expand social housing into the realm of privatized, sub-contracted construction and operation. Their inherently costly nature currently limits service delivery and does not address the broader class of households that would qualify for RGI on a 30% rent-to-income basis. While this model may be an appropriate means of expanding social housing if and when that is justified (e.g. when supportive housing is needed), it does not constitute efficient regulation of the private market.

Clearly, a variety of tax and planning policies that benefit home ownership can be shifted to support the rental housing sector. On the supply side, these efforts – whether through capital cost allowances or reduced development charges – should focus on the entry costs arising from construction of new rental housing units and the conversion of existing non-rental units. Improved supply elasticity is critical to the market-based delivery of low-income housing access.

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297 *ibid*, pp. 25-26
An overall shift from supply-side social and affordable housing construction to demand-side subsidies is not only Pareto efficient, but more easily targeted to achieve distributive justice goals. The appropriate demand-side subsidy mix – specifically, between the OW/ODSP shelter component and some additional voucher program – depends largely on income distribution and work incentive concerns that may constrain OW benefits and leave unmet housing need to other programs. Nevertheless, an increase in public spending on both of these demand subsidies – funded by housing policy shifts elsewhere – would seem appropriate.
5. Conclusion

The analysis in this Part suggests that regulators can improve the efficiency and competitiveness of the rental housing market in three ways: removing rent control, reforming covenant control and increasing supply elasticity through tax and planning policies that offset high market entry costs. Obviously, a more responsive market stands to benefit all involved – improving income and investment opportunities for landlords while generating a variety of housing options for tenants at stable rental prices. But the inherently inelastic demand for shelter by low-income tenants also requires supply elasticity (i.e. a healthy vacancy rate) to allow efficient and effective delivery of demand-side subsidies to market participants.

In addition to finishing the task of rental market reform, this Part also calls on governments to rationalize its current approach to social housing by eliminating waitlist rationing of subsidized units. Current public housing projects – frozen at mid-1990s service levels – should either be transitioned to supportive housing programs for priority groups, or further devolved to independent operation by co-ops, non-profits or even private landlords under agreement. Future investment in social housing – either through loan support for entire projects under AHP, or piecemeal acquisition of subsidized units through rent supplement programs – ought to be cautiously considered or avoided in most cases where similar funding can be distributed directly to the low-income households that need them the most.
Remaining low-income affordability gaps must be closed not through government-direct supply but through demand-side subsidies that can effectively target the relative needs of the unemployed and working poor in each municipality. Increased OW and ODSP shelter components – and differential benefit entitlements based on cost-of-living differences across municipalities – appear to be the correct starting point, but may be limited by the need to maintain incentives to work as part of broader income distribution policy. On this view, moderate increase and variation of OW/ODSP benefits must be augmented by an additional, broader demand-side subsidy that targets welfare recipients and the working poor alike.

Where Ontario’s low-income households are concerned, the wide gap between welfare benefits and the cost of adequate urban housing is filled by part-time and minimum-wage jobs – and these are the jobs that are protected by work incentive rationales. The notion that welfare benefits must remain low (such that additional housing assistance must be distributed through additional programs beyond income security) is predicated on the assumption that these jobs are a socially desirable, despite the fact that they do not generate enough income to support the basic needs of most families. For example, the City of Toronto calculates that a minimum-wage earner must work 17 full days each month just to pay the rent on an average two bedroom apartment in the city.\(^{298}\) While it is beyond the scope of this paper to propose changes to the minimum wage or other forms of income regulation, it is nevertheless worth noting that the normative relationship

\(^{298}\) *Toronto Social Housing By The Numbers* (City of Toronto Shelter, Support & Housing Administration, 2011, http://www.toronto.ca/housing/social_housing/pdf/shbynumbers.pdf)
between housing access policy and income distribution policy deserves continual questioning.

Another admitted limitation of this analysis is, of course, its failure to propose the quantitative detail of a demand-side subsidy that would satisfy the structural theory of housing rights elaborated in Part I. While proposals like the suggested Ontario Housing Benefit (discussed earlier in this Part) are laudable in their numeric precision, such benefit programs will inevitably involve the setting of arbitrary limits and ratios that, much like the OW/ODSP housing allowance, may fall far behind market realities. The appropriate quantitative level of low-income housing subsidy is a policy question answered in the broader context of limited economic resources. A juridical response, however, asks whether the state’s efforts to deal with housing need are rational, effective and fair in terms of the interests prioritized. To that end, it is hoped that the direction of reform suggested in this Part elaborates a helpful framework.

\[299\text{ That is, the proposed extent to which legal theory and principles of justice can inform policy.} \]
Conclusions and Recommendations

The legal, philosophical and economic overviews of low income housing markets and policy provided in Parts I and II are intended to establish a normative basis for the analysis of regulatory instruments presented in Part III. As noted in Part I, many of the initial justifications for regulation that affects housing access are external to the topic of human shelter. A range of goals within the broad categories of efficiency and communitarianism motivate simultaneous creation of private housing markets and the restriction of housing to elaborate minimum specifications, concentrated within limited geographic spaces to ensure that communities are safe, serviceable and sustainable. The indirect consequences of these restrictions are typically exclusionary – driving up the minimum cost of housing such that shelter affordability becomes a challenge for low-income persons.

These affordability problems, in turn, represent the distributive and corrective injustices to which housing access regulation is the normative response. According to this structural theory, distributive justice requires the state to implement policy that raises the minimum allocation of housing to the worst-off members of a given community. Moreover, corrective justice requires that this minimum allocation be sufficient to compensate low-income individuals for the loss of housing freedom as a critical element of legal personality. The juridical nature of this theory limits its technical specificity; indeed, the theory implies that governments have considerable latitude to select between various regulatory tools, so long as the outcome is just.
However, for the purposes of this thesis, Ontario’s character as a liberal, capitalist jurisdiction with a private market in housing is accepted as a normative point of departure. The particular features of this market – specifically the low-income rental segment – are therefore catalogued as basic realities to which any housing access regulation must attend. These features include inelasticities of both supply and demand, information and transaction cost asymmetries, significant externalities and geographic disparities. However, the predominant regulatory approach of federal and provincial governments over the past 50 years does not appear to have mitigated these failures in the most efficient way possible – as suggested by governments’ frequent experimentation with new regulatory approaches.

The rent and lease covenant controls implemented by Ontario in the 1970s, combined with the pace of social housing construction up until the 1990s, implies a general rejection of rental markets as a long-term source of affordable housing. Whether or not an initial decline in rental housing development was precipitated by these controls or income tax changes at the federal level, they ensured that rental housing supply levels would remain largely stagnant. Half-hearted attempts to encourage new rental supply have been undermined by frequent withdrawals of rent control exemptions for new construction and overwhelming subsidy favouritism of owner-occupied housing.

However, the end of social housing construction in the early 1990s necessitated the urgent reform of private rental markets to absorb low-income demand. These reforms have been limited to the introduction of vacancy decontrol and relatively minor supply-side subsidies. More importantly, welfare shelter components (de facto demand-side
housing subsidies) were not increased to counter the initial spike in market rents following vacancy decontrol; nor has the overall balance of public subsidies between owner-occupiers and tenants improved to fair levels. As a result, wait times for subsidized urban housing have become decades long.

This thesis suggests that the way forward does not lie in revisiting prior regulatory tools (e.g. new social housing or public-private affordable housing projects), but in the delivery of increased demand-side subsidies to the poorest households, without reliance on waitlist rationing or arbitrary rent-to-income ratios. Because income distribution policy inevitably includes *de facto* subsidies for basic needs like housing, this thesis recognizes that demand-side housing support will be necessarily split between two formats: the welfare shelter component, and some freestanding rent voucher benefit. New government expenditure ought to prioritize these policy tools above all others.

However, to ensure that demand-side subsidies do not merely ‘bid up’ existing rents, supply-side expenditure is required to restore competitive vacancy rates and improve overall supply elasticity in the rental market. Rather than the bureaucratic selection of specific private-sector proponents on a project-by-project basis, more general tax expenditures offer a superior means of attracting new rental housing investment and growth.

While these reforms are justified primarily by the distributive and corrective justice rationales for housing access policy, they have the added benefit of improving the competitiveness of rental housing markets from an efficiency perspective. In this respect,
sufficient market competition ought to permit the further removal of rent control and the
reform of covenant control to allow greater flexibility and more effective private ordering
in residential tenancy agreements. Perhaps the lowest priority among these reforms,
finally, would involve the rationalization of frozen social housing supply through
conversion to co-operatives (where possible) and/or supportive housing (where
appropriate).

The foregoing recommendations accept, without question, the rental housing market as
the primary source of shelter for Ontario’s low-income households, and rest on the simple
observation that demand elasticity in rental housing is, fundamentally, a function of
household income. When compared to the status quo legacy of low-income housing
regulation in this province, these reforms comprise a framework for the measure of
distributive and corrective justice required by the human right to adequate housing.