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A. Wayne MacKay*

Fairness in the Allocation of
Housing: Legal and
Economic Perspectives

Margaret Holgate**

I. Introduction

Housing is an emotional, almost religious, topic. Indeed, even church groups have been active in promoting public housing in Canada and elsewhere.¹ The housing market has also become a battleground for a struggle between vested property interests and citizens' groups which insist upon a redefinition of the right to shelter. Organizations, such as the Toronto-based People's Housing Coalition, Halifax's Access Housing Services Association, and a host of tenants' unions, ensure that housing problems are not hidden from public scrutiny. Developers and landlord associations have risen to the challenge and, under the banner of free enterprise, they steadfastly resist any charges that they are the cause of the housing crisis.² The focus of the numerous federal programs directed towards this problem has changed direction since the 1960s, shifting more toward the middle-income home owner. However, the shift in the focus of these programs is not the result of a coherent policy decision, but is a by-product of economic restraint and a changing social mood. Indeed, a coherent policy has never been the hallmark of Canada's national housing policy.³

In spite of the obvious importance of housing, only in recent years has it been fashionable to speak of it in terms of rights. Ron Basford, then Minister of Housing, made the following policy pronouncement in 1973: "It is the fundamental right of every Canadian to have access to good housing at a price he can afford . . . Housing is not simply an economic commodity that can

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1. Rev. Gary Quart, director of a low-cost housing project in Hamilton, Ontario, explains that the church is involved in housing because the Gospel mandates it. He cites passages from both the Old and New Testaments emphasizing the importance of shelter. United Church, *This Land is Whose Land: The Housing Squeeze* (1982) 26 Issue, 14.

2. Lorimer, James, *The Developers* (Toronto: James Lorimer and Company, 1978). He places much of the blame for high-priced housing on the developers.

3. Dennis, M., and Fish, S., *Programs in Search of a Policy* (Toronto: Hakkert, 1972).

be bought and sold according to the vagaries of the market, but a social right.”⁴ What he meant by a “social right” and whether it can be enforced in a legal framework are questions which will pervade this study. The rhetoric of housing rights may have more substantive content for middle- and upper-income Canadians than for the residents of low-income public housing. This raises the question of fairness in the broad sense of that term, a question which is the focus of this paper. Specifically, the type of housing focused on in this study is low-income housing in Canada, for it is the provision of public housing units to disadvantaged Canadians which causes the most political controversy and raises the most difficult legal and economic issues. This kind of housing shall be referred to in this paper as “public housing”.

Fairness in its broad sense is very difficult to define and, indeed, there is no absolute definition. Economists tend to use concepts of fairness in regard to problems of allocation, while lawyers are more likely to use the term in respect to the removal of social goods. The sense in which fairness is advocated in this paper has many components and it cuts across several disciplines, including law, economics, and politics. We advocate fairness in the legal sense by calling for the more frequent occurrence of due process in both the allocation and removal of housing. Vital to this concept is an increased participation by the housing consumer, whose interests are directly affected. In the economic sense, we exhort an equitable distribution of a scarce resource and a reduction in housing discrimination against the poor. Finally, in the political arena we argue for the promotion of fairness in housing by the allocation of more financial resources to the development of low-income public housing. This would involve the creation of a larger housing pie, in addition to a fairer distribution.

II. *Background Considerations*

On the legal front, the issue of housing provides an excellent case study of the emerging public law concept of fairness. An important element of this development is a redefinition of the kinds of rights which deserve legal protection. Housing, in the sense of real estate, has always been well protected, but claims of a right to access to public housing are more novel. The arrival of Canadian Charter of

4. *Federal Government Housing Policy Statement*, released at Federal-Provincial Housing Conference in 1973.

Rights and Freedoms⁵ (hereafter “the Charter”) and its guarantees of “liberty” and “security of the person” raise exciting questions in the context of housing. When the equality rights come into effect in 1985, the potential impact of the Charter on public housing will be considerable.

How a society allocates its resources is a matter of intrinsic interest and one which takes on larger dimensions in times of economic restraint. Housing provides a fascinating case study in resource distribution. While reference to housing as a societal resource may be somewhat novel, it is nonetheless apt. In fact, it is increasingly a scarce resource, whether in terms of privately owned or rental units. Growing government intervention in the economy and the impact of this on the housing field have also added a public dimension to issues of shelter.

There are basic differences between the way Canada and other countries, such as the United Kingdom and the United States, handle problems related to public housing. As usual, the attitude in Canada falls somewhere between the distrust of public housing that is prevalent in the United States and its general acceptance in the United Kingdom. Housing activity in the United Kingdom emphasizes equality in the results of government policy, rather than the equality of opportunity which seems to guide social policy in the United States.⁶ Further evidence of this basic difference between the two countries is found in the relative importance of public ownership. While the United Kingdom has always featured a large public sector in its economy, the United States has never exhibited this market structure. Instead, Americans have relied on private ownership to direct the economy under the guiding hand of minimal government intervention. The United Kingdom is more concerned with the equitable distribution of the housing stock among a wide range of income levels, while the United States is concerned only with redistribution to the poor. Both countries have declared that a minimum standard of basic shelter is a right of all citizens, but the extent of the actual provision of housing is much greater in the United Kingdom than in the United States.⁷ Differences in the perception of public housing by the electorate in the two countries

5. Part I of Constitution Act, 1982, Schedule B of Canada Act, 1982 (U.K.) 1982, c. 11.

6. Wolman, H.L., *Housing and Housing Policy in the U.S. and the U.K.* (Toronto: Lexington Books, 1975) at 3.

7. *Ibid.*, at 15.

may be explained by the proportion of public housing units to total housing stock. In the United Kingdom, approximately thirty-one percent of households rent publicly owned units; in the United States, the corresponding figure is less than two percent.⁸ Public support is, thus, greater at the electoral level in the United Kingdom than in the United States because voters within a much wider income range occupy public housing in the United Kingdom.

Canada has adopted the approach of its North American neighbour, rather than following the British tradition. Government involvement in this country has primarily taken the form of financial support to the private sector. The result is that assistance to Canada's low-income housing population, in terms of an increase in the number of public housing units available, is less than three percent of the total housing stock. The antagonism toward the support of public housing, while not as great as in the United States, is still significant.⁹

Few issues impinge more directly on the average Canadian than housing problems. Newspapers contain numerous references to the "housing crisis" in Canada. What is usually meant by the housing crisis is the economic fact that fewer Canadians can afford to purchase their own homes. High unemployment and the high cost of money have conspired to prevent people from purchasing their first home or have forced them to sell the one they had. In economic, as well as legal, terms, a person's home is his or her castle, but there just are not as many castles as there used to be. In fact, however, housing problems have only been portrayed by the media as a crisis since middle-income Canadians have felt the pinch. At the lower levels of the socioeconomic strata, there has always been a housing problem. Privately owned homes have long been beyond the reach of the poor. Their real concerns have been the availability of reasonable rental accommodations and accessible public housing. Tenants have banded together in unions to press claims for security of tenure and decent living conditions. In times of shrinking government budgets, there are genuine concerns about the degree of

8. *Ibid.*, at 13. Figures are for 1972. Figures for 1978 in the United Kingdom were slightly higher, at 32 percent, with England at 30 percent, Wales at 29 percent, and Scotland at 54 percent. See Cullingworth, J.B., *Canadian Housing Policy Research: Some Initial Impressions* (Toronto: University of Toronto Center for Urban and Community Studies, 1980) at 9.

9. Rose, A., *Canadian Housing Policies 1935-1980* (Toronto: Butterworths & Co. (Can.), 1980) at 192.

social commitment to public housing. The method for allocating public housing acquires new importance when there is considerable excess demand for the existing supply of units. The formation of special interest housing lobbies has been one response to this housing shortage.

Not all groups have responded to the housing crisis by lobbying the government for increased assistance. However, because the private market has simply failed to produce housing that is within the reach of low-income people, an attractive alternative is cooperative housing, a movement that has maintained the momentum it developed during the 1960s. Of course, the affordability of cooperative housing is explained, in large part, by the assistance it receives from the federal government.¹⁰ One of the most appealing aspects of this approach to housing is that the consumer has more autonomy. The subsidy required per unit of cooperative housing is also lower than that required for traditional public housing.

Predictably, an exploration of housing issues will embroil the explorer in economic matters; the legal dimensions are less apparent. However, the procedures by which government housing authorities grant or remove the benefit of shelter do raise questions of administrative law. Traditionally, Canadian courts have attached certain procedural protections to the removal of property rights. These rights are akin to the assurance of due process as mandated by the Fifth and Fourteenth Amendments to the American Constitution. In Canadian terms, courts have been concerned about providing a fair hearing before an objective decision-maker; the focus has been on procedural aspects and Canada has not adopted the more extensive American model of substantive due process. The willingness of courts to grant procedural protections has been greatly influenced by the kind of housing rights at issue, as well as the expansiveness of their content. In *Cooper v. Wandsworth Board of Works*,¹¹ the court came quickly to the defence of a man whose house had been knocked down by the government. The case involved the removal of classic property rights, so the court implied a common law right to a hearing, even though the statute was silent on the point. Meanwhile, in *Re Webb and Ontario Housing*

10. Laidlaw, A., *Housing You Can Afford* (Toronto: Green Tree Publishing Co., 1977).

11. (1863), 14 C.B. (N.S.) 180.

Corporation,¹² the courts were willing to grant only the minimum requirements of fair procedure before a single-parent mother was denied the benefits of subsidized rental accommodation. The Ontario court also made it clear that the original grant of subsidized tenancy would attract no procedural protections. In *Webb*, the court used the neutral term "benefits", thus avoiding the use of either "rights" or "privileges", which have become legal terms of art. Rights, upon removal, are protected by fair procedures, while mere privileges result from governmental acts of grace and are not subject to legal protections. Not surprisingly, courts have been quite traditional in their attempts to distinguish rights from privileges. Classic property rights have been well protected, while newer interests have not fared so well.

Charles Reich argues, in a seminal article, that government largesse in the context of the welfare state is as worthy of legal protection as traditional property interests.¹³ Indeed, he asserts that a "new property" has emerged that is as important and as deserving of protection as land was in the feudal context. Because the American due process protections are specifically tied to property, Reich felt that a broader definition of property was essential. In Canada, procedural protections have no constitutional link with property. This is still true, as property rights are not specifically mentioned in the Charter. In fact, the legislative and committee debates reveal that property rights were quite deliberately omitted to appease the provinces. Thus, expanding the definition of property may not be vital to extending procedural protection in Canada.¹⁴

Although the economic dimensions of housing are more apparent, they are as complex and confusing as the legal dimensions. Governments adopt various ways to promote housing objectives and it is often difficult to identify a coherent policy. Tax incentives, special interest programs, and subsidized mortgages are but a few of the economic devices developed in order to execute government policy. Furthermore, to the extent that there is an identifiable economic policy, it is concerned more with efficiency than with fairness. There is also an element of political expediency at work, for economic programs are never far removed from their

12. (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).

13. C. Reich, *The New Property* (1964), 73 Yale L.J. 733.

14. I. Christie, "The Nature of the Lawyer's Role in the Administrative Process" (1971), *Special Lectures* (L.S.U.C., Toronto) 1, at 27.

political and social climate. Thus, the interconnection of politics, law, and economics is a recurring theme throughout this study.

Unfortunately, legal choices are usually made in ignorance of their economic impact, and economic decisions are taken without regard to legal concepts of fairness. Fair procedures do have a price, and the real question is to what extent governments will be willing to bear the cost. Some efforts will be made in this study to empirically assess the fairness of existing practices. However, before tackling the difficult problem of defining what is meant by fairness in both legal and economic terms, the confusing division of authority over housing will be considered.

III. *Jurisdiction over Housing*

Housing is a subject which cuts across traditional classifications of government authority. In the United States, authority over public housing has been described as arising out of the fundamental objectives of government to protect the health, safety, and general welfare of the public.¹⁵ Thus, the impact of federal authority on American housing policy has been great. Unlike the division of authority that exists in the United States, Canadian housing problems are most frequently handled at the local level. This is true in practical, as well as constitutional, terms. However, the National Housing Act¹⁶ (hereafter "the NHA") does provide a significant federal presence through which federal funding can be used to set housing priorities. Federal fiscal superiority has been a counterbalance to provincial constitutional superiority in the housing field. Furthermore, the courts exercise their powers of review over both local and federal housing agencies and thereby set some minimal standards at the national level.

(a) *Evolution of Housing Authority*

The issue of housing has been plagued, more than most Canadian concerns, by a rather confusing division of authority between the provinces and the federal government. General authority over housing in Canada rests with the provinces by virtue of section 92(13) of the Constitution Act, 1867,¹⁷ whereby a province may make laws exclusively in relation to property and civil rights within

15. *New York City Housing Authority v. Muller* (1936) 270 N.Y. 33.

16. R.S.C. 1970, c. N-10.

17. 30-31 Vict., c. 30 (U.K.); R.S.C. 1970, Appendix II.

its boundaries.¹⁸ The federal government's involvement, which takes place on a general, but limited, basis and which began with The Dominion Housing Act, 1935,¹⁹ was justified by the importance of housing problems to the national interest.²⁰ The real heart of federal jurisdiction is its spending power; the power of the purse strings should not be underestimated.²¹ A third government actor in the housing field is the municipal units. This level of government receives no mention in the Constitution Act, 1867, and, in a legal sense, the units receive their power as delegates of the province. This means that priorities in local housing tend to be set at the provincial level, the policy directions of which may conflict with municipal housing objectives.

It is not an easy task to clearly identify the roles of the various levels of government involved in the actual process of providing housing services to the Canadian public. None of the various governments has ever clearly stated its housing goals or how programs were designed to attain them.²² While specific housing policies are always provisional, due to the changing nature of housing problems, the evidence indicates that the pace of change has been due to political exigency as much as, if not more than, to the nature of the problems being addressed.²³

The 1964 amendments to the NHA marked the first appearance of

18. Several matters relating to housing fall within specified classes of subjects in s. 92 of the Constitution Act, 1867. Municipalities and the incorporation of companies with provincial objectives are but two examples. To the extent that housing is considered either a social responsibility or a function of the private market, it falls within the provincial domain.

19. S.C. 1935, c. 58.

20. The claims to federal jurisdiction are based upon sections 91(1a) and 91(3) of the Constitution Act, 1867. Section 91(1a) gives Parliament the right to legislate in relation to the public debt and property and section 91(3) grants a general authority to raise money. Although section 91(2) — the trade and commerce power — is a potential source of housing jurisdiction, that head of power has been narrowly construed.

21. During the depression of the 1930s, the provincial treasuries were so depleted that they had no real economic alternative to surrendering some of their jurisdiction over social welfare. Thus, unemployment insurance became a federal responsibility by way of constitutional amendment.

22. *Supra*, note 9 at 32.

23. For a more complete analysis of federal and provincial housing policies, see Rose, A., *supra*, note 9; Lithwick H., *Urban Canada: Problems and Prospects* (Ottawa: CMHC, 1970); Dennis, M., and Fish, S., *supra*, note 3. For an interesting analysis of the treatment of low-rental housing programs under NHA, see S. Fish, *Administrative Discretion in Social Housing Policy* (1972), 10 Osgoode Hall L.J. 209.

the term “public housing”.²⁴ Public housing agencies were redefined to include corporations “wholly owned by the government of a province or agency thereof” or by “one or more municipalities in a province”.²⁵ This broadening of public housing operations brought some of the provinces into the field for the first time. The 1964 revisions prodded the provinces into assuming the housing responsibilities that accompanied their constitutional mandates and encouraged more active participation at the local level, both of which were achieved through the manipulation of federal government spending power. The increasingly visible role of the provinces after 1964 resulted in most of the credit for housing provision being directed toward the provinces and away from the principal source of funding — the federal government. The motivating force behind the establishment of a Task Force on Housing and Urban Development in 1968 was the desire on the part of the federal government to rationalize its expenditures on housing programs.²⁶ It succeeded in increasing the visibility of the federal government and in providing support “from the people” for federal direction in housing policy.

The final report of the task force, which contained many recommendations, caused considerable controversy. One such recommendation held that a federal Department of Housing and Urban Affairs should be established, an idea which was rejected by the government primarily because it was thought that the inclusion of the term “housing” might indicate an invasion of provincial constitutional territory. Because no level of government had been given specific constitutional responsibility for “urban affairs”, a Ministry of State for Urban Affairs was established in 1971.²⁷ The Canada Mortgage and Housing Corporation (hereafter “CMHC”) was to report to the new minister. Up to this point, CMHC had operated as an autonomous body and was beyond the direct control of Parliament. However, starting in 1971, its activities were

24. Part IV of the NHA was renamed “Public Housing”.

25. S.C. 1953-54, c. 23, s. 35B as amended by S.C. 1964-65, c. 15, s. 9.

26. Canada, *Report of the Task Force of Housing and Urban Development* (Ottawa: Queen’s Printer, 1969). Paul Hellyer was appointed chairman.

27. From the start, there was confusion surrounding the relationship between the new ministry and The Canada Mortgage and Housing Corporation. CMHC had reason to feel threatened, as one of the first tasks the ministry set itself was the appointment of new men to several key positions within the corporation.

controlled by the new ministry, which reported to Parliament.²⁸ In the view of many CMHC critics, the creation of a new ministry that would exercise some control over the corporation was a step in the right direction.²⁹ It was also recommended that the nature and role of public housing be de-emphasized and that no more large public housing projects be built. The ban on urban renewal and public housing projects, in effect since the establishment of the 1968 Hellyer Task Force, was continued by the new ministry. During the years from 1968 to 1972, the provinces had to wait for the federal government to decide on future directions. The power exerted by the federal government was never more evident, as provincial housing programs came to a virtual standstill without the support of federal capital contributions.³⁰

The various amendments enacted in 1973 in response to the Hellyer Task Force³¹ had the combined effect of forcing both provinces³² and municipalities to review their legislation, with the result that such legislation is now virtually identical across Canada. The changes were adopted to meet new requirements for the financing available under the terms of the NHA. The act also emphasized a relatively new trend, the rehabilitation of existing housing, rather than the building of new public housing, and the provision of housing for the elderly, rather than for low-income tenants. The elderly had two major virtues in the eyes of planners: they were becoming a significant voting block and they tended to be less troublesome to house than single-parent families with numerous children.

(b) *The Role of the Courts*

The NHA is unquestionably a powerful factor in the determination of housing priorities by the other levels of government, but it is not the only means by which housing policy is implemented in Canada. A wide range of activities are employed, particularly at the local level, which greatly influence the delivery of housing services to local residents.

28. Until 1971, responsibility for CMHC had always been considered a minor portfolio for a cabinet minister, with the result that CMHC received little attention.

29. *Supra*, note 9 at 50.

30. *Supra*, note 9 at 77.

31. S.C. 1973-74, c. 18.

32. Between 1970 and 1972, Nova Scotia amended all of its basic housing legislation.

The bulk of decisions affecting housing are concerned with land-use planning, in which the role of the province is primarily one of coordinator. The provinces must, under provincial planning statutes, approve all municipal development plans and the bylaws associated with them. The power of ministerial review over decisions made at the local level allows the provinces to ensure that local decisions will not conflict with provincial planning objectives.

The municipal power over housing decisions generated through the use of zoning bylaws is a double-edged sword. The objective of such bylaws is to ensure a rational pattern of development by segregating land use on the basis of compatibility. These same powers often result in the production of less housing that is suitable for low-income individuals and families, on the grounds that it is not "compatible" with land-use patterns already in existence. In addition, because the municipal tax base provides the major source of funds for municipal operations, there is an incentive for developing land for its best economic use and to the greatest extent possible.³³ Given the choice between supplying luxury condominiums or low-rental housing units, the government recognizes that the former will increase tax returns, while the latter will deplete tax coffers as a result of the subsidies required to finance them. The two alternatives may involve similar housing densities, but low-rental housing could be expected to require ongoing subsidization, as well as the provision of increased levels of community services to cope with the higher proportion of children per unit.

The responsibility for ensuring that housing is provided for low-income individuals and families thus places the municipalities in an unfortunate dilemma. The demand for such services is higher during periods of economic stress, requiring the reduction of services elsewhere to fund them. It is extremely difficult for municipally elected officials to balance the demands and needs of competing groups in an equitable fashion when the voting majority is most often comprised of middle- and higher-income individuals who do not wish to see a reduction in services to themselves. Thus,

33. As the value of inner-city land increases, so does its municipal assessment. The resulting increase in property taxes may create enough of a burden to the present owner that he or she must sell. The new buyer is likely to use the property for some activity that will generate more income. Scotia Square in Halifax is a commercial development that replaced slum housing in what was formerly known as the Jacob Street area. It is now the single largest provider of municipal taxes in the city.

the most effective means of screening out development that will both strain the tax base and alienate local inhabitants is to zone for land uses which are not affordable by low-income groups.

(i) *Local Review.*

Such exclusionary zoning practices³⁴ have come under considerable fire in the United States in the last ten years and have resulted in the development and enforcement of fair-share plans. A fair-share plan is one "which typically determines where housing, especially low and moderate-income units, should be built within a region according to such criteria as placing housing where it will expand housing opportunity, where it is most needed, and where it is most suitable. Fair-share plans hope to improve the status quo by allocating units in a rational and equitable fashion . . . [and emphasize] . . . expanding housing opportunity usually, but not exclusively, for low and moderate-income families".³⁵ The attitude of the United States courts has been to regard exclusionary zoning statutes which impose minimum lot sizes and maximum building heights as unconstitutional.³⁶ In Canada, however, there has been far less court interference with zoning power. In general, the courts are likely to defer to experts in planning agencies or to municipal councils that are closer to the electorate. It is rare that a local bylaw will be struck down as discriminatory, because the courts only interfere where there is evidence of jurisdictional errors, such as abuse of discretion. There are some exceptions, however.³⁷

In Canada, the courts prevent discrimination on the basis of race, sex, creed, and other specified grounds by enforcing the provincial human rights statutes, and will now also do so under section 15 of the Charter.³⁸ Thus, the role of the Canadian courts in these matters

34. Other common American practices are the assessment for property tax purposes of lower-value properties and of properties in poorer neighbourhoods at a higher percentage of market value on average than other properties in an area. They result in part from political pressures and the use of certain inappropriate appraisal techniques. See K.K. Baar, *Property tax assessment discrimination against low income neighbourhoods* (1982), 1 *Property Tax Journal*, (No. 1), 1.

35. Listoken, D., *Fair Share Housing Allocation* (New Brunswick, N.J.: Rutgers U. Center for Urban Policy Research, 1976) at 1.

36. *Ibid.*, at 14.

37. *Hollett v. City of Halifax* (1975), 58 D.L.R. (3d) 746 (N.S.S.C.) and *R. v. Bell* (1979), 26 N.R. 457 (S.C.C.).

38. G.J. Smith, in *The New Planning Act v. The Charter of Rights* (1983), *Municipal World* 87 (two parts — April and May), suggests that the Charter may have a significant impact on planning.

is closer to the British model of deference to the policy-makers than to the situation in the United States, where interference by the courts is more frequent.

(ii) *Federal Review*

Judicial review of crown agencies, such as CMHC, pose special problems.³⁹ Since such agencies are established by a statute of Parliament, they are supposedly reviewable in the political arena. Ministerial review of CMHC has been minimal, due primarily to its frequent pairing with a major cabinet portfolio, such as transportation, which leaves little time for a minister to oversee its activities. CMHC performs two separate functions. The first, essentially a private market function, is to reduce inefficiencies in capital markets in Canada which restrict the development of mortgage markets. It achieves this by acting as a mortgage insurer, thereby reducing the degree of risk to private-market financial institutions and increasing the supply of mortgage funds to home owners. CMHC's second function is a public one. It acts as the administrator of housing programs which allocate public funds, and thus directly affects the rights and privileges of individuals. When exercising its role as a social agency, CMHC could be subject to the Federal Court Act,⁴⁰ as it falls within the definition of a "federal board, commission or other tribunal" outlined in section 2 of that Act.⁴¹

(iii) *Constitutional Limitations*

The recent Supreme Court of Canada decision limiting the decision-making powers of Residential Tenancy Boards has opened the door to greater intervention by the courts.⁴² This change may secure more consistent procedural fairness in the protection of individual rights, but it has important economic implications which affect fairness in a broader sense. A ruling that requires individuals to seek protection of their rights only in section 96 courts, as defined by the Constitution Act, 1867, may result in protecting only those

39. Canada Mortgage and Housing Corporation Act, R.S.C. 1970, c. C-16, s. 5(4), states that although CMHC is an agent of the crown, it is subject to some legal actions.

40. S.C. 1970-71-72, c. 1.

41. *Ibid.*, s. 2(g).

42. *Re Ontario Residential Tenancies Act (1981)*, 37 N.R. 158 (S.C.C.). An equivalent Nova Scotia decision is *Burke v. Arab* (1982), 49 N.S.R. (2d) 181 (N.S.C.A.).

who can afford the costs associated with these judicial procedures. Tenancy boards provide a more expeditious and less expensive means for resolving disputes. As in the case of exclusionary zoning, those most in need of assistance may be unable to avail themselves of required services. The greater degree of protection afforded by the new ruling will benefit those who have money, but not the poor. It is important to note that increased judicial intervention in housing matters can have a negative, as well as a positive, influence.

IV. *Fairness in the Context of Economic Policy*

The economists' fascination with the issue of housing lies in the fact that society tends to treat inequality in basic shelter, along with inequality in nutrition, access to medical care, and legal assistance, differently from inequality in goods such as books, automobiles, or vacations.⁴³ The characteristic that sets housing apart is that consumption by one individual produces external effects, or externalities,⁴⁴ which have a direct impact on the well-being of other members of the community. These externalities may be negative, as in the case of poor quality housing which offends the sensibilities of all who look upon it, or positive, as in the case of a well-maintained house with tasteful landscaping which not only creates personal joy in the eyes of beholders, but increases the property values of neighbouring landowners. The link that has been established between poor housing conditions and poor health, low levels of educational achievement, and high crime rates is further indication of the externalities associated with housing.⁴⁵

It is this very interdependence in the determination of personal utility, or satisfaction,⁴⁶ that intrigues economists because it demands that special consideration be given to the production and

43. J. Tobin, *On Limiting the Domain of Inequality* (1970), J. Law and Economics 263, 265.

44. These external effects are also referred to as externalities, external economies or diseconomies, spillover effects, and neighbourhood effects.

45. For a discussion of the effects of public housing on the social behaviour patterns of families relocated from slum housing to Mulgrave Park, Halifax, see B. Sutherland, *Housing Conditions and Behavioural Patterns: A Study of the Relationship Between Relocation from Physically Deprived Housing Conditions and Social Behaviour Patterns*, Master's Thesis, Maritime School of Social Work and Saint Mary's University, Halifax, 1967.

46. The functions used by economists to indicate the level of well-being or satisfaction of an individual based on personal preferences are called personal utility functions. They are not measurable, but may be ranked ordinally.

consumption of this good to insure that its potential benefits to society are maximized. If all individuals are left to choose their own housing, then some may “underconsume”. Whether substandard units are occupied due to free choice (consumer sovereignty), lack of choice (scarcity of adequate units), lack of income, or a combination of these factors, the result will be a net loss to society. Interdependence also indicates that a redistribution, or transfer of resources from the wealthier members of society to those who are poorly housed, would benefit the givers as well as the receivers. Since a system which relied upon individual initiative and participation is unlikely to achieve the desired redistribution, an alternative must be found if society is to capture all potential benefits.

Recognition of externalities provides an incentive for individuals to act collectively. It suggests that there is a unique level of consumption preferred by society and that everyone should receive at *least* this amount.⁴⁷ However, a general acceptance that some sort of collective action is required still leaves many questions unanswered. What is the socially desired minimum level of consumption, and what redistribution is required to achieve it? How are the recipients to be chosen and identified? Should income or the goods themselves be transferred, and by what mechanism and by whom? What are the “best” or the “fairest” means of achieving social objectives? Solutions to these problems, or the lack thereof, will be discussed more directly in our analysis of public housing.

These are all questions for social choice theory and, as such, are beyond the limitations of pure economics alone. However, the role played by economic analysis in the exercise of choice by social organizations, such as government, is vital to the decision-making process as a whole. Since we will be examining social choice in the realm of housing and housing policy, it is necessary to clearly outline the extent and limitations of economic analysis before proceeding further.

(a) *Limitations of Economic Analysis*

The determination of what is in the social interest, or what is fair and good, does not come from the objective application of social scientific principles, since the final decision will require the application of “unscientific” value judgments. However, the

47. Culyer, A. J., *The Economics of Social Policy* (N.Y.: Dunellin, 1973) at 206.

Careful and objective assessment of alternatives that should precede any decision *must* be based on sound, social science methodology. Economics has no difficulty in meeting these requirements. In addition, it is important in any decision process to clearly determine where social science methodology has been superseded by ideological interpretation. Beyond that point, pure economics has nothing to say and any criticisms must be directed at the judgment of decision-makers, rather than at the tools of analysis. These same tools, it must be remembered, are equally supportive of different policy prescriptions based on such divergent ideologies as communism and capitalism!

Economists are very careful to distinguish between two branches of analysis within their discipline, those of positive and of normative economics. The former is intended to analyze and predict observable events and is completely value-free in its assumptions.⁴⁸ The latter approach is used to make value judgments about what ought to be done and inferences are drawn from these basic ethical assumptions in order to recommend specific courses of action. Consider, for example, a positive statement such as "the distribution of income [in Canada] in 1975 was more unequal than in 1967".⁴⁹ This statement is objective, being based on the results of a carefully constructed analysis, and makes no reference to whether the described situation is to be considered "good" or "bad". However, a normative statement, such as "present policies are neither fair nor effective [in that] some low income taxpayers are subsidizing the rents of families with equal or higher income,"⁵⁰ does not simply state what *is*, but judges the facts in light of some principle of fairness.

Positive economics alone cannot recommend the means that should be adopted to achieve a social goal. It can only objectively outline the costs and benefits of various alternatives. Normative analysis, conditional as it is upon value judgments imposed from outside the discipline, may take up where positive economics leaves off and recommend a particular policy. At this point, the analysis leaves the realm of pure economics and enters that of the

48. Some economists would argue that there is no such thing as value-free economic theory.

49. Henderson, D. W., and Rowley, J.C.R., *The Distribution and Evolution of Canadian Family Income, 1965-1973* (Ottawa: Economic Council of Canada, 1977), Discussion Paper no. 91.

50. *Supra*, note 43 at 275.

“economics of social policy”. This is particularly important to keep in mind when evaluating housing policy, in view of the changing nature of the problem. The tools of economic theory do not change, but the housing situation, as well as the criteria by which it is judged, are constantly shifting.⁵¹

(b) *Economic Efficiency and the Pareto Criterion*

Economics as a social science, then, does not deal with fairness. Rather, it is primarily concerned with efficiency, a term which is often used in a technical sense to mean that method of production which results in the greatest level of output for a given level of input. Assuming that the quality of output is identical, a small building contractor who could produce two housing units at the same cost as his competitor's single unit would be considered the more efficient. The definition of efficiency that will be used in the analysis which follows, and which is assumed in economic literature whenever an alternative definition is not explicitly introduced, is much broader than technical efficiency. Rather, it holds that society has allocated its resources efficiently when no further change can be effected without making at least one person worse off. Since changes in individual welfare are not measurable, “the only guide, in general, that the economist allows to indicate such improvements in social welfare is when individuals voluntarily agree to arrangements”.⁵² Any course of action is judged to be good if those who are affected by it also agree unanimously that it is so. This criterion, by which any change in social welfare may be judged, is referred to in economic literature as the Pareto criterion.⁵³ Any change to which all members of society agree is termed a Pareto improvement, and when all potential gains from exchange that can be unanimously agreed upon have been exhausted, a Pareto optimum has been achieved. Since the Pareto optimum is the state of economic efficiency, any Pareto improvements would also be improvements in efficiency.

The Pareto criterion provides economists with a philosophically consistent rule for evaluating whether or not a particular change is in the social interest. Any policy that meets the Pareto criterion would

51. Donnison, D.V., *The Government of Housing* (Harmondsworth, Eng.: Penguin Books, 1967) at 18.

52. *Supra*, note 47 at 5.

53. After Vilfredo Pareto, an Italian sociologist and economist.

be determined unambiguously to be in the social interest, without having to employ value judgments or the measurement of personal levels of satisfaction. Consistent or not, this rule has very limited usefulness. It leaves no room for policy and planning, which become necessary components of the choice process when certain desirable objectives are not being met. Thus, some economists have extended the application of the criterion for economic efficiency to include redistribution which "corrects" individual choice. The very nature of an externality-producing good, such as housing, makes it difficult for many individuals to correctly evaluate its potential benefits. They may underestimate, or fail to recognize, the importance to their own welfare of a subsistence transfer towards those who are poorly housed. For example, a one-hundred dollar contribution from each of twenty families in a neighbourhood to repair the exterior of the one obviously substandard unit in the area might increase the property value of all other units by an average of one thousand dollars. In cases such as this, an imposed redistribution which produced "choices which the individual himself would be able to recognize [ex post facto] as 'superior' . . . [would be] . . . quite consistent with consumer sovereignty, broadly interpreted".⁵⁴

Even with this extension of the application of the Pareto criterion, it is still evident that the possibility of redistribution on purely economic grounds is extremely limited and is unlikely to form the base of any social policy. Beyond this point, economics is just one tool among many⁵⁵ by which the social interest, once it has been defined, may be furthered. Put another way, it is highly unlikely that social goals may be achieved by means of a single analytic tool, such as economics or law. The corollary of this claim is that criticism from a single point of view, such as economics, is not sufficient evidence on which to reject a policy. Social policy, which concerns itself so profoundly with fairness, cannot be dictated by economic theory alone.

(c) *Housing Policy: Who Should Be Responsible?*

The perceived need for some sort of collective action does not in itself determine who is to coordinate, fund, or provide housing units. There appear to be three potential candidates for this role. The

54. Head, *J. Merit Goods Revisited*, (1969), 28 *Finanzarchiv* at 215.

55. Other similar tools are law and political science.

first group, the voluntary sector, which is comprised of philanthropists and organizations such as churches and community groups, has certainly been responsible for the provision of housing to some of the less fortunate members of society. However, the limit to the amount of income that will be voluntarily transferred from the richer members of society to the poorer tends to fluctuate positively with economic cycles. This results in fewer funds being made available during difficult economic times, when they are most desperately needed. Due to the inconsistency of support from this sector, it cannot be relied upon to ensure adequate housing for all members of society.⁵⁶ Private-market provision cannot be relied upon either. "In a capitalist market economy the housing industry, by definition, must produce for those who have the resources to take its products off the market. Otherwise capitalist entrepreneurs would be forced out of business. This has meant, and can only mean, that adequate housing is not provided automatically for those persons with modest or inadequate resources."⁵⁷ Therefore, government, the third candidate, is usually required to intervene in some form in order to counteract the occurrence of less-than-efficient production and consumption of housing. It is assumed that government will more clearly reflect the social interest and will have the power to forcibly redistribute resources by manipulating fiscal and monetary incentives to encourage greater levels of support from both the voluntary and market sectors. Acceptance of the need for action on the part of government does not determine the extent of action required or whether government should be involved in the provision or the financing of housing or both. It still remains to be resolved whether government should play a leading or supporting role. While the justification for *some* government participation in the provision of housing is supportable in terms of economic efficiency, the final role will inevitably be shaped by each country's social and political traditions.

The hazards associated with government control of the national purse strings have been well documented by political theorists. Downs' hypothesis, for example, assumes that government will always act so as to maximize the number of votes in the next election and, thus, will formulate policies not for the social interest,

56. Such voluntary provision is consistent with the Pareto criterion and would, therefore, be considered an improvement in economic efficiency.

57. *Supra*, note 9 at 2.

but to serve special interest groups.⁵⁸ "Each level of government has its own constituency and its job is to serve the interests of that constituency however narrow these may be."⁵⁹ The resulting distribution of public funds has done more to confirm and reinforce the inequalities already dividing society than it has to further the social interest.⁶⁰ There is clearly a need to control the decision-maker's ability to identify the social interest with his own if we are to avoid government power being wielded arbitrarily or in the interests of a few. The courts are one means of control, and they will be considered more fully later in this study. The potential for bias in the exercise of discretion by public officials in the distribution of housing benefits will also receive considerable discussion in later sections of this paper.

Regardless of the pattern that is chosen in an attempt to meet social housing needs, there is the ever-present danger that the redistribution of benefits will not flow in a socially desirable direction. Even if perfection is denied us, the objective of housing policy should be to find the least imperfect method of approaching an equitable allocation of scarce housing resources.

(d) *Objectives of Housing Policy*

All countries seem to state the achievement of a comprehensive housing policy as an objective, but no country seems to have achieved it.⁶¹ Part of the difficulty may lie in the inability of policy-makers to precisely define the term "housing policy".⁶² Another problem is policies which are inherently conflicting.

Most modern societies include both equity and efficiency in the statements of their national objectives.⁶³ Since in practice these goals conflict not only with each other, but also with other economic, social, and political objectives, governments are faced with the difficult task of minimizing, as much as possible, the inherent conflicts among policy objectives. In many cases, this seems an impossible task. Due to the conflicting nature of pressures

58. Downs, A., *An Economic Theory of Democracy* (N.Y.: Harper, 1957).

59. Cullingworth, *supra*, note 8 at 20.

60. *Supra*, note 51 at 11.

61. D.V. Donnison, *Towards a comprehensive housing service*, Conference of English Housing Authorities, October 1971.

62. Aaron, H. J., *Shelter and Subsidies: Who Benefits from Federal Housing Policies?* (Wash. D.C.: Brookings, 1972) at 4.

63. G. L. Reuber, *The Impact of Government Policies on the Distribution of Income in Canada: a Review* (1978), 3 Canadian Public Policy, 505 at 505.

from these quarters, the already inadequate resources available to government are often wastefully dispersed on a large number of small programs and on projects which may confer their greatest benefits upon those best able to resolve their own housing problems. The final policy choices may not reflect what is deemed most fair by society or most efficient in economic terms, but what is most politically acceptable.

V. Constitutional Protections and the Charter of Rights

The arrival of the Charter of Rights has already had dramatic impact upon the manner in which legal issues arise in Canada; it will be several years before Canadians will know whether it will have a significant long-term impact on the protection of rights. However, while the Charter is still in its infancy, it offers great scope for innovative legal argument. Not all aspects of its potential application to the issue of housing will be explored here.⁶⁴ Indeed, in order to realistically explore the exciting possibilities of the Charter of Rights, its limits must be considered.

(a) State Action

Few aspects of public life will escape the reach of the Charter; however, its application is not universal. It is aimed at public or state violations of rights, rather than private violations, and this was the clear intent of the drafters of the document.⁶⁵ The focus on state violation is also clear from the wording of section 32 in the Charter itself. The difficulties implicit in defining state action and the value of the American experience with this issue have been ably discussed by constitutional scholars,⁶⁶ and these problems shall not be examined here.

64. For example, there are some rather exotic arguments that section 7 guarantees a right to privacy which would have important implications for public housing. It could also be argued that s. 36 of the Constitution Act, 1982, dealing with equalization of services, adds at least a moral claim to minimal national standards of public housing. Other claims will arise as the Charter unfolds.

65. Testimony of F.J.E. Jordan, Senior Counsel, Public Law, Federal Department of Justice, in *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of the Thirty-Second Parliament, 1980-81, Issue 49, at 47 (January 30, 1981). The Hon. Jean Chrétien, then Minister of Justice, made statements to the same effect in Issue 49 at 30-31.

66. Hogg, P. W., *Canada Act, 1982 Annotated* (Toronto: Carswell Co. Ltd., 1982) at 75-78. K. Swinton, "Application of the Canadian Charter of Rights and

Regulations made by a Minister of Housing or the bylaws of a city council or local housing authority will be clearly captured by the Charter. Internal policy guidelines and administrative practices are not as easily classified. However, since the police, as administrators of the criminal law, are bound by the dictates of the Charter, the same constraint should apply to bureaucrats who administer public housing. Housing authorities have been defined as crown agents who dispense public housing.⁶⁷ Crown agents may fall within the scope of the Charter of Rights, but only if they are engaged in state action in which the dispensing of housing would surely be included. Agencies which are not part of the Crown may also be engaged in government action, as the law relating to crown status is only one of the factors the courts may consider.⁶⁸

Drawing the line between private and government action is particularly problematic in Canada because of its history of state involvement in important segments of the economy — transportation, communications, and, to a lesser extent, housing.⁶⁹ Whether or not an agency is engaged in an essentially private commercial activity is one of the factors considered in deciding whether the entity is a crown agent. This test should also be relevant in determining the applicability of the Charter.

Although CMHC, established under the Canada Mortgage and Housing Corporation Act,⁷⁰ has been primarily concerned with making mortgage money available and with insuring loans, it has assumed responsibility over the years for an increasing number of public-oriented housing programs. Some examples are the Rural and Native Housing Program, the Assisted Home Ownership Program, Neighbourhood Improvement and Rehabilitation Programs, and the Home Insulation Program. In administering this type

Freedoms'', in W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell Co. Ltd., 1982) at 44-49. L. Tribe, *American Constitutional Law* (New York: Foundation Press, 1978) ch. 18.

67. *R. v. Ontario Labour Relations Board, ex parte Ontario Housing Corporation* (1971), 19 D.L.R. (3d) 47 (Ont. H.C.). Presumably, residential tenancy boards and rent review commissions would be swept into the same net. However, crown status depends upon the facts, especially the statute, in each particular case.

68. Swinton, *supra*, note 66 at 54-59; Swinton alludes to certain American tests, such as "public access", "public function", and "degree of government involvement". The nexus between the agency in question and the government is crucial.

69. K. Swinton, *Federalism and Provincial Government Immunity* (1979), 29 U. of T.L.J. 1 at 28-31 and, *supra*, note 66 at 57.

70. R.S.C. 1970, c. C-16.

of program and distributing the benefits which flow from them, CMHC is engaged in government activity and should be subject to the Charter. However, in its role as mortgage insurer, it acts more like a private enterprise and, like its sister crown corporation, Air Canada, should not be subject to the Charter.⁷¹ In general, the line between what is public and what is private government action has become blurred in recent years.

Many government actors will be subject to the limits of the Charter. Moreover, private corporations which either derive their authority from statute or are heavily subsidized by public funding may also find themselves restricted by it.⁷² A cooperative housing unit that is set up under express legislation and subsidized by federal funding may provide an interesting test case for the courts. Regardless of who is caught by the Charter, it is time to consider what new limits, if any, will be imposed.

(b) *Liberty, Security of the Person, and Fundamental Justice*

There is a provision in the Charter which may add a constitutional dimension to the argument for rights to such things as social assistance, socialized medicine, and public housing. It is section 7, which reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

(i) *Affirmative Rights*

What, if anything, does section 7 of the Charter add to claims for fairness in the allocation of housing? In respect to "life, liberty and security of the person", there is an affirmative guarantee of rights, rather than a negative check on the actions of government, as is the norm in the American Constitution. Taken literally, these affirmative rights could embrace guarantees of minimum levels of income, adequate medical treatment, and decent housing. Such a broad interpretation would produce a dramatic recognition of the

71. Swinton, *supra*, note 69 at 39, argues that an agency which acts in a private commercial fashion should not be bound by the *Charter of Rights* but only when it affects responsibilities as between the individual and the state. This analysis necessitates a division of the CMHC mandate.

72. Every statutory corporation is not ipso facto an arm of the executive branch of government. However, if it also receives extensive public funding, it may fall within the doctrine of state action. *Regents of University of California v. Bakke* (1978) 438 U.S. 265.

right to housing,⁷³ with a constitutional dimension found not even in the United States.

The deletion of property rights from section 7 of the Charter makes comparison with the American provision of due process difficult. Article 5 of The European Convention on Human Rights⁷⁴ does use the phrase "liberty and security of the person". However, these words have been interpreted as referring to the physical liberty and security of the person, rather than to matters of economic and social security.⁷⁵ This conclusion is aided by the list of specific guarantees of physical security encompassed within Article 5. There is no such list in section 7 of the Charter, leaving its interpretation even more open-ended. A broad interpretation of the affirmative rights contained in section 7 is hampered by its appearance under the "Legal Rights" segment of the Charter. This has led at least one commentator to conclude that the section is concerned with physical liberty, in the sense of freedom from confinement.⁷⁶ However, another writer suggests that the liberty referred to is broad enough to include even property rights.⁷⁷ It is more likely that the courts will construe the meaning of liberty narrowly. Liberty was one of the major vehicles for developing a doctrine of substantive due process in the United States, but Canada's political traditions run counter to this.

The phrase "security of the person" offers greater promise for an expansive interpretation.⁷⁸ Canada's Law Reform Commission has adopted the following broad definition: "Security of the person

73. M. Wheeler, ed., *The Right to Housing* (Montreal: Harvest House, 1969).

74. Reproduced in Tarnopolsky, W., and Beaudoin, G., *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell Co. Ltd., 1982) (Appendix 4) at 558.

75. Council of Europe, *What is the Council of Europe doing to protect human rights?* (Strasbourg: Secretariat of Council of Europe, 1977) at 31. Property rights and related economic rights are protected in the *First Protocol to the Convention*, Article 1, cited, *supra*, note 74 at 561.

76. P. Garant, "Fundamental Freedoms and Natural Justice", in W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary*, *supra*, note 74 at 263-4.

77. McDonald, D., *Legal Rights in the Canadian Charter of Rights and Freedoms* (Calgary: Carswell Co. Ltd., 1982) at 273. Such an interpretation runs counter to the legislative intention to omit property rights from the Charter.

78. One early Charter case, *R. v. Fisherman's Wharf* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), interpreted security of the person as including property. On appeal, this decision was upheld without commenting on the lower court interpretation of "security of the person" or the importation of property rights via s. 26 of the Charter. Laforest J.A. wrote for the court in *R. v. Fisherman's Wharf*, (1982), 44

means not only protection of one's physical integrity but the provision of necessities for its support.''⁷⁹ Although this definition was espoused in a medical context, the items necessary for support can be viewed more broadly to include housing.⁸⁰ Indeed, shelter has been recognized as one of the basic economic rights guaranteed in Article 25 of the 1948 Universal Declaration of Human Rights.⁸¹ In the harsh North American climate, decent housing is one of the necessities of life. In the United States, there is at least a statutory recognition of the importance of housing,⁸² but there are no such statutory protections in Canada. It is also significant that the only case which interpreted security of the person as including property concerned more traditional property rights, and not claims to government largesse.⁸³

In times of economic recession and restraint, there are Canadians who are truly homeless and in a state of desperation. This is particularly telling in relation to the poor and underprivileged, such as the native Indians. Furthermore, the housing conditions tolerated by single-parent welfare families are often shocking. People in such conditions should be able to rely on the Charter without reducing its credibility.⁸⁴ However, it is unlikely that courts would interpret section 7 of the Charter as positively guaranteeing the right to housing. Even if the courts took such an adventurist approach, legislatures could exercise their section 33 rights under the Charter and override section 7 with respect to the relevant housing legislation. More likely, the courts themselves would limit the application of "security of the person" by use of the reasonable

N.B.R. (2d) 201 (N.B.C.A.). For further elaboration of this issue, see C. J. Brandt, *Canadian Charter of Rights and Freedoms — Right to Property as an Extension of Personal Security — Status of Undeclared Rights* (1983), 61 Can. Bar Rev. 398 (Special Charter Issue).

79. *Medical Treatment and the Criminal Law*, Working Paper No. 26 (Ottawa: L.R.C.C., 1980) at 6.

80. M.L. Friedman, in *Legal Rights Under the Charter* (1981-82), 24 Crim. L.Q. 430 at 433, suggests that security of the person could affect the abortion rights debate. This encompasses more than just medical health. An extension of the concept of liberty was used in *Roe v. Wade* (1973) 410 U.S. 113, to permit women to make their own decisions about abortions.

81. U.N. Doc. A/811, 1948.

82. The Federal Fair Housing Law, Title VIII. of the 1968 Civil Rights Act, Pub. Law 90-284, codified at 42 U.S.C., sections 3601-3619 (1970, Supp. 1975).

83. *R. v. Fisherman's Wharf*, *supra*, note 78.

84. *R. v. Altseimer* (September 15, 1982), an unreported decision of Zuber J.A. (Ont. C.A.) at 9. It warns against trivializing the Charter by pressing bizarre or outlandish arguments.

limits clause in section 1. The harsh reality is that it may be held reasonable in the "free and democratic society" of Canada to tolerate substandard housing.

(ii) *Procedural or Substantive Justice*

However the courts define "life, liberty and security of the person", there is a second branch of section 7 of the Charter which guarantees that a person shall not be deprived of these rights except in accordance with the principles of "fundamental justice". This latter phrase was selected instead of the phrase "due process of law", which was the language of section 1(a) of the Bill of Rights.⁸⁵ Commentators agree that the change of wording is significant, but do not agree upon the nature of the significance.

Substantive due process is a concept which would allow the courts to assess the fairness of a government program on its merits. Procedural due process, on the other hand, is concerned with the way in which a program is administered, but not its substance. Furthermore, procedural protections normally attach when property is taken away from an individual and not at the time of the initial grant. A substantive due process interpretation would permit an argument that the security of the person is violated when a person is denied access to public housing, and not just when housing has been provided and later removed. Such an approach would apply concepts of fairness to those seeking housing, as well as those who have had it removed or diminished in quality. Accordingly, the debate about whether "fundamental justice" is procedural or substantive is important. Commentators have come down on both sides of this debate.⁸⁶

An obstacle to a substantive due process interpretation is the decision of Laskin C.J. in *Curr v. The Queen*.⁸⁷ This case involved the interpretation of the due process of law terminology in section 1(a) of the Bill of Rights. In the case, Laskin C.J. rejected an argument for a substantive due process interpretation because it

85. R.S.C. 1970, Appendix III.

86. *Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of the Thirty-Second Parliament, 1980-81, Issue 46, at 32 (January 27, 1981), cited in Hogg, *supra*, note 66 at 29; *supra*, note 76; D. Mullan, "Human Rights and Administrative Fairness", in R. Macdonald and J. Humphrey, *The Practice of Freedom* (Toronto: Butterworths, 1979) at 111, 126; and *Duke v. The Queen*, [1972] S.C.R. 917 at 923.

87. [1972] S.C.R. 889.

would involve the courts in second-guessing the legislatures and would, thus, run counter to the basic principle of the supremacy of parliament. The views of the Chief Justice were, in part, premised upon the fact that the Bill of Rights was not a constitutional document. The Charter is a constitutional instrument which places limits on legislative supremacy; nonetheless, there will be considerable judicial resistance to substantive due process.

There have been a number of post-Charter cases which have grappled with whether the "principles of fundamental justice" are procedural or substantive.⁸⁸ While many lower courts have been divided on this issue,⁸⁹ indications are that a procedural view of section 7 is likely to prevail. This is not to suggest that the section will be impotent, for procedural rules often have a substantive impact upon the merits of the decision.⁹⁰ Indeed, matters of procedure shade into matters of substance. For example, an unreasonable conclusion on the merits of a decision is often a sign of unfair process and can be attacked on that basis.⁹¹ Even by adding a constitutional dimension to procedural rules, the result may be substantively better decisions about the allocation of housing. Furthermore, preoccupation with the new Charter should not obscure the importance of evolving common law protections. A constitution is an important, but not an exclusive, source of rights. The doctrine of fairness, which will be discussed in the next segment of this study, is a case in point. Indeed, Professor Mullan suggests in a recent article that some cases have used fairness as a

88. *R. v. Potma* (1982), 67 C.C.C. (2d) 19 (Ont. H.C.), held that section 7 rights were substantive; however, at the court of appeal level the procedural view prevailed. *R. v. Potma* (January 14, 1983), an unreported decision (Ont. C.A.).

89. *R. v. Cadedda* (December 31, 1982), an unreported decision (Ont. S.C.); *R. v. Holman* (July 15, 1982), an unreported decision (B.C. Prov. Ct.); and *R. v. Campagna* (June 25, 1982), an unreported decision (B.C. Prov. Ct.) have all ruled that the section is procedural. *R. v. Roblin* (May 28, 1982), an unreported decision (Que. Ct. of Sess.) aff'd. (October 26, 1982), an unreported decision (Que. S.C.), held that the rights in section 7 were substantive.

90. Nonet, P., *Administrative Justice* (New York: Russell Sage Foundation, 1969) at 3-7.

91. *Goldberg v. Kelly* (1970), 397 U.S. 254, is a case where a procedural attack was successfully used to affect the actual distribution of welfare payments in New York. However, there has been a retreat from this broad approach in *Mathews v. Eldridge* (1970), 96 S.C.R. 893, a case which involved disability payments. A useful exploration of the interconnection of procedure and substance is found in R.L. Rabin, *Some Thoughts on the Relationship Between Fundamental Values and Procedural Safeguards in Constitutional Rights to Hearing Cases* (1979), 16 San Diego L.R. 301.

vehicle for imposing substantive, as well as procedural, standards.⁹² New standards of both a procedural and substantive variety may also be imposed by regular statutes, as well as in constitutional documents. The interesting American statutory examples will be explored later.

(c) *Equal Benefits and Nondiscrimination*

It is the equality rights guaranteed in section 15 of the Charter, which hold out the best hope for a constitutionally protected right to decent public housing. The signatories to the November Accord, which set the political stage for the adoption of the Charter, agreed that the protections of equality rights would only become effective in 1985.⁹³ This delay was designed to give both the federal and provincial governments the time to scrutinize their statute books in light of the new constitutional standards and put their respective houses in order. There was also a tacit understanding that section 15 could have a more drastic impact on the existing legal structure than any other section of the Charter.⁹⁴ Accordingly, governments were given three years to react.

The exact language of section 15 was altered at various stages in the process of making the Constitution. In its final version, it guarantees the following:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

By using the term “individual”, the section probably excludes corporations from the benefits of this provision. The use of many phrases to define equality is a deliberate effort to escape the narrow

92. D. J. Mullan, *Natural Justice and Fairness: Substantive as well as Procedural standards for the Review of Administrative Decision-Making* (1982), 27 McGill L.J. 250.

93. *Supra*, note 5, at s. 32(2).

94. Hogg, *supra*, note 66 at 50, agrees that section 15 was delayed because it is potentially so intrusive.

judicial definitions of equality adopted by the Supreme Court of Canada under the Bill of Rights.⁹⁵ In using the phrase “equal protection” of the law, there appears to be an open invitation to consider the American jurisprudence regarding the interpretation of similar language in the Fourteenth Amendment.⁹⁶ In the past, reference to the American Bill of Rights has not won favour in Canadian courts. Indeed, section 15 goes beyond its American counterpart in certain respects, containing as it does a long list of expressly prohibited grounds of discrimination, the broad phrase “equal benefit of the law”, and justification of affirmative action programs.

(i) *Statutory or Constitutional Protections*

A constitutional protection of public housing is a particularly exciting possibility because the American experience suggests that it is the only way to provide meaningful guarantees to the low-income consumers of housing.⁹⁷ Statutory guarantees of fair housing tend to be broadly stated and, thus, are easily overridden by more specific government policies. America’s Federal Fair Housing Law provides a good example of this tendency. It states, as follows, that: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁹⁸ In the case law, the emphasis has been on the limitations, rather than the protections.

Canada also has minimal guarantees of equal access to housing in its human rights legislation at both the federal and provincial levels.⁹⁹ Examples of legislative protection at the federal level are the National Housing Loan Regulations¹⁰⁰ and the Canada

95. *A. G. Can. v. Lavell*, [1974] S.C.R. 1349 and *Bliss v. A. G. Can.*, [1979] 1 S.C.R. 183, are two examples of cases where very limited content was given to sexual equality.

96. Hogg, *supra*, note 66 at 51.

97. K. L. Cambronne, *Towards a Recognition of a Constitutional Right to Housing* (1972-74), 41-2 Univ. of Missouri Kansas City L.R. 363 and C. Reich, *supra*, note 13.

98. *Supra*, note 82.

99. In May 1982, the Association of Nova Scotia Housing Authorities, which is responsible for the administration of public housing in the province, made a formal commitment to the principles of equal access to public housing. This was part of a human rights affirmative action program.

100. Consolidation of Federal Regulations (1978), c. 1108, s. 53, pursuant to the National Housing Act R.S.C. 1970, c. N-10.

Assistance Plan.¹⁰¹ The problem with statutory limits on the dispensers of housing is that they do not go far enough and can easily be repealed. Housing in both Canada and the United States has, in general, been classified as a privilege to be granted, and sometimes even removed, as an act of grace. By a clever turn of phrase in *Re Webb*,¹⁰² subsidized public housing has been designated a "benefit". However, it was a benefit which was only protected at the removal stage and not at the time of initial allocation. Moreover, the fairness protections in *Re Webb* had a rather minimal procedural content.

Describing public housing as a benefit does provide a springboard for lodging public housing within the constitutional protections of section 15 of the Charter. The relevant phrase in this section is "equal benefit of the law". If the argument for expanding the legally protected interest at this stage in Canadian legal evolution is accepted, then public housing acquires the status of a constitutional right. An advantage of such an argument is the newness of the Charter, in that it has not yet acquired judicial baggage which would limit constitutional protections to traditionally accepted rights, such as the right to private property.¹⁰³

(ii) *Defining Equality in Housing*

Bringing housing within section 15 of the Charter would not ensure full protection or fairness in the broad sense. Indeed, the question of what is a fair allocation of public housing may not be appropriate for courts to answer at all. What constitutes a fair or equal distribution

101. R.S.C. 1970, c. C-1. This act begins as follows:

Whereas the Parliament of Canada, recognizing that the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Canadians, is desirous of encouraging the further development and extension of assistance and welfare services programs throughout Canada by sharing more fully with the provinces in the cost thereof; Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows. . . .

Under section 2 of this act, "assistance" is defined to include shelter. However, because the implementing provinces bring differing financial resources to the task, the goal of equal assistance to all Canadians is frustrated.

102. *Supra*, note 12.

103. American commentators who have advocated making housing a constitutional right had to propose expanded definitions of property which the courts were reluctant to accept; *supra*, note 97. At this stage, Canada does not face this hurdle.

of goods is, at base, a value question which is as dependent on ideology and politics as it is on either economics or law. The complexity of problems concerning the original allocation of public housing has led courts to focus upon the more limited problems related to post facto removal of housing. Courts can go beyond their prior role, but they will not define what allocation of public housing is fair. Indeed, there have been many different interpretations of the concept of equality.¹⁰⁴

It is important to have realistic expectations of the Charter of Rights and what it can do. The more modest role of providing a fair legal framework for political decisions and guaranteeing a genuine input into the process should be the judicial objective. In doing this, courts can also invalidate allocations of resources that are clearly unfair or which discriminate in ways expressly or implicitly prohibited in section 15.

(iii) *Housing Equality: The American Experience*

Professor Walter Tarnopolsky¹⁰⁵ predicts that the American approach to equality problems will be instructive for interpreting section 15 of the Charter. Three levels of judicial scrutiny have been applied to legislation in the United States, depending upon the classification of the rights affected. The first and most searching level of scrutiny is applied to laws which discriminate on the basis of inherently suspect categories. Examples are race, religion, and nationality. Such laws can only be justified if there is a compelling state interest which cannot be achieved without such discrimination. This same criterion should be applied to the expressly forbidden grounds of discrimination enumerated in section 15 of the Charter. Thus, if public housing were denied on the basis of race, nationality, religion, or sex, there would be a clear violation of section 15, which could only be justified under section 1 of the

104. Jennings, *The Law and the Constitution*, 3rd ed. (London: University of London Press, 1943), cited in W. Tarnopolsky, "The Equality Rights", in W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell Company Ltd., 1982) at 401. In many respects, the only way to give a disadvantaged person real equality of opportunity, is to provide preferential treatment; Dworkin, R., *Taking Rights Seriously* (Cambridge: Harvard University Press, 1979) at 273. *Regents of the University of California v. Bakke* (1978) 438 U.S. 265.

105. W. Tarnopolsky, "The Equality Rights", in W. Tarnopolsky and G. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary*, *supra*, note 104 at 401-7.

Charter in the most extreme circumstances, if at all. Professor Hogg argues that the inclusion of "age" and "mental or physical disability" in the Canadian list of enumerated prohibitions does not necessarily elevate them to the inherently suspect category.¹⁰⁶ It is more likely that discrimination based on these facts would fall into a lower level of scrutiny.

At the second level of intermediate scrutiny, laws must serve important governmental objectives and be substantially related to those aims in order to meet the constitutional test. This analysis has frequently been applied to sex discrimination in the United States; however, the general advances of the women's movement and the special prohibition against gender discrimination in section 28 of the Charter make sex a likely candidate for strict scrutiny. This is important in the context of housing, as single-parent families headed by women are among those most in need of public housing. And, finally, there is the minimal scrutiny test, which, in the United States, has been applied where there is neither an invasion of the inherently suspect categories nor of basic constitutional rights. This level of review tends to be used for legislative classifications based upon economic and social factors. Public housing could easily fall within this category of minimal protection, yet such a categorization would be unfortunate because, as Tarnopolsky indicates, it is much easier for the state to justify cases of discrimination in this last category.¹⁰⁷ In addition, scrutiny based on this test would be little improvement over the narrow protections provided by the Bill of Rights. Under this statute, laws which are enacted for the purpose of achieving a valid federal objective do not violate the guarantees of equality in the Bill of Rights.¹⁰⁸ Such enactments would now have to meet a constitutional, as opposed to a statutory, standard of equality, but the criteria identified by McIntyre J. in *MacKay v. The Queen* will no doubt be considered.¹⁰⁹

Public housing in the United States has, in general not been viewed as a basic constitutional right;¹¹⁰ thus, judicial review of laws related to housing has been carried out on the minimal scrutiny

106. *Supra*, note 66 at 51.

107. *Supra*, note 105 at 405.

108. *MacKay v. The Queen*, [1982] 2 S.C.R. 370.

109. *Ibid.*, at 407.

110. The New Jersey Supreme Court regarded public housing as being akin to a constitutional right, in that it was vital to the general welfare. *Southern Burlington County N.A.A.C.P. v. Mount Laurel* (1975) 336 A. (2d) 713.

level.¹¹¹ In spite of arguments which hold that housing is of fundamental importance, Mr. Justice White, speaking for the majority in *Lindsey v. Normet*, expressed the American judicial view, as follows:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions . . . since the classifications under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.¹¹²

In one of the few Canadian cases dealing with public housing, *Winnipeg Regional Housing Authority v. Woloshen*,¹¹³ a landlord succeeded in getting an eviction order against a tenant who was habitually late with her rental payments. The majority of the court held that being financially destitute and paying other bills, such as car and bank loans, was not a reasonable excuse for late payment of rent. Thus, the judicial view of public housing as a privilege, rather than a right, may well prevail in Canada as well. However, Mr. Justice Huband dissented in the *Woloshen* case. He was sympathetic to the fact that one of the single-mother's large debts was incurred as the result of an amorous fling with an Edmonton man who did not indemnify her for expenses, as promised. Huband J.A. made the following comment, which offers some hope for the inhabitants of low-income public housing:

In the course of argument, counsel for the landlord argued that the tenant's poverty cannot be proffered as an excuse for late payments. It was argued that there cannot be a double standard for deciding what constitutes justifiable or reasonable cause.

In my opinion, the issue of justifiable or reasonable cause must be decided according to the circumstances of each individual case. The economic circumstances of the tenant may well constitute circumstances which would justify a late payment.

111. *Lindsey v. Normet* (1972), 405 U.S. 56 and *Village of Arlington Heights v. Metropolitan Housing and Development Corporation* (1977) 429 U.S. 252.

112. (1972), 405 U.S. 56 at 74.

113. (1982), 16 Man. R. (2d) 344 (Man. C.A.).

Where a tenant has substantial savings in a bank account, it would not constitute justifiable or reasonable cause for such a tenant to say that his cheque for wages had been dishonoured, or his unemployment insurance cheque had not come through, or he had not been reimbursed for the cost of a trip to Edmonton. But for one who has no other resources these unexpected turns and twists of fate can constitute a justifiable or reasonable cause for late payment of rent.¹¹⁴

While section 15 of the Charter offers promise, much depends upon whether public housing will be considered a basic right, deserving of a high level of constitutional scrutiny. A heavy burden rests upon lawyers in the early cases to convince judges that the American classification of public housing rights is wrong, or at least outdated. These lawyers will be assisted in their task if public housing is regarded as a basic right in the larger society. When all is said and done, courts can do little more than provide a framework for giving effect to the value judgments of the larger society. Thus, law can promote fairness in public housing, but cannot create it.

(d) *Constitutional Remedies*

It is beyond the scope of this paper to explore the nuances of the remedial sections of the Charter of Rights. Commentators have already addressed remedial problems,¹¹⁵ and this aspect of the Charter will undoubtedly spawn more scholarly writing as the new law develops. Suffice it to say that the remedies offer an invitation to judicial creativity. Once again, the United States offers guidance. In *Hills v. Gautreaux*,¹¹⁶ the United States Supreme Court applied the Fourteenth Amendment to prevent federal funding of a housing authority which engaged in discriminatory practices. The lines have also been blurred between public and private action in the United States, as private discrimination at a state level has been indirectly forbidden.¹¹⁷

One of the many questions about the Charter which remains to be answered is whether or not its remedies will be accessible to the poor and disadvantaged members of society, whose rights are most

114. *Ibid.*, at 349-50.

115. One example is E. G. Ewaschuk, *The Charter: An Overview of Remedies* (1982), 26 C.R. (3d) 54.

116. 425 U.S. 284 (1976).

117. *Reitman v. Mulkey* (1967) 387 U.S. 369 and C. Black, *Foreword: "State Action"*, *Equal Protection and California's Proposition 14* (1967-8), 81 Harv. L. R. 69.

likely to be violated. For example, many inhabitants of public housing would not be informed of their constitutional rights or, even if they were, could not afford lawyers to take their cases. Unless legal aid is implicitly guaranteed by the Charter, there is no assurance that low-income people will have access to legal counsel, without which the remedies provided in the Charter are not equally available to all.

Questions of legal standing raise further problems of access to the courts. Standing is particularly problematic in relation to public housing because eligibility criteria for public housing and discriminatory practices in relation to such housing can be disguised to prevent the interested party from having an identifiable interest. Are the rights of a person who has applied for public housing, but has not yet been accepted, violated by the adoption of discriminatory criteria? Does the violation only arise when the guideline is applied or is a person only adversely affected when existing property is removed? The language of section 24(1) of the Charter suggests its own standing requirement: only when rights "have been infringed" can a person apply to the courts. This does not really resolve the problem, as the rights of a prospective public housing tenant may be violated by the adoption of discriminatory criteria. However, even if this broader approach is taken, there must be a violation of a Charter right, and not just any unfair act. Timing and judgment will be important in using section 24 of the Charter. If a statutory provision is being challenged pursuant to section 52 of the Constitution Act, 1982, the normal rules for standing in constitutional cases apply;¹¹⁸ specifically, the person seeking the remedy must have an affected interest.¹¹⁹ Standing has had a proprietary flavour and the United States cases on discriminatory zoning illustrate this. Zoning laws were regularly used to exclude people of low income or minority status from certain designated housing areas. In *Warth v. Seldin*,¹²⁰ the United States Supreme court denied the plaintiffs standing because they could not point to

118. *Thorson v. A. G. Can.* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *N.S. Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.), and *Min. of Justice (Can.) v. Borowski*, [1982] 1 W.W.R. 97 (S.C.C.).

119. *Finlay v. Minister of Finance and Minister of Health and Welfare* (April 25, 1983), an unreported decision (F.C.A.), which held that a Manitoban social assistance claimant had standing to challenge payments allegedly below the requirement of federal law.

120. (1975) 422 U.S. 490.

existing or planned housing developments on the zoned lands from which they had been excluded.¹²¹ The entire point of the zoning was to exclude such housing projects in the first place.

The chances are that remedies will be provided more readily at the stage of housing removal than at the time of the initial grant. One device to ensure this traditional approach is standing. There is a potential for innovative remedies both within the language of section 24(1) of the Charter and the invitation to affirmative action in section 15(2). However, the would-be recipient of public housing would be well-advised to educate the general public about the importance of housing and not expect the courts to be educated, or to educate on, this matter.

VI. *Fairness: Procedural and Substantive Review Standards*

In legal terms, fairness is a doctrine concerned primarily with procedures. Like much of our common law heritage, it is British in origin. It is important to note that it has been a procedural doctrine, and not a substantive one. It is hoped that a decision made by following fair procedures will be a substantively better decision. This link has not been expanded into a doctrine of substantive due process, as has developed in the United States; however, there are signs that the line between procedural and substantive review has recently been blurred by a broad interpretation of fairness.¹²² Procedures are still the main focus, but there is a new policy role for the courts which allows them to consider, at least indirectly, the merits of a decision — formerly a matter exclusively within the legislative domain.¹²³ The evolution of the concept of fairness from the doctrines of natural justice has already been examined and shall not be repeated here.¹²⁴

The difficulty of separating matters of procedure and substance has already been emphasized by the discussion about the constitutional right to fundamental justice. This same problem resurfaces in regard to the interpretation of the common law concept of fairness. Whether fairness will remain true to its procedural roots

121. However, *Mount Laurel*, *supra*, note 110, imposed a duty to provide an opportunity for low- and moderate-income housing.

122. *Supra*, note 92.

123. M. Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory* (1978), 28 U. of T.L.J. 215.

124. *Ibid.*, and D. J. Mullan, *Fairness: The New Natural Justice* (1975), 25 U. of T.L.J. 281.

in natural justice or expand into substantive review is not clear at present. Further confusion is added by the evolution of the traditional grounds for substantive review of administrative decisions under the umbrella of abuse of discretion. Agreement is also lacking as to whether increased judicial review is desirable or, if desirable, whether it should proceed under the banner of fairness.

(a) *Substantive Content to Fairness*

There has been an increasing awareness that procedure and substance are really points on a single continuum, and not completely distinct ideas. Professor Grey argues that this has been the core of recent developments in administrative law.¹²⁵ Professor Mullan agrees that there are signs of a substantive extension of fairness, but is more inclined to view this as heresy, rather than orthodoxy.¹²⁶ To date, few cases in Canada have adopted the substantive view of fairness and thereby challenged the merits of an administrative decision.¹²⁷ This may reflect a more traditional view of the role of the judge in the administrative process. Such a view is well expressed in the following quotation:

However, judges are not supposed to base their decisions on arguments of policy, that is, on what will promote desirable social goals, be they comfort for the sick, shelter for the homeless, education for children, mitigation of industrial unrest, or — and this is the major problem — the equitable assessment of priorities in the use of limited resources. Judges must reach their decisions by reasoning from the established rules, resolving difficult questions by reference to principles of law rather than social aims. . . .¹²⁸

(b) *The Exercise and Review of Housing Discretion*

Administrative discretion is a vital aspect of modern government. The proper approach for a lawyer to take is not to decry its existence, but to devise the best means for taming it.¹²⁹ This

125. J. H. Grey, *Can Fairness be Effective* (1982), 27 McGill L. J. 360 at 370.

126. *Supra*, note 92.

127. *Trans West Development Ltd. v. Nanaimo* (1979), 11 M.P.L.R. 254 (B.C.S.C.), was the only one located by D.J. Mullan, *supra*, note 92. Mullan feels that Canada is achieving the same result by reviewing decisions on the grounds of inconsistency.

128. *Editorial: Rights or Rationing* (1978-79), *Journal of Social Welfare Law* 193 at 193.

129. Davis, K.C., *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969).

constructive approach is even more important in the Canadian than in the American context. In the Anglo-Canadian tradition, statutes are skeletal in nature, leaving it to front-line administrators to flesh out the legislative intent.¹³⁰ By contrast, the American tradition is to enact detailed statutes which often encompass extensive guidelines to assist the administrators. This difference in legislative drafting is likely a reflection of the differing perceptions of government in the two countries. America was born out of a distrust of government, which extended to bureaucrats as well as to legislators; Canada, in the British tradition, is more likely to trust her civil servants.¹³¹

(i) *Structuring Discretion*

Discretionary government authority over housing has mushroomed since World War II, when the federal government made its presence felt on the Canadian scene. The exercise of discretion in the housing field is vital to the fairness of the resulting allocation of public housing. Fair decisions must be made at the front lines and on the administrative level, so that the person claiming the benefits of public housing can avoid the costs and uncertainty of seeking a remedy for abuse of discretion in either the political or judicial arenas. A focus on the advance structuring of discretion, as opposed to the limiting of it in a post facto fashion by way of external judicial restraints, promotes this. Traditionally, law has been used as a tool for confining administrative decision-makers to their statutory jurisdiction, leaving agencies free to exercise their power within the protected sphere of jurisdiction.¹³²

In his treatise *Administrative Justice*, Philippe Nonet captures the excitement of focusing legal attention upon preventing abuse of discretion at the first level, rather than pursuing post facto review in the courts. He also underscores the connection between procedures, broadly defined, and the substantive fairness of the administrative decision:

At issue here is the very meaning of legal procedure. Procedure is not primarily a way of confining government within the limits of rules. Instead, it is seen as a structure of opportunities for participation and criticism, allowing affected persons to

130. Fish, *supra*, note 23 at 209.

131. J. Wills, *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), 18 U. of T.L.J. 351.

132. *Supra*, note 90 at 3-7.

challenge and influence official policy. In this perspective, the function of legal criticism is less to reduce the role of government than to use and develop the resources governmental policy offers for promoting individual and group interests in public welfare.¹³³

To be effective, this structuring process must be an open one.¹³⁴ Bureaucrats are rarely neutral in the implementation of government policy. Yet a lack of neutrality does not imply sinister representation of vested interests; it may be explained by a personal choice between conflicting government policies. Susan Fish provides an interesting example of this by exploring the low-income housing program instituted under section 15 of the NHA.¹³⁵ The building of these units was directed more towards promoting profits for the developers than meeting the real housing needs of the poor. Furthermore, once the public housing units were built, their management was neglected.¹³⁶

The structuring of discretion is still in its infancy in Canada and there are still problems, as will be discussed in the examination of the Halifax Housing Authority. However, the making of broad policy is only one aspect of exercise of discretion. The application of these rules to each individual case is a more frequent activity. Even when proper procedures are followed, abuse can result, requiring substantive review in the courts. The traditional grounds of substantive review for abuse of discretion are well articulated in the late Professor de Smith's classic book, *Judicial Review of Administrative Action*.¹³⁷ When all else fails, it is possible to lobby the relevant political authorities. Unfortunately, the recipients of public housing rarely possess political clout.

VII. *Case Studies in Housing Allocation*

Before considering Canadian agencies, it will be useful to briefly examine developments in the United States and England in regard to housing allocation. The historical roots of Canada's law regarding procedural protections and abuse of discretion are found in the United Kingdom. America's constitutional protections of equality

133. *Ibid*, at 6-7.

134. *Supra*, note 129. K.C. Davis stresses that openness is the natural enemy of arbitrary and abusive discretion.

135. R.S.C. 1970, c.N-10.

136. Fish, *supra*, note 23 at 211-4.

137. de Smith, S., *Judicial Review of Administrative Action: 4th ed. J. Evans* (Toronto: Carswell Co. Ltd., 1980) at 278-357.

and due process have been considered as a guide to the interpretation of the Charter. However, the United States has also addressed housing problems in statutory form. These statutes may also provide guidance for the future.

(a) *United States: The Judicial Model*

Americans appear to be much less trusting of their housing officials than Canadians are of theirs. This is reflected by the onerous procedural requirements imposed upon housing authorities in the United States.¹³⁸ Some commentators argue that over-judicializing the allocation of housing has been counterproductive for all concerned.¹³⁹ The efficiency of the housing authorities has been thwarted by the requirement of full evidentiary hearings. This is a particular problem for large city agencies, which received many applications for public housing.¹⁴⁰ Legal decisions about housing are frequently made without serious consideration of the economic consequences that may follow.¹⁴¹

Guidelines for determining who is eligible for public housing have been challenged in the courts. The existence of a record of rent arrears and the possession of a criminal record were not sufficient grounds to deny eligibility for public housing.¹⁴² Rejections on these grounds were invalidated, not because the rules themselves were unreasonable, but because the applicants were denied a fair hearing. A federal district court in *Thomas v. Housing Authority of Little Rock*¹⁴³ threw out a housing authority rule which denied access to unwed mothers. This rule was considered patently unfair because it was based on the assumption that unwed mothers were promiscuous. While the latter rule is offensive and probably

138. J. S. Fuerst and R. Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor* (1977), 9 Urban Lawyer 496 at 498.

139. *Ibid.*

140. *Sampller v. White Plains Housing Authority* (1972) 278 N.E. 2d. 892, is a case where the court held that requiring the New York City Housing Authority to give a full hearing to each of the 9,411 applicants it rejected that year was too burdensome.

141. This is one of the major themes which emerges from a series of papers delivered at the Liberty Fund Inc. Seminar on "The Common Law History of Landlord-Tenant Law", Law and Economics Center, Emory University, Atlanta, Georgia, March 11-13, 1983.

142. For the first example, see *Neddo v. Housing Authority of Milwaukee* 335 F. Supp. 1397 (E.D. Wis., 1971), and, for the latter example, see *Mamgo v. New York City Housing Authority* (S.Ct., 1966) 273 N.Y.S. 2d 1003.

143. (E.D. Ark., 1967) 282 F. Supp. 575.

justifies court intervention, the general suspicion of guidelines casts a wet blanket on the desirable process of structuring discretion.¹⁴⁴ It is also significant that guidelines for eligibility are intended to limit hearings and, so long as they are relevant and reasonable, should be allowed to do so.

Eviction from public housing has attracted more extensive procedural safeguards than has the initial grant of housing. This is consistent with the distinction in *Re Webb*¹⁴⁵ between acquired benefits and those which have only been sought. Procedural protections at the removal stage in the United States are part of the price that state and local authorities must pay for federal housing assistance. There has been no such federal imposition at the initial grant of housing.

In 1971, several court cases contended that state housing authorities were not following constitutional due process. In response, the department of Housing and Urban Development (hereafter "HUD") issued two circulars requiring those who received federal assistance to recognize certain rights.¹⁴⁶ Some of the required protections included termination of tenancy only on good cause, reasons for eviction at a private conference, subsequent hearings, notice of rules of the hearing, an impartial board, rights to counsel, cross examination, and a right to a written decision disposing of the case. Furthermore, the HUD circulars were sometimes applied in lieu of the constitutional due process protections. In *Thomas v. Housing Authority of the City of Durham*, which involved a federally assisted public housing project, a tenant was given a fifteen-day eviction notice the day after he became president of the tenants' association.¹⁴⁷ Focusing upon the lack of reasons for the eviction, the United States Supreme Court held that a tenant could not be evicted for engaging in a constitutionally protected activity, such as freedom of association. Again, there are some costs to such procedural protections. It may take considerable

144. There are many states which impose no procedural requirements at the eligibility level. Federal funding is not conditional on provision of fair procedures at the initial grant of public housing. No attempt has been made to fully canvass the American position on eligibility criteria for housing and the cases were selected for their instructive, rather than representative, value.

145. *Supra*, note 12.

146. The full text of these circulars, numbers 7465.8 and 7465.9, is contained in *Omaha v. U.S. Housing Authority* (1972) 468 F. 2d 1. This case held that the HUD circulars were not an invasion of local housing jurisdiction.

147. (1969) 383 U.S. 268.

time to evict an undesirable tenant who, during the course of the required hearings, may inconvenience or disrupt the rest of the tenants. *Housing Authority of Milwaukee v. Moseby* is a case in point.¹⁴⁸ The tenant was being evicted for bad housekeeping, which had deteriorated to the extent that it was detrimental to his neighbours. After three years of hearings, the court was finally able to evict the tenant.

There is no denying the importance of an eviction from public housing, and some fair procedures should accompany such a decision. However, in setting the content of the hearings, attention should be given to the hardship caused to the rest of the tenants by the continued presence of the alleged rule violator.¹⁴⁹ The flexibility of common law concepts of natural justice and fairness is attractive in this respect. Canada, in developing her approach to fairness in housing, should consider whether the person applying for public housing should be denied the protections afforded to a person who is evicted from the same housing. The American due process clause is anchored in property rights, while the equivalent section in Canada's Charter is not. This may allow greater flexibility in extending the range of protected interests by both constitutional and statutory means.

(b) *England: Curial Deference and Administrative Checks*

A different model for controlling the fair distribution of public housing is found in England. It is not a judicialized model, but an administrative check on maladministration in housing at the local level. Public housing forms a large portion of the housing market in Britain, unlike in the United States, where private housing maintains a clear dominance.¹⁵⁰ Local housing authorities are a major provider of increasingly scarce public housing units and they exercise a very broad discretion in both the allocation and transfer of public housing. However, the Commission for Local Administration in England has the power to investigate complaints of

148. 192 N.W. 2d. 913 (Wis., 1972).

149. *Supra*, note 138 at 504.

150. Note the statistics on the percentage of public housing cited in the *Introduction* to this paper, and the update on these statistics in Cullingworth, *supra*, note 8 at 9.

administrative abuse and to publish reports of their findings.¹⁵¹ In the Housing Act, 1957,¹⁵² local authorities are given a broad discretion over the “management, regulation and control” of houses. There is a requirement that “reasonable preference” be given to tenants who occupy unsanitary houses, live in overcrowded conditions, or have large families.¹⁵³ There is also a duty to provide housing for people who have been displaced from their residences as a result of a demolition or closing order.¹⁵⁴ Local authorities are directed to give preference to the homeless in accordance with the Housing (Homeless Persons) Act 1977.¹⁵⁵ Within these broad statutory parameters, there is room for discretion.

Most local authorities in England have established eligibility criteria to guide and structure their discretion in the processes of allocation and of transfer. D. J. Hughes and S. R. Jones suggest that these distribution schemes fall into four main groups — “date order” schemes, “point” schemes, “merit” schemes, and “combined” schemes.¹⁵⁶ Government has insisted that these schemes be simple and public so that the affected tenants can become aware of the rules which determine their housing claims.

A review of reported complaints made to the Commission on Local Administration from 1977 to 1979 provides clear examples of abuse of housing discretion.¹⁵⁷ Local ward councillors are given considerable input into the issuing of public housing, which gives rise to favouritism and political bias and also could give rise to problems of dictation.¹⁵⁸ In some cases, moral views about marriage break-ups, common-law arrangements, and proper conduct were considered, and local hearsay about a particular housing claimant can be quite damaging. In one colourful case, a family was denied public housing because there were doubts that the parents were properly married and because the local characterization of the family was as a “rum mixture”.¹⁵⁹

151. D.J. Hughes and S.R. Jones, *Bias in the Allocation and Transfer of Local Authority Housing: A Study of the Reports of the Commission for Local Administration in England* (1978-79) *Journal of Social Welfare Law* 273.

152. (U.K.), 5 & 6 Eliz. 2, at c. 56, s. 111.

153. *Ibid.*, at s. 113.

154. Land Compensation Act, 1973, (U.K.), 1964, c. 26, s. 39.

155. (U.K.), 1977, c. 48, s. 4.

156. *Supra*, note 151 at 275.

157. *Supra*, note 151 at 279-92.

158. *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

159. *Supra*, note 151 at 282-4.

British courts can intervene through judicial review for abuse of discretion. However, the onus of proof is on the tenant and allegations of abuse of discretion are very difficult to prove.¹⁶⁰ This is accentuated by the general absence of written reasons. The few housing cases which have reached the courts demonstrate an attitude of deference to the front-line housing authorities. *R. v. Bristol Corporation, ex parte Hendy*¹⁶¹ was a case where the court agreed with the local authority that a person displaced as the result of a closing order need not be given preference over other claimants on the general waiting list. The philosophy of deference was well articulated by Lawton L.J. in *Bristol District Council v. Clark*, as follows:¹⁶² “. . .this court should be most reluctant to interfere with the exercise of Housing Act powers by a local authority. Local authorities have to meet the electors from time to time. The electors are in a far better position than the court could ever be to decide whether the powers have been exercised in a way which meets with general approval.”¹⁶³

The fact that British courts are deferential to the front-line housing administrators does not mean that the latter institutional mechanism is ideal. Indeed, a proper policy analysis should consider the comparative virtues and vices of the various institutional mechanisms available.¹⁶⁴ Some of the weaknesses of the English bureaucratic approach to housing are exemplified by the controversial “housing allowance” scheme which was introduced by the Conservatives in 1972. These allowances were designed to ensure that the rents charged in both the private and public sectors would be assessed on a fair basis. More specifically, these allowances, in the form of rental subsidies tied to family income,

160. D. Hoath, *Council Tenants complaints and the Local Ombudsman* (1978), 128 New L.J. 672.

161. [1974] 1 All E.R. 1047 (C.A.).

162. [1975] 3 All E.R. 976 (C.A.) at 981.

163. *Ibid.* cited in Hughes and Jones, *supra*, note 151 at 275. For further elaboration of this point, see D.J. Hughes, *Municipal Eviction* (1977), 127 New L.J. 1067.

164. N. K. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative* (1981), 79 Mich. L. Rev. 1350. This view has been elaborated on by Komesar in “The Revolution in Landlord-Tenant Law: A Comparative Institutional View”, a paper prepared for *Liberty Fund Inc. Seminar on the Common Law History of Landlord-Tenant Law*, held in Law and Economics Center, Emory University, Atlanta, Georgia, during March 11-13, 1983.

were intended to assist the poorer tenants to acquire decent housing.¹⁶⁵

There were significant problems with the administration of the housing allowance scheme even in the early days of the program.¹⁶⁶ David Yates wrote an informative article in which he assessed both the potential of housing allowances and the practical problems of implementing them.¹⁶⁷ The complexity of the program is identified as one of the major difficulties, especially in light of the generally low literacy rate of the potential claimants. Many of the claimants had a pessimistic view of welfare agencies and did not know where to seek assistance in untangling the complicated application process. Tenants were also reluctant to seek out the rental officer for purposes of lowering their rents, because they feared that their landlord would be even less willing to make needed repairs than was presently the case. In short, there was a significant communication gap between the administrators and the potential claimants. Finally, one of the most despised features of the application process was the means test. The housing means tests placed a heavier burden on the claimant to prove the level of both his income and his rent than was the case with other programs. Often, the documentation needed in such a claim was either lost or never provided by the landlord. The fairness of the means tests themselves has also been questioned.¹⁶⁸

(c) *Canada: Agencies in Search of a Model*

The United States and England offer Canada very different models for dispute resolution. The American courts are considered the major avenue of redress in that country and, with the arrival of the Charter and given the resulting higher profile for Canadian courts, the judicial model has an increased appeal in Canada. However, the British model of a court which is deferential to administrative decisions is more in line with the Canadian tradition. Using an administrative device, such as a commission or ombudsman for

165. The complex statutory scheme for housing allowances is outlined in the Housing Finance Act 1972 (U.K.), 1972, c. 47, ss. 62-70 (now repealed) and Rent Act 1977, (U.K.), 1977, c. 42, s. 70.

166. Research conducted under the auspices of the American Urban Institute in Washington, D.C., canvassed some of these problems in comparison with American housing programs. O. Hetzel, D. Yates, and J. Trutko, *Making Allowances for Housing Costs* (1978), 1 Urban Law and Policy 229.

167. D. Yates, *Rent Allowances — Six Years On* (1978), *Journal of Social Welfare Law* 195.

168. *Ibid.*, at 214.

housing, is also a reform worthy of consideration. Before turning to models of reform, however, it is time to consider the existing state of housing allocation in Canada. This front-line analysis will take the form of case studies of two particular housing agencies.

(i) *Rent Review Agencies*

Rent control has been the focus of the research and writing that has been done on the issue of housing. Economists have been foremost in dissecting rent control schemes.¹⁶⁹ Less attention has been given to rent control in legal circles, but the topic has not escaped mention.¹⁷⁰ Instituting, or at least not withdrawing from, a program of rent controls is politically attractive because of the voting power of tenants. Thus, attacks by economists have gone largely unnoticed. J.B. Cullingworth expresses it well, saying that: "Since rent control is such an attractive policy to governments, and so contrary to economic theories, it is difficult to think of any other issue on which the dictates of economic and political theory so clearly clash."¹⁷¹

Rent control causes confusion, as it is commonly used to describe significantly different degrees of interference in the housing market.¹⁷² At one end of the scale is a rent freeze, which allows little or no change in rents. This was effectively the form of rent control imposed in Canada during World War II. At the other end of the scale is rent review, which allows costs to be passed on fully to tenants. This process usually includes allowances for a "reasonable" return on investment, often based on returns available in other segments of the financial market. Such a rent review process would allow increases in rents, based on rising interest rates in other parts of the economy, even if no significant changes were occurring in the housing market itself. In the debate over rent control, its opponents tend to argue as if all controls were, in fact, rent freezes. Dire predictions of deteriorating rental housing stock and increasing scarcity of rental units due to a lack of incentive for investment

169. Two examples are: Patterson, J. and Watson, K., *Rent Stabilization: A Review of Current Policies in Canada* (Toronto: Canadian Council on Social Development, 1976), and Hoyek, F.A., *Rent Control: A Popular Paradox — Evidence on the Economic Effects of Rent Control* (Vancouver: Fraser Institute, 1976).

170. D. Owen, *Rent Controls: Solution or Problem* (1977), 41 Sask. L. Rev. 3.

171. Cullingworth, *supra*, note 8 at 46.

172. See J. Patterson and K. Watson, *supra*, note 169.

invariably form part of the debate. The proponents of rent control focus on the system of rent review, which does little to effectively control rents in times of rapidly increasing prices and interest rates.¹⁷³ The opponents of rent control demand that controls be abolished in order to avoid further disruption of the housing market, while the proponents argue that more control is needed to protect tenants in a volatile market.

It is necessary to first determine the degree of control in each locality so that the emotionalism surrounding rent control may be tempered with reality. For the purposes of this paper, the term "rent review" will be used to describe all forms of rent control other than rent freezes, recognizing that considerable latitude exists within the rent review process itself. It should not, however, be assumed that rent review is necessarily favourable to the tenant. The broad administrative discretion given to the relevant review agencies produces a mechanism which can be used to keep landlords happy as well. Couple this with the reluctance of tenants to trigger the rent review process for fear of landlord reprisals, and the pro-tenant character of rent control diminishes. Because tenants in Nova Scotia and, to a lesser extent, in other parts of Canada lack security of tenure, they are in an unequal bargaining position with landlords.¹⁷⁴ To the extent that rent review does benefit tenants, it is more likely to do so in the middle- and upper-income ranges. Litigation, either by these middle-income tenants or the landlords, has improved the procedural structure of rent review agencies.¹⁷⁵ In Ontario, public housing tenants were exempted from rent review protections in 1976, emphasizing the unequal status of lower-income tenants.¹⁷⁶ In Nova Scotia, rent review appears to apply to public, as well as private, "residential premises". This latter term is defined broadly

173. Cullingworth, *supra*, note 8 at 46-50. There is little solid empirical evidence on the economic impact of rent review.

174. *Supra*, note 6 at 61. Canada's tradition has been closer to the American model than the British, as most Canadian legislation does not ensure security of tenancy.

175. *Re Scott et al v. Rent Review Commission* (1977), 81 D.L.R. (3d) 530 (N.S.C.A.). It is noteworthy that this case was argued by Dalhousie Legal Aid, but only after there was a heated debate at the board level about whether it was a proper case for the Legal Aid Clinic. Some of the tenants earned incomes in excess of the eligibility criteria for service at the clinic.

176. Residential Premises Rent Review Amendment Act, S.O. 1976 (2nd. Sess.), c. 36, s. 5(1).

in section 4 of Nova Scotia's Rent Review Act.¹⁷⁷ However, in practice, government-owned public housing is exempted from the rent review process in Nova Scotia, as well as in Ontario.¹⁷⁸

The income range of the clientele of the Rent Review Commission is much broader than that of the Halifax Housing Authority, which will be examined in the next segment of this paper. By definition, this latter agency deals exclusively with low-income tenants. However, the scarcity of public housing units ensures that a large proportion of low-income tenants must rely on the private rental market to meet their housing needs. As illustrated in *Re Webb*,¹⁷⁹ those who live in publicly subsidized housing are entitled to a lower level of procedural fairness. Lower-income tenants are likely to be disadvantaged under the rent review process as well.

The Economics of Rent Review: The genesis of rent review is the scarcity of housing units. The supply side of the housing market is notoriously slow to react to increases in demand, which explains the preoccupation of government and the private market alike with statistics related to housing starts. Rent increases are the market solution to choking off demand and maintaining some sort of balance, or equilibrium, in the marketplace. This creates a particular problem for low-income tenants who often have no alternative housing available to allow them to escape unaffordable rent increases. The objective of rent review is to control rent increases and offer protection primarily to those who are unable to protect themselves. Thus, rent review programs are often billed as a social justice program for the poor.

Rent review pertains only to the price of rental housing and may encourage tenant selection based on nonprice characteristics, such as age, size of family, and occupation. Lower-income tenants will be disadvantaged by the lack of informal information networks,

177. S.N.S. 1975, c. 56, s. 4. There are specific exemptions from the statute for universities, hospitals, maternity homes, nursing homes, hotels, boarding homes, and colleges.

178. *Herring Cove Housing Co-operative*, December 22, 1982. A decision of Randall Duplac, Chairman of the Nova Scotia Rent Review Commission (file no. 11927.00), holds that nonprofit cooperative housing developments also fall outside the control of the rent review process. Section 38(b) of Nova Scotia's Rent Review Act also allows exclusions by regulation and, in January 1983, all premises were excluded from rent review for the three-year period after the first occupancy. N.S. Reg. 218/82, October 14, 1982.

179. *Supra*, note 12.

such as word-of-mouth and the passing on of units to “desirable” tenants without advertising. The economic incentive to landlords to encourage such networks are numerous. Desirable tenants are those who are rarely home (and, thus, use less power and fewer services), have no children or pets (and cause less wear and tear on property), are financially stable (offering less risk of nonpayment of rent), and are long-term (resulting in a reduction in the administrative cost of change-over).¹⁸⁰ Thus, rent review without provision for security of tenure may benefit wealthier tenants at the expense of lower-income tenants. In addition, there is a clear political context which overshadows the economics of rent review: “Policy issues are typically translated into a choice between short-term considerations of tenant hardship and political advantage, and longer-term considerations of the future of the housing market. Since politicians commonly discount the future, rent controls are often introduced when rents begin to rise rapidly.”¹⁸¹

Rent review is favoured over the rationing of actual units as a means of allocating this scarce commodity. The clearly established property rights of land owners preclude rationing being carried out along the lines of equal units for all. Similarly, a concerted government initiative to provide more public housing stock at the lower income range would be resisted as an invasion of the private sector, and providing housing allowances or increasing welfare payments necessitates higher taxes, which are politically unpopular. Indeed, rent review may reduce pressures on the public purse in that fewer people will be forced onto the welfare rolls.

The political advantages of rent review are more apparent than the economic ones. Once a policy of rent review is adopted, the problem becomes one of designing a mechanism to effectively implement it. In dealing with a rent review structure, problems of fairness emerge. What costs should be allowed to landlords? To what extent should tenants, as well as landlords, be involved in the process? These questions can only be answered by examining the administrative agency charged with the task of reviewing rents.

180. There was considerable controversy in Halifax during 1982 when it became known that landlords had access to a list of blacklisted tenants, some of whom had perpetrated no greater crime than that of being on welfare.

181. Cullingworth, *supra*, note 8 at 47.

Statutory Rent Review Structures: Most Canadian provinces adopted rent review schemes in the 1970s. Although the immediate cause was skyrocketing housing prices, another underlying factor was the growing consciousness that there is a right to affordable accommodation, reflected in a study of the British Columbia Law Reform Commission of 1973.¹⁸² However, the major impetus was of an economic nature, not dedication to social justice in housing. By the 1980s, most of the Prairie Provinces had withdrawn from rent control programs.¹⁸³ Both Ontario and Nova Scotia introduced rent review legislation in 1975,¹⁸⁴ but Ontario updated its scheme with the Residential Tenancies Act of 1979.¹⁸⁵ It is thus instructive to compare the two schemes.

In both provinces, the reviewing agency only acquires jurisdiction to review rents when the proposed increase exceeds the guideline set by regulation. At present, the allowable increase under both statutes is six percent. The first line of review in Ontario is the Rent Review Officer and, in Nova Scotia, the Residential Tenancy Officer (hereafter "the RTO"). Under Nova Scotia's Rent Review Act, the affected parties must be given notice, but there need not be a hearing. In exercising his or her discretion, the RTO is to be guided by the factors in section 11(2), namely return on investment and the potential adverse effect on the landlord. Most decisions do not proceed to the second stage of review.

Procedural changes were introduced by the 1979 Ontario amendments. Each hearing is now chaired by a commissioner of the Residential Tenancy Commission, who receives cost information from the landlord. The landlord is then subjected to questions from both the commissioner and the tenants. Such a hearing is rare in Nova Scotia. In Ontario, if the first-level ruling is appealed, the commissioner must prepare a written statement of the reasons for the decision and forward it to all concerned parties. The parties are then given an opportunity to file statements indicating their

182. *Law Reform Commission of British Columbia Report* (1973), in *A Report of the Interdepartmental Study Team on Housing and Rents* (Victoria, B.C.: Ministry of Housing, 1975) at 1.

183. In Alberta, controls on public housing were the last to go. Saskatchewan and Manitoba have largely eliminated controls, but they do still exist in some larger urban centers, such as Regina and Winnipeg. In June 1983, Prince Edward Island served notice that it plans to abolish rent controls in the next legislative session.

184. Residential Premises Rent Review Act, 1975 S.O. 1975 (2nd Sess.), c. 12 and Rent Review Act S.N.S. 1975, c. 56.

185. S.O. 1979, c. 78 (now R.S.O. 1980, c. 452).

disagreement (if any) with the reasons given.¹⁸⁶ Nova Scotia has no such formal procedure, although the Nova Scotia Rent Review Commission has broad powers to set its own procedures so long as it grants the affected parties an opportunity to present information.¹⁸⁷ Nova Scotia's commission operates upon the basis of in-house guidelines, concerning matters such as the maximum cost allowance for fuel price increases. These guidelines are neither published nor disclosed,¹⁸⁸ which has led landlords to complain that they do not know how the commission operates or how they should present their cases.¹⁸⁹ By contrast, Ontario mandates that all guidelines and procedural manuals used in the decision process must be open to public scrutiny.¹⁹⁰ In general, statutory protections of procedure are much more extensive in the Ontario framework.

Court-Imposed Procedures: Nova Scotian courts have been eager to fill the statutory void by using the doctrines of natural justice and procedural fairness in relation to the Rent Review Commission. Under section 27 of the act, there is provision for an appeal from the board to the Nova Scotia Court of Appeal. Courts have readily granted leave to appeal in these matters. Moreover, review by way of the prerogative writs has apparently not been eliminated by the existence of the appeal rights.¹⁹¹ As happens so often, little attention has been paid to the privative clauses.¹⁹² Even the decisions of the RTO have fallen under judicial scrutiny. As a result

186. Arnot, R., *Rent Controls and Options for Decontrol in Ontario*, (Toronto: Ontario Economic Council, 1981) at 137-8.

187. *Supra*, note 177 at ss. 19-20.

188. The practice of using secret in-house manuals has been soundly condemned in *Dale Corporation v. Rent Review Commission* (June 27, 1983), an unreported decision (N.S.C.A.). The Cabinet of Nova Scotia responded by making the manual a regulation and allowing its continued use.

189. Newspaper reports of evidence given before the Royal Commission Inquiry into Rents, conducted in the winter of 1983, *Halifax Chronicle Herald*, February 16, 1983 at 3 and February 23, 1983 at 12. This information and the observation about guidelines appear in K. Pike, "Administrative Law: Field Research Project: Rent Review Commission", a paper prepared for credit as partial fulfillment of the requirements for an LL.B. degree at Dalhousie Law School, March 1983.

190. *Supra*, note 185, s. 82. Also in contrast to the flexible Nova Scotian structure, ss. 92-119 of the Ontario statute sets out detailed appeal procedures.

191. *Rawdon Realities Ltd. v. Rent Review Commission of Nova Scotia* (December 30, 1982), an unreported decision of Rogers J. (N.S.S.C.), which granted the remedy of mandamus. However, *Francois v. Joseph and Rent Review Commission* (1980), 40 N.S.R. (2d) (N.S.S.C.), held that appeal rights from the decision of the RTO had to be exhausted before there would be access to the courts.

192. *Supra*, note 177, ss. 16, 27.

of *R.D.R. Construction Ltd. v. Rent Review Commission*,¹⁹³ the RTO is now required to give the reasons for his or her decision. The court felt that without such reasons, the aggrieved parties could not properly exercise their right of appeal. In *Kesme Enterprises Ltd. v. Rent Review Commission*,¹⁹⁴ the Court of Appeal clarified the duty imposed earlier upon the RTO. It was held that the reasons need not be detailed, but they must be sufficient to alert the party to the case that he or she must meet on appeal.

One of the earliest Canadian cases on fairness was the Nova Scotian decision in *Scott et al v. Rent Review Commission*.¹⁹⁵ In that case, the Nova Scotia Court of Appeal held that, regardless of how the process was classified, a duty of fairness is owed to the parties that appear before the commission. On the facts of this case, the duty was not met, because tenants were denied access to the landlord's financial information — which is the heart of a rent review case. By being denied such information, the tenants were deprived of a fair opportunity to be heard.

Courts have been critical of the secretive nature of the rent review process in Nova Scotia at the RTO and commission levels. As a result of *Yarmouth Housing Ltd. v. Rent Review Commission*,¹⁹⁶ a duty to give reasons has been imposed upon the Commission, as well as the RTO. The Court of Appeal asserts that the applicant has a right to know upon what bases the appeal was rejected. One effect of requiring reasons is the expansion of the scope for judicial review for abuse of discretion. The court has rejected the argument that once the Commission considers the statutory factors, it is free to set rent increases as it deems appropriate.¹⁹⁷ However, the court did accept a deferential approach to decisions of the commission.

Implications: The statutory protections attached to the rent review process vary considerably from one province to another. The courts can narrow this gap by imposing common law requirements of a fair

193. (1982), 55 N.S.R. (2d) 71 (N.S.C.A.).

194. November 19, 1982, an unreported decision (N.S.C.A.).

195. (1977), 81 D.L.R. (3d) 530 (N.S.C.A.). These rights were further elaborated in *Rawdon Realities v. Rent Review Commission* (December 30, 1982), an unreported decision of Rogers J. (N.S.C.).

196. (1982), 54 N.S.R. (2d) 28 (N.S.C.A.).

197. There was some suggestion of this approach in *Fort Massey Realities Ltd. v. Rent Review Commission* (1982), 50 N.S.R. (2d) 451 (N.S.C.A.). This case also held that the Rent Review Commission was not performing a function analogous to a section 96 court under the Constitution Act, 1867, and hence was not open to the same constitutional challenge as the Residential Tenancies Board was.

hearing.¹⁹⁸ This has certainly been the experience in Nova Scotia. Nevertheless, litigation is an expensive and time-consuming process which is more likely to be instigated by landlords and middle-income tenants.¹⁹⁹ It is no accident that there are numerous cases on rent review in Nova Scotia and very few on public housing authorities.

Even with the more open rent review process mandated by the cases, the landlords still have a distinct advantage over tenants in the process. It is a classic case of unequal bargaining power. Tenants do not normally have access to accountants and computers to assist them in compiling financial data for use at rent review hearings. Because there is no guaranteed representation of tenants on the Rent Review Commission, it may acquire a pro-business bias, favourable to landlords. In fact, the broad discretionary powers of the commission permit a subtle implementation of such a bias.²⁰⁰ All regulatory agencies are in jeopardy of becoming captive to those they regulate by virtue of their frequent appearances before the board. Finally, it is interesting to contrast the legislative and judicial approaches to the Rent Review Commission and the Halifax Housing Authority. The differing financial status of the clientele of each board is a suspiciously important factor. "The experience of other countries shows that legal regulation of the rights of private landlords and tenants tends to advance in step with the financial assistance given to either of them."²⁰¹

(ii) *Public Housing and the Halifax Housing Authority*

The provision of public housing can be expected to benefit all members of society to the extent that housing conditions of the poor are raised to some socially determined minimum standard. Both those who are rehoused and those who view the improvement

198. *Supra*, note 196 at 38.

199. *Supra*, note 175. Dalhousie Legal Aid's involvement in *Scott* is a partial exception to the middle-income characterization of the rent review cases. In many cases, landlords can bluff tenants into paying rental increases before they are approved. Tenants can be easily intimidated by a landlord and cannot always get access to a lawyer to protect their rights.

200. For example, a landlord might appear to be "adversely affected" if one considers rents alone, but not so affected if one considers the annual appreciation in value of the property. How discretion is exercised in a case such as this involves value choices and preconceptions.

201. *Supra*, note 51 at 379.

benefit. It must then be asked to what extent the provision of public housing is economically efficient.

Economic efficiency requires the voluntary agreement of all parties concerned before any change can be made. Of all the programs falling under the umbrella of "housing policy", public housing has the greatest potential for promoting economic efficiency because the benefits of the program are widely distributed. However, resources must somehow be transferred from richer to poorer individuals to provide the housing units, and therein lies the barrier to efficiency. Those who are most able to finance improvements have alternatives available to them which are more acceptable than public housing for protecting their sensibilities and property values. As long as more preferred solutions are available, voluntary transfers in support of public housing will not be forthcoming. In addition, the members of more affluent groups tend to link social problems, such as family breakdown, violence, and juvenile delinquency, with any form of housing for the poor. Thus, the location of a public housing project becomes as sensitive and emotional an issue as the location of a sanitary landfill.²⁰² This antagonism toward the provision of public housing, which is displayed by a large and vocal segment of the population,²⁰³ has led many municipalities to discriminate in the selection of housing so as to exclude poor families.²⁰⁴ A further obstacle to the provision of public housing is noted at length in the 1977 final report of Ontario's Royal Commission on Metropolitan Toronto. In the short term, public housing projects are expensive and politically unpopular.²⁰⁵ The conflict that occurs at the municipal level

202. J.L. McGrew, *Resistance to Change Continues to Restrict Public Housing Choices* (1981), *Journal of Housing*, 375 at 375-81. Ms. McGrew, former General Counsel for the Department of Housing and Urban Development, has documented the hostilities that surrounded the construction of 120 townhouses for low-income families in Whitma Park, Philadelphia, following eight years of litigation and two trips to the U.S. Supreme Court.

203. M. Lipman, *Social Effects of the Housing Environment*, Background paper no. 4, prepared for the Canadian Conference on Housing, Oct. 20-23, 1968, (Ottawa: Canadian Welfare Council, 1968) at 21. Lipman noted that the anxiety of residents in more settled and suburban areas was reflected in their petitions against public housing being built in their area. Among the reasons cited for this response were the negative impact on property values and the expected adverse effect of such a housing project on their own children.

204. *Supra*, note 9 at 173.

205. Ontario, *Report of the Royal Commission on Metropolitan Toronto* (Toronto: 1977) at 232.

between meeting real social needs and maintaining solvency has been discussed earlier in this paper. It accounts in large part for the fact that public housing has never exceeded five percent of the Canadian housing stock.

Halifax Housing Authority: Since the early 1970s, public housing development in Halifax has been directed almost exclusively at the elderly. With the exception of isolated units bought from the private market and minimal in-fill housing,²⁰⁶ the supply of public housing for low-income families has remained virtually unchanged over the last ten years. This paper refers to public housing for low-income families only, unless otherwise designated.

Scarcity, especially of public housing in Canada, inevitably results in applicants of equal merit competing for a single housing unit. Predictably, the losers far outnumber the winners in such cases.²⁰⁷ The selection of any one applicant from among several of equal merit will be as efficient as any other, and the community must somehow choose among them. But the final decision becomes a matter of great importance in terms of fairness in the broad sense. As a general rule, the scarcer a public commodity, the more important it is to exercise effective control over the means by which it is actually distributed to the public. In Canada, the task of distributing public housing has been assigned to municipal housing authorities, which reflects the general presumption that local housing interests are best served by a local authority. They are the management arm of the "partnership"²⁰⁸ of senior governments outlined in the NHA; they "manage, maintain and administer Public Housing Developments, built and financed by the Federal and Provincial Governments under section 40 and sections 43 and 44 of the *NHA*." ²⁰⁹

206. In-fill housing generates greater density in an existing neighbourhood through either new construction on vacant lots or the renovation and rehabilitation of existing units.

207. *Supra*, note 9 at 37. Rose noted that between 1958 and 1963, waiting lists for public housing grew only at a moderate rate because eligible families realized the futility of applying for accommodation that did not exist and which there was no hope of attaining. Only thirty-eight dwelling units were actually completed for occupancy by low-income families in Metropolitan Toronto during this period.

208. For Halifax, the partnership would consist of representatives of CMHC, the Nova Scotia Housing Commission, the City of Halifax, and the Halifax Housing Authority.

209. R.S.C. 1970, c. N-10.

One such authority is the Halifax Housing Authority, which was established by the Halifax Housing Authority Act in 1948.²¹⁰ It superseded the Halifax Relief Commission Act of 1918,²¹¹ which set up an agency for the purpose of organizing relief activities, including the provision of housing, following the Halifax explosion in December 1917. A brief look at the minimal increase in low-income family public housing over the last ten years underlines dramatically the decline suffered by the Halifax Housing Authority's program in the last decade. Since 1973, only fifteen new units have been completed in the City of Halifax. A comparison with the seventy-three units of senior citizens' housing produced in just the last three years supports the claim that a shift in policy away from providing low-income housing and toward providing housing for senior citizens has occurred. The statistics also highlight the shift away from new construction and toward renovation and rehabilitation.

The guidelines and directives on policy and administrative matters which govern the Housing Authority are provided in a lengthy and detailed Housing Authority Manual, published by the Nova Scotia Housing Commission in 1979.²¹² The stated objectives of this manual are to ensure uniformity by establishing policies, guidelines, and directives.²¹³ This manual does not presently have the force of law, although, under special circumstances, public housing could be managed by the Governor-in-Council, pursuant to

210. Halifax Housing Authority Act, S.N.S. 1948, c. 78. The present act is based on the Halifax Housing Authority Act, S.N.S. 63, c. 54, as amended by S.N.S. 1970-71, c. 72 and S.N.S. 1975, c. 70. The effect of the two minor amendments was to change s. 4(1) of the 1963 Act, outlining the number of members required on the board of the Halifax Housing Authority. According to the February statistics of the Nova Scotia Housing Commission, the Halifax Board (one of three in the metropolitan area) manages 1,276 units of various sizes. This represents 45 percent of the province's public housing units, and about 43 percent of the units under construction are also in Halifax.

211. Halifax Relief Commission Act, S.N.S. 1918, c. 61. It was the first public housing authority in Canada and constructed the buildings in the hydrostone area. The so-called hydrostone area, named after the building material used in construction, is that area bordered by Kaye, Agricola, Duffus, and Gottingen Streets. It was later turned over to the private market and has now become a fashionable neighbourhood. It is difficult to imagine any of the later public housing projects, Mulgrave Park or Uniacke Square, being in such demand by private market consumers!

212. Nova Scotia Housing Commission, *Housing Authority Manual* (Halifax: 1979) Ch. 1, p. 1. The manual is presently undergoing revision.

213. *Ibid.*, at ch. 1, p. 1.

various regulations.²¹⁴ A potential difficulty with the Nova Scotia Housing Commission's guidelines concerns the "fettering" of a local authority's discretion.²¹⁵ Examination of the chapter of the manual which outlines general policies concerning applications for housing would lead one to believe that they are not binding on the authority. The following excerpt illustrates the type of guideline which would likely escape the no-fettering rule by leaving room for the board to make exceptions:

It is the basic principal that the selection of tenants be based on need. It is the need of applicants rather than their desirability as tenants which should be the guideline. The principle of tenant selection in accordance with need must, however, be balanced with judgement and discretion against the well being of a particular project. *The final decision on selection rests with the Members of the Housing Authority* (emphasis added).²¹⁶

The Nova Scotia Housing Commission's attempt to structure the operations of housing authorities does not remove the potential for considerable discretion in the routine exercise of an authority's allocation policies.²¹⁷ The annual review of a housing authority's decisions would not necessarily bring to light evidence of bias, particularly as reviewing officers are in scarce supply and detailed review is an extremely time-consuming and costly process. It is essential that potential abuse of discretion be controlled at the time decisions are originally made and that the review process not be relied on to identify examples of such abuse. Formal regulations and guidelines have a further serious limitation, in that they are ineffective as a means of promoting sensitivity among administrators in their dealings with their clients. They also reduce the flexibility of management to deal with cases on an individual basis. For example, a point system is employed by the Halifax Housing Authority in an attempt to allocate housing according to need and to deal fairly with all applicants. According to this system, a single person with no children has virtually no chance of securing housing. In a child custody case, however, a judge may decide that the child or children of a single-parent mother are to remain in foster care

214. Housing Development Act R.S.N.S. 1967, c. 129, at s. 33, as amended by S.N.S. 1975, c. 29, s. 30.

215. *British Oxygen v. Minister of Technology*, [1971] A.C. 610 (Eng. H.L.). This case suggests that a board will not be held to fetter its discretion as long as it is open to exceptions.

216. *Supra*, note 212 at ch. 4, p. 1.

217. Fish, *supra*, note 23 at 210.

until suitable accommodation for the family is secured. Thus, while the woman is awaiting the custody decision, she is held, by the Housing Authority, to be ineligible for suitable housing, a necessary condition for custody to be granted. The applicant is caught between the guidelines of two different decision-making bodies, each of which concerns itself with "parts" of a person. The result is that the "whole" person remains unprotected. Administrative simplicity may be bought at a high cost to substantive fairness. Indeed, one person's due process can be another's red tape.

Guidelines have been responsible for a number of inconsistencies in the treatment of Halifax Housing Authority tenants. The present application form, for instance, states clearly, "*Absolutely No Pets Permitted*". However, those tenants who obtained occupancy prior to 1978 were not subject to this restriction and many pets are in evidence in all public housing projects in Halifax. An inability to adequately police the situation and the lack of clear identification for each pet makes control extremely difficult. The result is that incoming tenants feel that the regulation is discriminatory. Another example concerns the guideline which determines the rent to be paid by each tenant. A tenant receiving Social Assistance payments and no other income pays a flat rate according to the size of the unit. In 1983, this was set at \$85 a month for a two- or three-bedroom unit and at \$100 a month for a four- or five-bedroom unit.²¹⁸ An employed tenant receiving income other than Social Assistance payments is charged 25 percent of his or her gross income. Thus, two families living in identical four-bedroom units, both with gross incomes of \$800 a month, could experience a difference of 100 percent in their rents, depending on the source of income. The employed tenant would pay \$200, as opposed to the \$100 demanded of the tenant on Social Assistance. Adherence to this guideline clearly discriminates against the working poor.

A review of the guidelines concerning tenant selection and tenant eviction highlights a significant difference.²¹⁹ This is consistent with the legal emphasis on the removal of rights, rather than their creation. The eviction procedures are much more detailed and demand greater attention to procedural fairness than the selection procedures do. A brief review of both types of procedures will clarify this point. Upon application, a tenant is interviewed by a

218. *Supra*, note 212 at ch. 5, p. 15.

219. *Supra*, note 212 at ch. 7.

housing officer, who begins the point-scoring system. This is followed up by a home visit from another officer, who completes the scoring for such items as "health" and "housekeeping" and who verifies the points allotted by the initial interviewer. The applicant is then placed on a waiting list, but is not informed of his or her place in the queue. Although rank is a major determining factor in the allocation of units, the applicant has no right to be informed of any change in status. In terms of eviction procedures, it is more difficult to remove a tenant from a unit once it is occupied than it is to delay the initial selection, particularly if problems arise from anti-social behavior and the personal habits of tenants. The Nova Scotia Housing Commission states that a housing authority may require the services of a solicitor at various stages of the termination process, whereas such services are considered unnecessary for the selection process. This is a clear indication that more extensive protection is awarded to those already in possession of a unit, rather than to those awaiting possession.

The Halifax Housing Authority recognizes three conditions as cause for instituting proceedings to terminate tenancy: "1. excessive or habitual rent arrears; 2. bad housekeeping resulting in excessive damage to a unit and its fixtures; 3. personal habits of the tenants which antagonize neighbours, provoking complaints; or which create a poor atmosphere or bad example in the community."²²⁰ Eviction is only to be considered after all other options have been exhausted and rarely occurs during the term of a lease. If the first of the three conditions exists, a formal collection letter is sent notifying the tenant that "unless all arrears are paid in full within one week . . . or a satisfactory arrangement is entered into for the payment of your debt, we shall consider instituting appropriate legal procedure."²²¹ The facts underlying such procedures are rarely in dispute. Where the second or third condition, or both, exist, the manual states that "such complaints *should* be in writing and signed" and that all cases "must be fully investigated using a Community Relations Worker where available".²²² The "facts" in these cases are more difficult to document and, since it is not essential that either policy quoted above be followed in the process, there is considerably more

220. *Supra*, note 212 at ch. 7, p. 21.

221. *Supra*, note 212 at ch. 7, p. 24.

222. *Supra*, note 212 at ch. 7, p. 31.

discretion. A careful review of termination decisions made over a period of time would be required to establish, or even to attempt to establish, whether or not this discretion was being abused.

There appear to be two ways in which the termination policies could result in unfairness. The first might result from too lenient an observance of the guidelines. Proceedings initiated by complaints from antagonistic neighbours could result in the unwarranted termination of a tenant, even if the complaints were signed. The stereos, pets, children, and everyday activities of tenants disliked by their neighbours may be perceived as being excessively noisy, as compared to the same activities performed by a well-loved tenant on the same block. There is great potential for abuse, especially in areas where no Community Relations Worker has investigated the case. On the other hand, strict observance of the policies may result in the antisocial activities of one tenant creating an unpleasant and stressful environment for all other tenants in the area. A recent example from a housing project in Halifax illustrates this point.²²³ Complaints had been received by the Halifax Housing Authority for more than a year concerning two teenage boys from two different families in the complex. The accusations ranged from cruelty to neighbours' pets to vandalism. Yet the neighbours were afraid to sign statements because they feared reprisal from the parents. Finally, several tenants reluctantly came forward after witnessing the boys in an act of vandalism that resulted in over \$9,000 worth of damages. After termination procedures were completed, the Halifax Housing Authority chose not to renew the existing lease of the offending families, rather than issue an eviction order.

The preceding discussion indicates that the existence of detailed regulations alone is neither sufficient nor necessary to ensure that public housing tenants are treated with fairness.²²⁴ The final analysis must be based on the quality and fairness of results, rather than the means chosen to achieve them. The solution may lie in more regular, comprehensive reviews by objective parties to ensure consistent treatment of like situations, and sensitive, reasonable and

223. Interview with the Community Relations Manager, of the Halifax Housing Authority, by Margaret Holgate, February 1983.

224. Hughes and Jones, *supra*, note 151 at 274, note that Britain has rejected "the idea of laying down a statutory framework for allocation schemes." Fish, *supra*, note 23 at 210, also notes that many of the problems that arise from the exercise of administrative discretion do not lend themselves to legislative solutions.

fair treatment of special cases. Once again, the courts are but one means to a fairer resolution of housing problems.

VIII. *Conclusion*

Law and economics are vehicles for giving shape to social policy, but neither offer a solution to the problems of housing. At base, housing is a social and political problem and the most that can be expected of either law or economics is that they provide a framework for fair decision-making. One problem which emerges from this study is the failure of either discipline to properly take account of the other. Economists have been singularly unconcerned about fair procedures and appearances of justice, while lawyers and judges rarely considered the broad economic implications of their decisions. Because of the high degree of economic illiteracy among lawyers, the use of economic data in court cases is often problematic.²²⁵

There does not appear to be a coherent housing policy in Canada. This may be explained, in part, by the tendency of the social disciplines concerned with housing to compete, rather than cooperate. Judges often adopt a rather isolated model of decision-making which deliberately avoids taking account of political, economic, and social concerns.²²⁶ Similarly, many economists are unfamiliar with the legal framework within which economic decisions are made. There is recognition of the problems of single-discipline myopia, of which the following is an example:

Authors seeking to convey an understanding of the policies of government adopt a variety of approaches to their task. The history of their chosen field often furnishes their point of departure, but this approach too readily presents existing ways of doing things as a culmination of past progress rather than a preparation for a different future. Alternatively, the task may be approached through the methods and concepts of a particular discipline — by studying the economics of the subject, for example, or the administrative structure and legal powers of the authorities concerned. But although each discipline is commendably rigorous in analysing the problems it was created to deal

225. One example of this was the apparent neglect of the economic brief presented by Professor Lipsey in *Reference Re Anti-Inflation* (1976), 68 D.L.R. (3d) 452 (S.C.C.). For an analysis of some of the problems of mixing the two disciplines, see C. J. Bruce, *The Introduction of Economic Factors into Litigation Cases: Ontario's 2½ Percent Solution* (1982), 60 Can. Bar Rev. 667.

226. *Supra*, note 128 at 193.

with, the price of this efficiency is a tendency to resort to simplified and lazy-minded assumptions when confronted with problems which fall outside that territory.²²⁷

The benefits of housing programs are focused upon the higher rungs of the socioeconomic ladder. Housing policy is largely the product of a political process which responds to effective lobbying. Middle-income tenants and home owners are a more formidable political force than those who inhabit low-income public housing. The different treatment of these income groups is highlighted by the case studies on rent review and public housing in this paper. Public housing has been labeled a privilege, rather than a right, and this affects both the economic distribution of housing and the provision of legal safeguards. The time has surely come to recognize the importance of housing at all levels and to escape the tyranny of labels. Furthermore, greater attention must be given to the economic implications of government policies. This is particularly important with housing policy, which involves externalities. If low-income families are housed in substandard buildings located in rundown segments of the city, there will be a social cost, which may materialize in the guise of crime, juvenile delinquency, unemployment, or marriage breakdowns. Because these costs will be borne by the whole society, the economic policy may not even be efficient, much less fair. How can greater fairness be promoted?

One way of improving rights to public housing is by statute. The legislatures or Parliament can provide positive guarantees of housing as the equivalent bodies have done in the United States and the United Kingdom. One problem with this device is that these "guaranteed" rights may be removed by majority vote. This provides flexibility for government, but no security for the poor. Administrative agencies may also be created as a check on the activities of local housing authorities. This is an important part of the English model. However, this mechanism presents the risk of bureaucratic inbreeding. Courts are another mechanism by which greater fairness can be injected into the housing bureaucracy. Fairness is used here in the broad sense to mean not simply proper procedures upon removal of property, but also an equitable allocation of housing units in the first instance. There is a clear need for appropriate legal procedures for both the allocation and the removal of housing. The expansion of the common law concept of

227. *Supra*, note 51 at 10.

fairness has been an important means for extending greater protections to recipients of government largesse. Another hopeful sign is the movement towards the internal structuring of decision-making to produce fairer and more predictable results. Philippe Nonet makes the following stirring call for a redefinition of the legal role in administrative action:

At issue here is the very meaning of legal procedure. Procedure is not a way of confining government within the limits of rules. Instead, it is seen as a structure of opportunities for participation and criticism, allowing affected persons to challenge and influence official policy. In this perspective, the function of legal criticism is less to reduce the role of government than to use and develop the resources governmental policy offers for promoting individual and group interests in public welfare. Law can contribute to the growth of public policy in two related ways. First the legal process can help to assure positive regard for affected interests in administrative policy-making. Such use of law involves in part an enlargement of the meaning of "fairness" in administrative proceedings — beyond the observance of minimum standards of evidence and due process, toward an affirmative search for maximum representation of interested groups and persons. It also involves a creative development of opportunities for gaining recognition of substantive rights in administrative programs. Legal argument offers a strategy for transforming the "favours" of government assistance into vested "rights," thus helping to secure and enlarge the benefits of public welfare. As Charles Reich argues, "Only by making such benefits into rights can the welfare state achieve its goal of providing a secure and minimum basis for individual well-being and dignity. . . ." This latter point suggests a second way in which law can contribute to public policy: Legal argument can transform public purposes into authoritative principles, by which administrators can be criticized and held to affirmative duties. In both ways, law helps insure that the benefits of governmental programs are meaningful and that they effectively reach those for whom they are intended.²²⁸

The efficacy of the law as an effective instrument for promoting social policy has been enhanced by the Charter. As discussed in this paper, the guarantees of equality and security of the person hold promise for the future. It remains to be seen whether the promise will be fulfilled, as the reforming zeal of the courts should not be assumed. Nonetheless, the Charter is not encumbered by the baggage of weighty precedent and the time is ripe for bold

228. *Supra*, note 90 at 6-7.

arguments about the real meaning of Canada's constitutional rights. The remedial provisions of the Charter provide the power to act. The courts must be convinced of the need to act.

It is not only the courts which must be convinced that there is a basic right to decent shelter. Politicians at all levels of government are an equally important target for education. As long as the funds available for public housing remain constant, increasing the costs associated with fair procedures may actually result in the production of fewer public housing units. Governments must be convinced that they should enlarge the size of the housing pie, and this in turn will condition how much money can be spent effectively on designing and implementing better procedures for allocation and removal. Courts are equipped to deal only with the issues of distribution, and will not and should not tell elected governments how they should spend public funds. Thus, the war for decent housing must be waged on several fronts.

In both legal and economic terms, housing is a vital matter. Unlike Charles Reich, who blazed the trail in the United States,²²⁹ Canadian lawyers need not advocate a redefinition of property to bring public housing under the constitutional umbrella. The Charter, in particular, invites a classification of public housing as a constitutionally protected interest. How the courts will respond to the open-ended language of sections 7 and 15 is still unclear. Some interesting cases have already arisen to test the limits of protected interests in Canada.²³⁰ However, as indicated earlier in this paper, the courts may respond conservatively to the Charter. The development of constitutional rights to fair housing allocation would be a sign that the Charter is not just another paper declaration, but a positive commitment to basic human rights, such as the right to adequate housing. Only time will tell whether the judiciary will rise to the challenge, and reformers would be well-advised to pursue the more traditional political avenues as well.

229. *Supra*, note 13.

230. *Elliot v. Director of Social Services* (1982), 17 Man. R. 350 (Man. C.A.) A termination of a woman's social assistance benefits was challenged as being contrary to the principles of fundamental justice in section 7 of the Charter. Leave to appeal has been granted by the Man. C.A.