

THE EVOLUTION OF PROPERTY RIGHTS AND HOUSING TENURE IN POSTWAR CANADA: IMPLICATIONS FOR HOUSING POLICY *

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Over the past four decades, the property rights of owners, landlords and tenants have altered. The emergence of condominiums and the development of non-profit co-operative ownership have provided new forms of shared ownership that involve different kinds of property rights. Important changes in the landlord/tenant relationship include security of tenure legislation and rent controls. This article provides a brief review of the major postwar changes in owning and renting housing in Canada and discusses the impact these changes are having on the housing system in general and on housing policy in particular. The changes are situated in the broader context of the debate over property rights.

1. Introduction

The legal and social meaning of owning and renting housing in Canada has evolved in significant ways over the past four decades. In the 1940s one either owned or rented housing and there were few variations in what each of these tenures consisted of. Ownership was fee simple and, except for a few rudimentary building and land use restrictions, one could freely build or alter a house or apartment building in any manner.

By the 1980s home ownership tenure was no longer limited to owning a house on an individual plot of land. Condominium ownership was introduced in the 1960s, allowing individual ownership of the land and other common facilities [1]. Non-profit co-operative ownership was also introduced in the 1960s, allowing lower-income households to own a share in the multiple unit project they live in [2]. In addition, all forms of ownership have been affected

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by a wide range of regulations which define the way home owners can use and alter their property.

Rental tenure has changed dramatically for both the owner and the tenant. During the past two decades, concern over security of tenure and due process in the rental housing sector has led to the adoption of two types of regulatory measures: landlord/tenant legislation and rent regulation. Most provinces adopted landlord/tenant legislation during the early 1970s and concern over the impact of rent inflation and the inadequate supply of new rental units led to the imposition of rent regulations during the mid-1970s. As of 1988, seven of the ten provinces had rent regulations in place.

One aspect of housing policy analysis which has received little attention is the impact of changes in housing tenure options [3]. Tenure refers to the terms and conditions by which people own or have access to housing. These terms and conditions tend to change very gradually in politically stable countries. They are generally taken for granted as part of the "normal" way society operates. Yet, housing tenure, as with property rights in general, are socially created institutions. There is nothing natural or permanent about them. They are continually in flux. Legislation, administrative regulations and judicial decisions continually redefine elements of what is meant by owning and renting housing. These are ultimately rooted in changing social attitudes about the terms and conditions by which we access and hold shelter. Yet the implications of these changes for households, for housing policy, and for the housing system as a whole, have not been widely examined.

This article provides a brief review of major postwar changes in owning and renting housing in Canada within the context of the more fundamental debate over property rights [4]. The purpose is to identify the impact of these changes on the housing system in general and on housing policy in particular.

2. Change in the meaning of "property rights"

Before proceeding with the question of tenure, it is essential that the important concept of property rights be defined and recent trends in the nature of property rights as they relate to tenure issues be identified.

Over the past several decades it has been common to hear the claim that there has been an "erosion of property rights". According to a study published by the Ontario Real Estate Association, for example, "property rights are being eroded at an ever-increasing pace" due to an unabated "avalanche of legislation that affects the citizen's property rights" [5]. There is indeed a great deal of legislation affecting all aspects of owning and renting housing as well as the site on which housing is built [6]. The "erosion" conclusion, however, assumes that there is some defined set of property rights which is ideal and

that any change away from the *status quo* is a step backwards. This is based on a yet more fundamental assumption that private property is essential to individual freedom and democratic government and that government interference with property rights is a step towards despotism. These assumptions are deeply rooted in Canadian culture and institutions. The analysis of housing policy often avoids examining them, thereby accepting them as given and limiting the scope of the analysis.

“Rights” and “property” are two distinct concepts. Where do “rights” in relation to property come from? In the case of the controversy over landlord/tenant legislation, for example, it is often claimed that “a substantial transfer of property rights from landlords to tenants” is involved [7]. But as Makuch and Weinrib point out, “that statement presupposes a proper legal allocation of rights between landlords and tenants rather than a socially achieved consensus of what those rights should be ” [8]. Rights, whether they are property rights or human rights, can only be established politically. Property “rights” are socially defined. As Denman notes, property rights are “the creation of positive law whatever social or political theory may presuppose about their metaphysical origins in the natural or supernatural order of things”. Legislatures “can give and take, allocate and reallocate titles to them” [9]. As a result, the meaning of rights to property is not constant. Rather than the politically emotional term “erosion”, use of a more neutral term such as “change” is more appropriate. Over the past few decades there has been change in the rights associated with property ownership in general and with each form of housing tenure in particular. When change occurs, certain rights are being defined and allocated in a different fashion.

In relation to property rights, what is “property”? Property is essentially a bundle of rights bestowed by society’s institutions. The ownership of land, “real property”, is the consequence of the vesting of a right or bundle of rights in the name of the owner, providing the owner with certain decision-making authority. In modern usage, Denman argues, “rights as the objects of ownership are taking prominence over physical material things” [10]. It is a bundle of rights which in the sum add up to property. This is why “property rights” is so controversial. The “bundle” is socially defined and society is continually adjusting what it defines to be the bundle of rights associated with property. Macpherson points out that the “actual institution, and the way people see it, and hence the meaning they give the word, all change overtime ... The changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve” [11].

There can be more controversy over property rights than with other public issues because, as Macpherson notes, “there is not only argument about what the institution of property ought to be, there is also dispute about what it is” [12]. When people have different expectations about something they often see the facts differently, assuming they can even agree to look at the same facts.

As Macpherson explains, the “facts about a man-made institution which creates and maintains certain relations between people – and that is what property is – are never simple” [13].

The debate over property rights relating to housing and land use issues is often poorly focused due to the manner in which the key terms property and rights are used. This is very clear in the large body of literature on rent controls and security of tenure issues in Canada. There is the common usage of the term “property” and its usage by all legal systems. “In current common usage, property is *things*; in law and in the writers, property is not things but *rights*, rights in or to things” [14]. In addition, property “is usually treated as identical with *private* property, an *exclusive* individual right, my right to exclude you from some right or benefit of something” [15]. Both these uses, according to Macpherson, are misusages. The first is merely a popular misuse of the word “property”. The second, however, is more serious in that it affects policy, usually constraining the range of policy options open to government. According to Macpherson: “It is a genuine misconception, which affects the whole theoretical handling of the concept of property by many modern writers” [16].

Controversy over property rights has increased as the role of government in Canada’s housing sector has increased. The history of intervention reflects the widespread acceptance of the importance of housing in the private and community lives of Canadians. It also reflects an evolving view of the appropriate mix of the private and public sectors in housing and urban development. Left to itself, the price mechanism has been unable to meet the broad set of housing-related objectives and land use patterns deemed desirable by society. Intervention in housing has grown without significant interruption throughout this century; all three levels of government and all the major political parties have had a hand in it. Instead of a typical free market, Canada has a mix of public and private sector roles in the provision and maintenance of the housing stock [17].

Lansley notes that it is possible to identify three distinct views about government intervention in housing:

1. Housing markets should be allowed to operate freely with little or no intervention.
2. There is a substantial role for both public intervention and the private market, with governments involved in setting standards, in providing subsidies, in exercising control over various aspects of housing supply and demand, and in the direct provision of housing, with private market dynamics having free rein within these constraints.
3. There should be a much more comprehensive role of government, with a more extensively controlled and socialized market [18].

Public opinion, and the actions of elected officials at all levels of government, places the majority view of Canadian society in the second category. Canada has had a continual stream of national and provincial housing programs since

the 1930s. Yet, after fifty years, only 2 percent of the housing stock is publicly owned and another 2 percent is owned by non-profit and co-op corporations. A review of Canadian housing policy reveals that an underlying principle guiding intervention has been the desire to maintain the market mechanism for the supply and allocation of the nation's housing stock. This has constrained the development of social housing and promoted the development of home ownership over rental tenure.

In recent years, however, public opinion has tended to favour the imposition of a variety of new regulatory measures aimed specifically at the operation of the private rental market – a movement towards the third category. The result is increased and on-going political conflict over the issue of property rights in the rental housing sector. The problem is essentially one of finding a political procedure – administrative regulation of landlord and tenant relations, including rent review – that people can agree is fair. This is not easy. Changes in the rights associated with property ownership only come about through political conflict. The distribution of wealth and power is at stake. As Barton has recently noted:

Private property rights are the form of power created by government but insulated from democratic control by their private status. Instead of dispersing power and limiting the Leviathan State, private property can serve to harness the power of government to create great accumulations of wealth and power. People with little cash or income have little market power, and to the extent that market power is convertible into political power they are in an inferior position in the political arena as well [19].

People in the rental sector have traditionally had little power and few rights. This has changed over the past fifteen years in Canada, but not without a great deal of conflict.

In contrast to rental tenure, changes in ownership tenure in recent decades have been less controversial because the benefits and rights traditionally associated with ownership have not been significantly affected. They have, in fact, been extended by the creation of two new forms of ownership: condominium and co-operative. These involve no fundamental conflict over property rights. Rather, the role of government has been one of extending ownership tenure by making legal two new forms of ownership.

3. New forms of owning

The demand for home ownership after World War II was initially met by building detached houses on individual lots on the urban fringe. The National Housing Act placed an emphasis on this form of housing, providing subsidized mortgage funds and mortgage insurance to make low down-payments and long-term mortgages possible. In spite of the various subsidies available and

Table 1
Change in the number of two-earner families, Canada, 1951–1981

	1951 (%)	1961 (%)	1971 (%)	1981 (%)
Two or more earners	33	36	49	60
One earner	60	57	41	29
No earner	7	7	10	11

Source: Statistics Canada (1984) *Charting Canadian Incomes 1951–1981*. Cat. 13-581E: 10.

the prosperity of much of the postwar era, it became increasingly difficult for many households to afford the traditional suburban house. House prices began to increase more rapidly than incomes. The trend towards two-income families (see table 1) is likely both a cause and effect of the postwar inflation in the cost of home ownership. It is a cause in that families with two incomes could allocate more money to obtain the housing of their choice, thereby helping bid up the price of housing, and it is an effect in that other families had to switch from a single to a double income in order to afford home ownership.

The high demand for home ownership combined with the rising cost of accessing ownership, led to two now very common new forms of ownership: condominiums and co-operatives. Both involve changes in the notion of what is owned and how it is owned.

3.1. Condominiums

As a modified form of home ownership, condominiums provide a unique package of property rights through a legal arrangement which makes it possible for an individual to own a dwelling unit without exclusive ownership of the land on which the structure and its surroundings is built. Together with the dwelling unit, each resident of a condominium jointly owns a proportionate share of the common elements such as sidewalks, driveways, landscaped areas, recreational facilities, elevators, corridors, parking and storage. A condominium is a form of ownership, not a housing form. Condominiums may be detached, semi-detached, row townhouse, stacked townhouse or apartment structures. Although a condominium provides property rights similar to individual home ownership, by its very nature it involves a communal environment requiring each tenant-owner to yield some individual rights for the sake of achieving harmonious management of the common elements and of the project as a whole.

Condominiums became popular as a result of growing urbanization accompanied by high land values and a continuing demand for home ownership.

Factors such as rapid population growth, demographic changes, decreasing household size, and rising household income all contributed to a high demand for housing, particularly ownership housing. At the same time, other factors, including rapid increases in the price of housing and the cost of residential land, increased commuting time to the new suburbs and rising rents in metropolitan areas, gave rise to a demand for changes in the laws governing the ownership of housing. By permitting a separation of the ownership of the housing unit from ownership of the site many more Canadians could become homeowners at a potentially lower cost due to savings achieved by collective ownership of the site, common elements and shared maintenance.

The first condominium acts were adopted in 1966 by British Columbia and Alberta. By the end of 1970 all but one of the provinces had adopted condominium legislation. P.E.I. adopted its first legislation in 1977. The western provinces have patterned their legislation after the 1961 Conveyancing Strata Title Act of New South Wales, Australia. Manitoba, Ontario and the Maritime provinces borrowed many of the features of U.S. statutes. Overtime provinces have borrowed the best features of each other's legislation with the result that the present provincial acts have a great deal in common. [20]

Though traditional fee simple ownership is the preferred form of home ownership, condominiums became more widely accepted as the cost of and the demand for ownership increased in the 1970s. The major tax changes introduced in 1971 further stimulated demand by exempting privately owned houses from the newly introduced capital gains tax and removing the tax shelter provisions which applied to rental housing. The combined affect of these two income tax changes was to make home ownership more attractive and to make investment in rental housing less attractive.

The demographic and household formation trends, together with these tax considerations, helped maintain high demand for home ownership, causing many developers to shift their activities from the development of rental housing to ownership in order to satisfy demand [21]. Though there are many factors contributing to the decline of the private rental market, one important factor is certainly the increase in condominium starts. Developers could obtain an immediate return on their investment, rather than the gradual return obtainable by rental housing investment. Purchasers of condominiums obtained the equity, tax and security of tenure benefits of ownership.

An examination of the national distribution of condominiums indicates the extent to which local market conditions provide the impetus for demand. Table 2, which provides a summary of the distribution of condominium ownership in Canada as of 1981, indicates that condominiums have become a significant part of the housing market in the metropolitan areas with the highest housing costs. Over 50 percent of all condominiums can be found in Toronto and Vancouver. In locations where ownership costs are lower the condominium option is less prevalent.

Table 2
Distribution of condominium ownership across Canada, 1981

Area	Owner-occupied condominiums	Distribution of condominiums	Total owner-occupied units	Condominiums as % of total ownership
Toronto	65 610	38.4	587 305	11.2
Vancouver	23 400	8.3	101 795	14.0
Edmonton	10 360	6.1	128 175	8.1
Montreal	8 780	5.1	427 750	2.1
Calgary	7 905	4.6	120 730	6.5
Hamilton	6 400	3.7	120 640	5.3
Victoria	4 495	2.6	56 375	8.0
Other	29 865	17.5	3,320 315	0.9
Total	171 090	100.0	5,141 930	3.3

Source: A. Skaburskis and Associates (1984) *National Condominium Market Study, Working Paper 2*, Ottawa: Canada Mortgage and Housing Corporation, p. 6.

Who are the owners of the more than 200 000 condominiums in Canada? There have been two major “waves” in the demographic composition of the typical condominium purchaser. In the early 1970s young couples from the postwar “baby boom” purchased condominiums as an alternative to either renting or single detached ownership. As the decade progressed, more empty nesters entered the market and builders aimed new projects at this market segment. Households with young children, smaller households and empty nester households have been found to have a high propensity to buy condominiums. A recent study concluded that condominiums attract a broad spectrum of households and that the market has three basic components: “One caters to the under 40 year old apartment dweller without children who eventually plans to buy a single detached house; the second is the young family living in a townhouse condominium; the third is the empty nester seeking apartment condominiums” [22].

As a new form of ownership, the introduction of condominium tenure to Canada has broadened the range of available home ownership options and increased the supply of ownership units to meet the continually high demand for ownership. This is no doubt a significant positive benefit to the home ownership market, for both suppliers and consumers. It is not, however, without its potential problems. The quality of construction in many condominiums may prove to become a serious problem as the buildings age. The very nature of condominium development and ownership means that the builder is free of any long-term responsibility for the project once the units are sold. The quality of construction, materials used, and design considerations relating to life-cycle maintenance costs may be compromised. The fact that the

units are sold to individuals who rarely if ever knew each other prior to purchasing their units means that the initial purchasers of a new project have little or no opportunity to influence or supervise the quality of the design and construction process, as is sometimes the case in the construction of new houses. The competence and diligence of the management of a project is also extremely important. It is easy for poor management to go unnoticed until serious maintenance or financial problems arise.

Condominiums have also played a role in the decline of the affordable rental stock. Until regulations were introduced, many existing apartment buildings were converted to condominium ownership. In addition, many moderate-income households who would otherwise have contributed to rental demand, resulting in the construction of more private rental units, have opted for the condominium option. This means that the *demand* for rental housing in the 1980s, which is substantial, falls for the most part into the category of social *need* rather than market demand. Since the private sector only responds to market demand, the construction of new unsubsidized private rental housing has been in decline for the past fifteen years.

3.2. *Co-operatives*

Though housing co-operatives exist in many countries, they are usually similar to condominiums in that individuals make an equity investment and have the right to sell their share in the co-op at market values and profit from any capital gain which may accrue [23]. This type of market co-op is virtually the same as owning a condominium.

In Canada, condominiums and “non-market” continuing housing co-operatives originated at about the same time but are very different. Unlike condominiums, non-profit housing co-operatives involve no equity investment by the residents. In some cases members contribute share capital, usually \$2000 or \$3000, when they join the co-op. Upon leaving the co-op the share capital is returned and interest may or may not be paid depending upon the co-op’s rules. A federal government co-op housing programme provides an insured mortgage and subsidies enabling lower-income households to afford the monthly housing charges. An operating agreement covering the 35-year term of the mortgage guarantees ownership of the project by the residents on a non-profit co-operative basis. It is the non-profit and non-equity form of ownership combined with democratic self-management which distinguishes co-operative from condominium ownership.

In Canada’s housing co-operatives, the co-op, as a legal corporate entity, owns the entire project. The members of the co-op do not own the units they live in. They pay a housing charge (similar to rent) for the right to occupy a unit. All co-op members have one vote and all members elect a board of directors from among themselves. Provincial legislation defines the nature of

co-operative corporations, just like other legislation defines the nature of condominium corporations. When members of a co-op move out, they receive no financial compensation and they do not even select who will occupy their unit next. The board of directors, usually through a membership committee, interviews potential new members in advance and maintains a waiting list.

Because housing co-ops are democratically co-owned, the members have full management responsibilities. The board of directors appoints members to a number of committees, usually a maintenance, finance and membership committee. All members are expected to volunteer some time to the management of the co-op. Membership in one of the committees or serving a term on board of directors is the usual form of participation. Larger co-ops, those with more than 30 or 40 units, hire staff or retain the services of a management firm for keeping the books and doing the routine maintenance. The monthly "housing charge" is set each year by the members at a level sufficient to cover the mortgage payments, operating costs and maintenance reserves. The entire process of ownership and management is a democratic one.

Co-operative housing in Canada, therefore, represents a distinctly different tenure option for the ownership and management of housing. It is neither individually owned housing nor is it government owned and managed housing. Co-ops are within the public domain, like public housing, yet in practical and legal terms, they are owned by the people who live in them.

Co-operative housing in Canada dates back to the 1930s when a number of building co-operatives were established in smaller communities, mainly in Nova Scotia and Quebec [24]. In a "building co-operative" a group of people join together to build each other's individual house. The house is then owned by the occupant. This was a difficult model to apply in an increasingly urbanized nation and to large numbers of households.

In the 1960s, housing reform advocates began to focus on the "continuing co-op" model whereby members jointly own the entire project on a continuing basis [25]. Enough momentum had developed during the 1960s for a national organization, the Co-operative Housing Foundation of Canada (CHF), to be established by the Co-operative Union of Canada and the Canadian Union of Students. One of CHF's first actions was to lobby the 1968-69 Federal Task Force on Housing and Urban Development for the establishment of a national co-op housing program. The Task Force was created to look into the growing discontent with the "bulldozer" approach to urban renewal and the building of large-scale public housing projects [26].

In its brief to the Task Force, the Co-operative Union of Canada complained of the failure of post-war programs to assist lower-income households and of the regressive nature of National Housing Act programs.

Canada should have seen that the National Housing Act, balanced like an inverted pyramid, was serving the higher income people quite nicely over the years, giving them the

protection of pegged interest rates and even providing serviced land in land assembly projects, but doing less for low-income families at the broad base except in a very limited public housing program that for many years could only be described as token. Thus the operations of the NHA became “socialism for the rich, free enterprise for the poor” [27].

The brief asked for “full recognition of co-operatives in planning and policies for housing” and argued for the creation of a third sector:

instead of one form of housing for all, based on private ownership and private initiative, the nation needs three housing sectors: public, co-operative and private, the first two catering to those for whom the present system has little or offer, and the third to those who are able to “go it alone” [in the private sector] as at present [28].

The 1969 report of the Task Force recommended that greater emphasis be placed on finding ways for moderate-income households to obtain home ownership and that the public housing program be discontinued in favour of socially mixed assisted housing projects. These recommendations helped focus further attention on the co-operative form of tenure. One of the Task Force’s specific recommendations was that “greater encouragement be given to the use of limited divided, non-profit and co-operative projects” [29].

When the federal government announced its \$200 million fund for innovative housing in 1970, the Co-operative Housing Foundation successfully negotiated with CMHC to have about a dozen housing co-ops financed. As a result, about 1200 co-op units were successfully built in or near eight major cities. When the National Housing Act was being revised in the early 1970s, the co-op sector was able to have funding provisions included in the 1973 amendments to the National Housing Act [30]. In the mid-1970s the number of housing co-ops and sponsoring organizations began to increase and, when the program was further revised in 1978, the federal funding commitment grew to about 5000 units per year.

The continued growth of co-op housing was ensured after the Conservative government, elected in September 1984, decided to maintain the program in order “to promote security of tenure for households unable to access home ownership” [31]. The co-op housing program’s objectives were a subject of much debate since the mid-1970s because it started as an alternative to public housing, a program aimed at only extremely poor households. Targeting became a major issue because co-ops house both low- and moderate-income households. The federal government ended this debate over targeting by explicitly announcing that the “orientation of the new program recognizes the dual objectives of co-operatives – a social housing objective and an objective of providing security of tenure as an alternative to home ownership” [32]. The program was maintained in spite of fiscal restraint measures as an alternative tenure aimed at people who cannot afford private home ownership.

The Cooperative Housing movement has played an important role in providing alternatives and security for Canadians who do not have the means to become homeowners. This group

will continue to be served through a revised co-operative housing program which relies less on government expenditure than has been the case in the past. The program revision, based on index-linked mortgaging, is being developed in conjunction with the Cooperative Housing Foundation [33].

The new index-linked mortgage was developed in order to minimize the subsidies required to make co-op units affordable to moderate-income households. A separate rent supplement program was established so that low-income households could afford to live in housing co-ops.

About 50 000 low- and moderate-income Canadian households now live in 1400 self-managed co-ops on a non-profit and non-equity basis. In terms of Canada's entire housing stock, co-op units represent a very small share, about one-half of 1 percent. Their impact, however, is much greater than these numbers indicate. Most co-op units, about 80 percent, have been built since 1978 and most have been built in the three most urbanized provinces. About 40 percent of co-op units are located in Ontario, about 25 percent in Quebec and 25 percent in British Columbia. The remaining 10 percent are distributed among the other seven provinces. Since 1980, co-ops represent about 4–5 percent of annual house starts. This alone is fairly significant, but because very few non-subsidized rental units are being built, and because co-ops tend to be concentrated in the larger urban areas, mainly Toronto, Montreal and Vancouver, co-op housing plays a very significant economic and social role in the larger metropolitan housing markets. This has given the programme a public profile well beyond its size.

4. New forms of renting

A fundamental distinction between renting and owning is that rental tenure separates ownership from occupancy, creating a potential for conflict. The owner of rental housing is an investor in a good (accommodation) while the occupant becomes the actual user of the good, with little or no concern for its investment aspect. Home ownership combines these two aspects, housing as a financial investment and housing as shelter. The home owner can choose which aspect to emphasize – its investment potential or its use as accommodation. A home owner has virtually total control over the percentage of income spent on housing (through the choice of housing, type, size, and location), the level of housing maintenance, and whether or when to move to another house.

The separation of ownership from occupancy creates the potential for conflict when the investment and occupancy interests differ. When a conflict arises in the rental relationship, who has the right to choose which interest should dominate? In Canada, up until the early 1970s, the decision was purely

the prerogative of the owner. There was no balance of rights, responsibilities, or power in the landlord/tenant contract. Common law treated residential tenancies the same as it treated commercial and industrial tenancies [34].

The significant change in the nature of renting housing in Canada has been the introduction of security of tenure legislation and rent regulations. Governments have sought, in housing as in other areas, to eliminate abuse of basic rights on the basis of such things as race and sex and to protect consumers from misleading and arbitrary actions on the part of producers and owners. Intervention by regulation has focused especially on threats to basic human needs, such as good health and physical safety, and on threats to fundamental principles of justice and due process. Out of this evolution of social institutions and practices, landlord and tenant legislation has emerged [35]. In some jurisdictions, the control of actual rent levels has followed the adoption of landlord/tenant legislation because of the potential of economic eviction (*i.e.* the possibility that landlords will circumvent security of tenure regulations by significantly raising rents as a means of evicting tenants). There is therefore an implicit, if not an explicit, societal recognition that there is something unique about rental housing – something that separates it from most of the significant goods that we treat as market commodities.

4.1. Security of tenure

The notion of security of tenure has found its way into residential landlord/tenant law over the past two decades just as “stability of employment” has permeated employment law over the course of this century [36].

Landlord/tenant law changed very little from its nineteenth-century roots until the 1960s. Changes in employment law began much earlier because labour organizations provided unionized employees with access to legislatures and the means to present claims and new theories to law-makers and the courts. Collective bargaining and arbitration procedures dramatically changed employment law. Although some 40 percent of Canadians have been tenants since the 1940s, tenants were not organized until very recently. Legislatures and courts, following public opinion, especially with regard to evictions, increasingly came to the view that the landlord, like the employer, controls a basic human necessity. Shelter is as crucial to subsistence as a job. As Glendon notes: “Increasing acceptance of this idea as an implicit premise has made legislative, as well as judicial, regulation of the residential rent contract as inevitable as it was of the employment contract” [37]. As a result, both the employment and rental relationships have passed over time from status to contract, from contract to regulation, and, to some degree, from regulation to administration. Glendon believes that private and public relationships are merging as the state, through courts and administrative bureaucracies, regu-

lates and controls more and more of the individual's life [38]. "Such a view", according to Makuch and Weinrib, "supports the notion that freedom of contract is no longer the norm and that society can and should impose social values in landlord and tenant relationships as it does in consumer affairs and other contractual tortious relationships based on reasonable reliance and expectation" [39].

This takes us a long way from the simple debate over property rights when even contract law is subject to consideration of social values. Social attitudes are changing in dramatic ways bringing with them subtle but significant changes in our institutions. Security of tenure and rent control in Canada's residential rental sector are prime examples. Anglo-American lease law had developed the rule of "mutuality" that either party might terminate a tenancy at will or a month-to-month tenancy for any reason upon complying with statutory notice requirements. Over the twentieth century this rule of free terminability has been replaced by its opposite, security of tenure. Just as discharges of employees at-will became increasingly unlawful, so otherwise legal termination of leases began to be forbidden if they contravened some public policy.

Makuch and Weinrib argue that there are two basic rationales for guaranteeing tenants' security of tenure: "one is to protect tenants' psychological interest and to give them security akin to that enjoyed by home-owners while at the same time recognizing the interests of landlords" and the second "is to prevent landlords from evading rent control" [40]. The second case is the most controversial rationale because it relates to housing affordability and general social welfare objectives. Yet the two are bound together. One cannot exist without the other. Psychological protection achieved by security of tenure requires the protection from inordinate rent increases. As Makuch and Weinrib put it in their study of security of tenure: "if psychological protection is to be provided, a limited form of rent control is necessary; if affordable housing is the main goal, then rent control is necessary along with security of tenure" [41].

Furthermore, if security of tenure is to be achieved, demolition and conversion of rental units must be addressed. As the first province to adopt legislation permitting condominium ownership, British Columbia had to deal with the problem of the conversion of rental units to condominiums in the early 1970s. With vacancy rates as low as 0.4 percent in Vancouver and Victoria in 1973, and conversions causing considerable controversy because of the displacement of lower-income renters, B.C.'s condominium legislation was amended in 1974 to allow municipalities to stop any conversion if they so wished [42]. During the 1970s many provinces and municipalities adopted similar legislation regulating and often preventing such conversions. This represents a further change in the nature of the bundle of rights associated with owning rental accommodation in Canada.

4.2. *Rent control*

Rent control is the result of a government decision to prevent landlords from reaping the benefit of a scarcity situation. It was first used in this century during wartime. Britain imposed rent controls during World War I and virtually every major combatant, including Canada, imposed rent controls as part of more general price controls during World War II. Canada's Wartime Prices and Trade Board imposed rent freezes in 15 cities in September 1940. A year later rents in the rest of the country were frozen. This was "simple" rent control – an absolute freeze. There was no complex formula for permissible rent increases or exceptions.

Beginning in 1947 a period of rent decontrol began in Canada, as it had in other major Western countries. Federal housing policy sought to establish a private rental housing development industry. During the war Wartime Housing Ltd., a crown corporation, developed rental housing for war industries and after the war for veterans [43]. In the postwar period, in addition to decontrolling rents, the federal government introduced subsidies for the private sector, both direct and through the tax system. With these direct and indirect subsidies in place the federal government ended rent controls in 1951, along with the remaining wartime price controls. Only the province of Quebec maintained comprehensive rent controls beyond 1951. From the early 1950s to the mid-1970s rent controls were not very common in Canada.

Rental market pressures were such that in the early 1970s demands for rent control became more common. Security of tenure legislation had been adopted by most provinces but, in the inflationary period of the 1970s, it meant little if economic evictions were possible. While several provinces had either adopted rent controls or were about to adopt them as of 1975, the decision of the federal government to impose wage and price controls in October 1975 carried with it a request to the provinces to impose rent controls. By April 1976 all provinces had imposed rent controls. Most of the legislation was comprehensive in terms of the types of residential premises covered. Each province established a system of rent tribunals separate from other price control mechanisms [44].

When housing supply fails to keep pace with demand, as it has for the past decade, the scarcity value of the existing rental housing stock becomes a powerful force reallocating income in favour of landlords. Rent stabilization or control can, in the short run at least, frustrate this undesirable change in the distribution of income. In this sense of protecting the *status quo* and frustrating undesirable income redistribution, rent control is a conservative instrument. It cannot improve the situation but it can at least prevent it from getting worse for tenants caught by the failure of the rental market [45]. While not all tenants have low incomes, the majority do have low incomes and are unable to afford home ownership. They have no place to go. In effect, as Barton argues,

“rent control creates a human right to remain in one’s home, even if one does not have a property right over it” [46]. This reflects the belief held by many that a tenant’s home should not be treated as an ordinary commodity.

Whereas the landlord/tenant relationship was once a pure market relationship, an issue relating to property rights, it is increasingly becoming a socio-political relationship, an issue relating to human rights. Human rights are instituted “wherever property rights create disparities of power that prevent equal participation in a bargaining process” [47]. The growing crisis in the rental sector points to yet further change in what is meant by “owning” private rental units and what is meant by “renting” housing. Human rights are essentially a bundle of rights entirely removed from the domain of the market. Security of tenure and rent regulations have been instituted as a means of counteracting the influence of private market power over a basic human need, shelter. This is indeed a very significant change in the nature of rental tenure in Canada.

5. Implications for housing policy

Over the past several decades market demand and public policy have increased the number of tenure options and modified the nature of existing options. There are two broad categories of significant housing policy implications. The first relates to the institutional framework in which the housing policy process is situated. The second relates to the more immediate implications of the high demand for ownership housing over the postwar period.

5.1. The property rights debate

At the broad institutional level, there is an on-going evolution in the meaning of property rights and tenure in Canada. This type of change will continue to be controversial, forming the overall framework in which specific housing policies and programs will be developed. Various groups with differing interests and philosophies in the housing sector will be promoting and defending their “rights”. Broadly defined social and community rights will conflict with more narrow definitions of private property rights. The private market commodity aspect of housing will continue to decline in importance, especially in the rental sector, making assessments of housing problems based on methodologies relying solely on market analysis even less relevant [48]. The controversial nature of this broader institutional change process will help guarantee that comprehensive and long-term housing policies will not be politically viable.

There will be too many conflicting demands placed on elected decision-makers and too little consensus.

C.B. Macpherson has defined this problem as the central difficulty of our liberal-democratic institutions:

the difficulty of reconciling the liberal property right with that equal effective right of all individuals to use and develop their capacities which is the essential principle of liberal democracy. The difficulty is great [49].

The only possible resolution is a broader conceptualization of the nature of property and of property rights. The problem, according to Macpherson, is that “we have all been misled by accepting an unnecessarily narrow concept of property, a concept within which it is impossible to resolve the difficulties of liberal theory” [50]. The difficulty disappears once we broaden our concept.

Property, although it must always be an individual right, need not be confined, as liberal theory has confined it, to a right to exclude others from the use or benefit of some thing, but may equally be an individual right not be excluded by others from the use or benefit of some thing The right not to be excluded by others may provisionally be stated as the individual right to equal access to the means of labour and/or the means of life [51].

As one of the most basic and essential “means of life” housing is and will continue to be at the forefront of this very fundamental philosophical and political debate. Government intervention in the housing sector is so controversial because, at its most fundamental level, any intervention affects property rights. Unlike most other consumer durables, housing is intimately tied to the problem of property and property rights. Owning and renting will, therefore, continue to undergo significant changes in the rights and obligations associated with these two forms of housing tenure. But the change will come, as it has in the past, in an *ad hoc* fashion. We are unlikely to see for some time a comprehensive housing policy in Canada. The dominance of market institutions in the housing sector places severe limits on public planning. Canadian housing policy has had one ubiquitous trait: privatism – the tendency to pursue public goals via private means [52]. The changes in housing tenure have not fundamentally changed this political reality. Rent control is the only significant exception.

5.2. *Polarization of households by income and tenure*

The second major implication relates to a more immediate situation within the housing sector itself. The demand for home ownership, fueled by many factors in postwar Canada, not the least of which has been government housing and

tax policy, is leading to a situation in which Canadian households are becoming polarized on the basis of income and tenure [53].

Trends in the distribution of home ownership among income groups are very dramatic. Table 3 demonstrates that there were gains among the top two quintiles and declines in the bottom two during the fifteen years between 1967 and 1981. Fifteen years is a relatively short time for such a dramatic change in tenure distribution patterns to take place. It is an indication of how significant the impacts of the changing macro-economic conditions since the 1960s have been for the housing sector. The overall percentage of households owning their own units remained virtually the same during the period (a change of 0.6 percent more home owners). What was dramatic was the change in who were the home owners. During a period in which a great deal of direct and indirect subsidies were provided to the ownership sector and to first time home buyers, households in the two highest income quintiles made substantial gains in home ownership rates (up to 10 percent each), whereas the households in the two lowest quintiles increasingly became tenants. The middle quintile household remained about the same, with a small increase of 4 percent in the rate of home ownership during the period since 1967. During the same period, however, the home ownership rate of the second quintile also declined from 55.5 to 52.4 percent. In short, fewer households in the lower 40 percent of the income range are home owners today than they were back in 1967. The temporary home ownership programs introduced since that time have not, it would appear, been able to outpace the tide of rising house prices and mortgage interest rates. This trend, of course, was not due solely to the regressive nature of housing program subsidies. Macro-economic trends continued to work against lower-income households.

Table 3
Changes in home ownership rates within and between income quintiles, Canada, 1967, 1973, 1977, 1981

	Percent of households owning their unit				
	1967 (%)	1973 (%)	1977 (%)	1981 (%)	1967-81 (%)
Lowest quintile	62.0	50.0	47.4	43.0	-19
Second quintile	55.5	53.6	53.3	52.4	-3
Middle quintile	58.6	57.5	63.2	62.7	+4
Fourth quintile	64.2	69.8	73.2	75.0	+11
Highest quintile	73.4	81.2	82.3	83.5	+10
Total	62.7	62.4	63.9	63.3	+0.6

Source: Statistics Canada (1983) *Household Facilities by Income and Other Characteristics*. Cat. 13-567.

Table 4
 Renter households by income quintile, Canada, 1967, 1973, 1977, 1981

Income	1967 (%)	1973 (%)	1977 (%)	1981 (%)	Change 1967-1981 (%)
Lowest quintile	20.4	26.6	29.1	31.1	+10.7
Second quintile	23.9	24.7	25.9	26.0	+2.1
Middle quintile	22.2	22.6	20.4	20.3	-1.9
Fourth quintile	19.2	16.1	14.8	13.6	-5.6
Highest quintile	14.3	10.0	9.8	9.0	-5.3
Total	100.0	100.0	100.0	100.0	

Source: Statistics Canada (1983) *Household Facilities by Income and Other Characteristics*. Cat. 13-567.

The increasing rate of home ownership among the upper-income groups also indicates an equally significant and very troubling trend for the rental housing sector. The rental sector was becoming an increasingly residual one, containing more lower-income Canadians and fewer higher-income Canadians. This has not always been the case. Table 4 indicates that as recently as 1967 the tenant population was divided equally between each of the income quintiles. The only exception was the highest quintile. By 1981, however, the number of higher-income tenants (tenants with incomes in the fourth and fifth quintiles) declined while the number of lower-income tenants (tenants with incomes in the first and second quintiles) increased, both by significant amounts for such a short period of time. This means that those households able to take advantage of the home ownership option did so, leaving virtually all those who had no choice in the rental sector.

Is it any wonder, then, that private investors cannot supply new rental units and make a return on their investment? How can Canada have a viable private market in a very expensive consumer good when the income profile of the consumers of this commodity is increasingly limited to the groups with the lowest incomes? The private rental supply market mechanism has not functioned for the past decade and most likely cannot function in the future, due to the upward cost pressures on supplying a rental unit and the downward trend in the income profile of renters. The vast majority of private rental starts over the past fifteen years have been subsidized. There are no longer enough tenants with the incomes necessary to support the economic returns required to make most new rental projects viable. In addition, the costs of building a unit are so high that tenants who can afford to pay the required rent levels are usually able to afford the purchase of a condominium at about the same monthly cost.

It is unlikely that this trend in the polarization of Canadian households by income and tenure will be reversed. It is also unlikely that the decline in the private rental sector will be reversed. The postwar demand for home ownership and the creation of a new form of ownership, condominiums, which essentially permits higher income tenants to own what would otherwise be rental apartments and townhouses, has helped create a socio-tenurial polarization of the country. Fiscal restraint programs mean that additional spending on social housing for low- and moderate-income households is unlikely in the immediate future. The shifts in the nature of owning and renting over recent decades, in the context of the constraints imposed by the broader political and economic institutions, has serious social, neighbourhood and housing market consequences which future generations of Canadians will have to face.

Notes

[1] There is very little literature on the evolution of condominiums in Canada and the characteristics of the condominium stock and condominium owners. See A. Skaburskis and Associates (1984) *National Condominium Market Study: Summary*, Ottawa: Canada Mortgage and Housing Corporation (CMHC), Research Division; S.W. Hamilton et al. (1978) *Condominiums: A Decade of Experience in British Columbia*, Vancouver: B.C. Real Estate Association; and City of Toronto Planning and Development Department (1982) *Toronto Condominiums, Past, Present and Future*, Toronto: The Planning and Development Department, Research and Information Section, Research Bulletin 19.

[2] A.F. Laidlaw (1977) *Housing You Can Afford*, Toronto: Green Tree Publishing Co.; and J.D. Hulchanski (1986) *Co-operative Housing in Canada: A Comprehensive Bibliography*, Vancouver: UBC Planning Papers, Bibliography no. 4.

[3] There are several recent studies of other aspects of housing tenure in Canada. See F. Dansereau, G. Divay and J. Godbout (1985) "State Intervention and Alternative Tenure Patterns in Montreal", in: W. van Vliet, E. Huttman and S. Fava (eds.), *Housing Needs and Policy Approaches: Trends in Thirteen Countries*, Durham: Duke University Press; R. Harris (1986) "Home Ownership and Class in Modern Canada", *International Journal of Urban and Regional Research*, 10 (1), 67-86; and G. Pratt (1986) "Housing Tenure and Social Cleavages in Urban Canada", *Annals of the Association of American Geographers*, 76 (3) 366-380.

[4] The related topic of land tenure is not discussed in this article. For two recent studies of the evolution land tenure in Canada, see J.B. Cullingworth (1987) *Urban and Regional Planning in Canada*, New Brunswick: Transaction Books, Chapter 5; and M. Qadeer (1985) *The Evolving Urban Land Tenure System in Canada*, Winnipeg: Institute of Urban Studies, University of Winnipeg, Report No. 10.

[5] A.H. Oosterhoff and W.B. Rayner (1979) *Losing Ground: The Erosion of Property Rights in Ontario*, Toronto: The Ontario Real Estate Association, pp. v, ix.

[6] See E. Adams, P. Ing, J. Ortved and M.J. Park (1986) *Government Intervention in Housing Markets: An Overview*, Toronto: Ontario Commission of Inquiry into Residential Tenancies, Research Study, No. 29; and S.W. Hamilton (1981) *Regulation and Other Forms of Government Intervention Regarding Real Property*, Ottawa: Economic Council of Canada, Technical Report No. 13.

[7] Ontario, Ministry of Municipal Affairs and Housing (1982) *The Impact of Rent Review on Rental Housing in Ontario: A Staff Research Report*, Toronto: The Ministry, p. 142.

- [8] S.M. Makuch and W. Weinrib (1985) *Security of Tenure*, Toronto: Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 11, p. 6.
- [9] D.R. Denman (1978) *The Place of Property*, Berkhamsted: Geographical Publications, p. 3.
- [10] *Id.*, at 34.
- [11] C.B. Macpherson (1978) *Property: Mainstream and Critical Positions*, Toronto: University of Toronto Press, p. 1.
- [12] *Id.*, at 1.
- [13] *Id.*
- [14] *Id.*, at 2.
- [15] *Id.*, at 1.
- [16] *Id.*, at 2.
- [17] For an account of the evolution and the extent of the intervention, see J.C. Bacher (1986) "Canadian Housing 'Policy' in Perspective", *Urban History Review*, 15 (1), June, 3-18; A. Rose (1980) *Canadian Housing Policies, 1935-1975*, Toronto: Butterworths; Hamilton *supra* note [6]; J.D. Hulchanski (1986) "The 1935 Dominion Housing Act: Setting the Stage for a Permanent Presence in Canada's Housing Sector", *Urban History Review*, 15 (1), June, 19-39; and J.T. Saywell (1975) *Housing Canadians: Essays on the History of the Residential Construction in Canada*, Discussion Paper No. 24, Ottawa: Economic Council of Canada.
- [18] S. Lansley (1979) *Housing and Public Policy*, London: Croom Helm, p. 18.
- [19] S.E. Barton (1983) "Property Rights and Human Rights: Efficiency and Democracy as Criteria for Regulatory Reform", *Journal of Economic Issues*, 17 (4), December, 921-922.
- [20] A. Skaburskis and Associates (1984) *National Condominium Study: Working Paper 2, Provincial Condominium Legislation*, Ottawa: CMHC, pp. 4-5.
- [21] See J.R. Miron (1988) *Housing in Postwar Canada: Demographic Change, Household Formation, and Housing Demand*, McGill-Queens's University Press; and R.G. Dowler (1983) *Housing Related Tax Expenditures: An Overview and Evaluation*, Toronto: Centre for Urban and Community Studies, University of Toronto, Major Report No. 22.
- [22] A. Skaburskis and Associates (1984) *National Condominium Study: Working Paper 1, Literature Review*, Ottawa: CMHC, pp. 34-35.
- [23] For a discussion of the differences between co-operatives and condominiums in Scandinavia, see L.J. Lundqvist (1984) "Housing Policy and Alternative Housing Tenures: Some Scandinavian Examples", *Policy and Politics*, 12 (1), 1-12.
- [24] W.M. Roach (1974) *Co-operative Housing in Nova Scotia 1938-1973*, Halifax: Nova Scotia Housing Commission. The co-operative movement in Canada has a long history and plays a significant role in a number of business sectors, housing being the newest. See I. MacPherson (1979) *Each for all: A History of the Co-operative Movement in English Canada, 1900-1945*, Toronto: Macmillan of Canada; I. MacPherson (1986) *Building and Protecting the Co-operative Movement: A Brief History of the Co-operative Union of Canada 1909-1984*, Ottawa: Co-operative Union of Canada; and National Task Force on Co-operative Development (1984) *A Co-operative Development Strategy for Canada: Report on the National Task Force on Co-operative Development*, Ottawa.
- [25] J.F. Midmore (1962) *Report on Co-operative Housing*, Ottawa: Co-operative Union of Canada.
- [26] Canada, Task Force on Housing and Urban Development (1969) *Report of the Task Force on Housing and Urban Development*, Ottawa: Information Canada.
- [27] Co-operative Union of Canada (1968) "Brief on Housing Presented to the Federal Minister of Transport and the Task Force on Housing", Ottawa: CUC, mimeo, p. 4.
- [28] *Id.*, at 21.
- [29] Canada, Federal Task Force on Housing and Urban Development, *supra* note [26], at 37.
- [30] J. Patterson and P. Streich (1977) *A Review of Canadian Social Housing Policy*, Ottawa: Canadian Council on Social Development.

[31] Canada, Minister Responsible for Canada Mortgage and Housing Corporation (1985) *A National Direction for Housing Solutions*, Ottawa: CMHC, p. 30.

[32] *Id.*

[33] *Id.*, at 7. The new programme uses index-linked mortgages (ILMs) for the first time in Canada. See CMHC (1986) *The Federal Co-operative Housing Program Featuring Index-Linked Mortgages: Affordability for Co-ops, Security for Lenders*, Ottawa: CMHC; and J. Bossons (1985) *The Effects of Using Indexed Mortgage-Backed Securities to Finance Non-Profit Housing Co-operatives: A Report Prepared for the Co-operative Housing Foundation of Canada*, Toronto: Institute for Policy Analysis, University of Toronto.

[34] See J.R. Miron and J.B. Cullingworth (1983) *Rent Control: Impacts on Income Distribution, Affordability and Security of Tenure*, Toronto: Centre for Urban and Community Studies, University of Toronto.

[35] For a comprehensive review of the literature on rent regulation, see E.B. Adams, P. Ing and J. Pringle (1986) *A Review of the Literature Relevant to Rent Regulation*, Toronto: Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 28.

[36] M.A. Glendon (1981) *The New Family and the New Property*, Toronto: Butterworths, pp. 176–177.

[37] *Id.*, at 177.

[38] *Id.*, at 207–245.

[39] Makuch and Weinreb, *supra* note [8], at 8.

[40] Makuch and Weinreb, *supra* note [8], at 37.

[41] *Id.*

[42] S.W. Hamilton, *supra* note [1], at 136–138.

[43] J. Wade (1986) “Wartime Housing Limited, 1941–1947: Canadian Housing policy at the Crossroads”, *Urban History Review*, 15 (1), June, 41–59.

[44] J. Patterson and K. Watson (1976) *Rent Stabilization: A Review of Current Policies in Canada*, Ottawa: Canadian Council on Social Development.

[45] J.D. Hulchanski (1984) *Market Imperfections and the Role of Rent Regulations in the Residential Rental Market*, Toronto: Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 6.

[46] Barton, *supra* note [19], at 923.

[47] *Id.*

[48] The dominant mode of analysis of Canadian housing policy over the past two decades has been from the perspective of neo-classical welfare economics. There is limited treatment of and even less sympathy for criteria other than market relationships based on a narrow conception of property rights. Good examples are: G. Fallis (1985) *Housing Economics*, Toronto: Butterworths; L.B. Smith (1983) “The Crisis in Rental Housing: A Canadian Perspective”, *Annals of the American Academy of Political and Social Science*, 465, January, 58–75; R. Arnott (1981) *Rent Control and Options for Decontrol in Ontario*, Toronto: Ontario Economic Council; and W.T. Stanbury (1985) *The Normative Bases of Rent Regulation*, Toronto: Ontario Commission of Inquiry into Residential Tenancies, Research Study No. 15. Stanbury starts by asserting that this method is “objective and without normative premises” (p. 1-12) and that people who disagree with his position are merely asserting normative arguments.

[49] Macpherson *supra* note [11], at 199.

[50] Macpherson, *supra* note [11], at 201.

[51] *Id.*

[52] For a discussion of “privatism” in U.S. housing policy, see L. Bennett (1983) “Privatism and Housing Policy in the United States”, *Urban Law and Policy*, 6, 169–184.

[53] Canada’s tax system favours home ownership. See Dowler, *supra* note [21]; and J.D. Hulchanski (1985) “Tax Cost of Housing”, *Policy Options*, June, 4–7. For an analysis of the use of tax expenditures in Canada, see K. Woodside (1983) “The Political Economy of Policy Instruments: Tax Expenditures and Subsidies in Canada”, in: M.A. Atkinson and M.A. Chandler (eds.), *The Politics of Canadian Public Policy*, Toronto: University of Toronto Press, pp. 173–198.