Rationales for Tenant Protection and Security of Tenure

Gary Yee
RATIONALES FOR TENANT PROTECTION AND SECURITY OF TENURE

Gary Yee*

1. INTRODUCTION
Most people are exposed to the residential rental market during some part of their lives. For the tenant, the product or service which is being supplied by the landlord constitutes the tenant's home. In this sense, the transactions that occur between landlords and tenants can be as important as those that occur in an employment relationship. The effects are very personal, substantial and direct. Therefore, it is not surprising to see that government action in the rental housing market is widespread.

This paper seeks to examine the issue of protection for residential tenants. It is limited to issues of quality regulation, as opposed to price regulation. There is ample literature of this latter aspect of rent control. Furthermore, the focus will be on one major aspect of quality—security of tenure or protection against eviction.

After a general discussion of quality regulation, there will be a brief overview of relevant aspects of the rental housing market. Then the rationales for intervention in this market will be analyzed, from both economic and ethical perspectives. It will be seen that the rental housing market is far from an ideal competitive market. In addition, since housing may be seen as a fundamental need, there are also ethical reasons for intervention. The various forms of intervention which should be taken will be discussed. The current state of law and policy in Ontario will be examined, along with alternatives. Finally, the effects of the government action will be considered and evaluated.

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1. In 1983, 36 per cent of households in Ontario were rental ones. This was up from 26 per cent in 1956. See S.V. Fram, "Philosophy and Structure of Part IV of the Landlord and Tenant Act", in Law Society of Upper Canada, Department of Education, Residential Tenancies (Toronto: LSUC, 1985) A1 at A5.
2. REGULATION OF QUALITY

In a market, goods or services are exchanged. The government may decide to regulate the exchange or the goods or services in many ways. Two major aspects are price and quality. Price or economic regulation has traditionally been aimed at monopolistic situations. Quality or social regulation has flourished more recently in many areas such as environmental pollution, occupational health and safety, misleading advertising and consumer protection.2

The analysis of any government regulation should take two steps. First, what is the reason for government action? Second, if the reason is compelling enough, what form of action should be taken? The first step may be re-phrased in terms of a threshold issue – is there a case for government intervention? However, this economic perspective may presuppose that the lack of "intervention" in a market is the ideal situation3 and that government intervention is needed only when the market economy has somehow failed in the particular situation. It has been noted that a competitive free market economy is itself possible only through government action to enforce and protect contractual rights and private property rights.4

The issue of whether there are good reasons for government action is not a strictly economical question. There are also ethical or normative reasons why the government should act in some cases. These entail value judgments which should be made explicit. Even the apparently objective economic framework is predicated on some value-laden assumptions of what is fair or best. However, the evaluation of government action cannot be divorced totally from some form of cost-benefit analysis. Furthermore, economic analysis can assist in predicting the effects of various alternative forms of regulation.

Apart from the economic and ethical frameworks, which will be considered further, there is a third perspective which is not really developed in this paper. This is the political or predictive framework

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4. Ibid.
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which is used to help understand why certain policies may or may not be adopted by the government.

The forms of government action or intervention can be very diverse. It may range from the provision or regulation of information to the extreme of direct provision of the product or service by government. In between are measures such as the creation of civil liability, the use of taxes or subsidies and the direct regulation or standard-setting for the quality of the product or service.\(^5\)

In the residential tenancies context, the government has taken many types of action that may be explained on an economic basis, ethical basis or purely political basis. These actions include rent regulation, public housing, subsidies, creation of landlord and tenant rights and obligations (concerning repair, security of tenure, etc.), zoning and land use controls, health standards, construction standards, property standards and so forth. The rental market is also affected by general government housing policies of all kinds, such as those related to encouraging co-ops or encouraging home ownership.

Some of the government action is aimed intentionally at price - that is, making housing more affordable to the tenant. Other policies may be directed at improving that quality of the tenancy. The main focus of this paper will be on government action that affects one crucial aspect of the quality of accommodation for tenants - security of tenure.

3. RENTAL ACCOMMODATION - CHARACTERISTICS

Before considering the rationales for intervention from the economic and ethical perspectives, it is helpful to take a brief look at the nature of rental accommodation and, more specifically, the rental market in Ontario.

The dimensions of the rental housing market are shown by the fact that over a third of Ontario’s households are rental ones.\(^6\) In Toronto, the proportion is 43.5 per cent.\(^7\) The 1981 census shows over one mil-

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6. Fram, supra, note 1 at A5.

lion rental households in the province. Therefore, it is evident that a substantial segment of our population has a direct interest in the regulation of this area.

Further statistics show the desperate situation which faces those who are in the market looking for a place to rent. The 1987 vacancy rate in Toronto was 0.1 per cent, the lowest rate in 20 years. A vacancy rate of 3 or 4 per cent is considered normal. The average apartment rented for $860 per month. Since the widely accepted guideline for accommodation expenditure is 25 per cent of income, this means a household needed a yearly income of over $40,000 to rent the average apartment in Toronto. Furthermore, it has been estimated that the cheapest one-bedroom apartment that can be built would have to be rented out at over $900 per month in order to break even. High land costs are a large part of the problem.

The affordability problem is obvious. The extent to which rent control is a solution or itself part of the problem is not clear. The focus of this paper is not on affordability or rent control. However, it will be noted that low vacancy rates, unaffordable rents and the form of rent control that exists (if any) can have some effect on the quality of housing, including the security of tenure.

The housing market is a very complex one. Even in economic terms, housing is acknowledged to be more than the four walls and roof that constitute simple shelter. Housing is a bundle of services, of which shelter is the most basic level. Housing also provides privacy,

8. Fram, supra, note 1 at A5.
14. Ibid.
amenities, status, a source of recreation, a neighbourhood, and so forth. In other words, housing provides a home and everything that the word "home" conjures up, whether the home is a rented room or a fully-owned mansion. As will be discussed later, this human element of the housing market distinguishes it from the ordinary commodities market. In the following section, more of the unique characteristics of the rental accommodation market will come to light in the analysis of whether the government should take action in this area, on economic grounds or on ethical grounds.

4. RATIONALES FOR GOVERNMENT ACTION

A. ECONOMIC FRAMEWORK

From an economist's viewpoint, the government should intervene in a market only if necessary to correct a defect or failure in the market. The ideal of a perfectly competitive market is central to the economic perspective. In such a market, exchanges would take place which would lead to an efficient and optimal allocation of resources. In a competitive market, no agent or group of agents would be able to influence prices; all agents would be equally well informed; there would be negligible transaction costs; there would be no barriers to entry or exist; there would be no externalities (all costs and benefits would be internalized within the parties to the transaction).

Although few markets are perfectly competitive, it seems clear that the rental accommodation market falls especially short of the ideal. The focus of discussion below will be on defects that affect quality aspects (for example, security of tenure) rather than rent or price aspects of rental housing.


16. The notion of Pareto optimal allocation of scarce resources, which would occur in a perfect market, means that no one can be made any better off without making at least one other person worse off. See Stanbury, supra, note 3 at 2.

17. Hulchanski, supra, note 15 at 31-32 and Stanbury, supra, note 3 C.2.
One defect concerns the major transaction costs faced by a tenant when he or she decides to or is forced to switch apartments. In the perfect market, a tenant could freely choose to sleep in a different apartment each night, depending on where the best deal could be obtained. However, the costs of moving are very substantial and they are not limited to merely pecuniary expenses. Most of the costs arise out of the fact that the tenant is leaving his or her home. There is a psychological loss because each housing unit is unique for each tenant, even if it has all the same features. There is a loss connected with inconvenience, having to adapt to an unfamiliar neighbourhood, changing transportation routes to work and so forth.

Although these losses are hard to quantify in economic terms, their significance must still be acknowledged. One study surveyed tenants to determine the minimum that they would accept as monetary compensation to move out. It showed that "tenants may experience a fairly substantial loss in welfare if they have to move involuntarily." Another aspect of the losses associated with moving is the time and money that must be spent in the search. This is exacerbated during times of low vacancy rates.

Transaction costs also exist for the landlord. Search costs for a new tenant include advertisements, screening prospective tenants, showing the apartment and possibly rental agency fees. There may also be administrative costs in having leases drawn up, changing records or cleaning and redecorating the apartment.


21. Ibid. at 16. Many people would only accept $3000.00 or more as compensation for moving.

22. Chant, supra, note 19 at 139 and Hulchanski, supra, note 15 at 33.
The high transaction costs have an economic result — lack of mobility and competition in the market. Furthermore, it is clear that the tenant suffers far more loss in having to find and move to a new home that the landlord suffers in having to find a new tenant. This puts the landlord in a much stronger bargaining position with existing tenants. They may not enforce their rights (legal or contractual) within the relationship or they may not move even if a better deal is available somewhere else. The landlord's transaction costs, though much less, can also deter it from replacing existing tenants with new ones who may be better tenants or willing to pay more. In addition, uncertainty is a factor in maintaining this closed relationship. Both landlords and tenants would rather not risk changing parties since the landlord and tenant relationship is a continuing one of mutual (though usually unequal) dependence.

Lack of information or inherent uncertainty is a market failure because it can lead to inefficient allocations since decisions are not made on full information. Tenants and landlords generally are not well informed (or equally informed) about the market rents, apartments available, condition of the apartment or how good the tenant is.24

The unequal bargaining power also characterizes the relationship between the landlord and the prospective tenants, especially if the vacancy rates is low. However, even without a low vacancy rate, the prospective tenant interested in a certain apartment usually wants it much more than the landlord wants that particular tenant. The landlord's interest is mainly, if not solely, economic while the tenant's interest is largely psychological. It has been noted that the housing market is very heterogeneous with many different types of accommodation; there is no single market.25 Therefore, the supply available to each tenant is actually much more limited than the vacancy rate would suggest. The tenant has very limited possibilities for substitution.26

24. Fallis, supra, note 12 at 41.
25. Hulchanski, supra, note 15 at 35.
Other factors that create an inelastic supply for housing include the high capital cost involved in building, the fact that very durable goods are involved (decisions have a very long-term effect), the long and expensive process of building and the immobility or fixed location of the product. Therefore, any change in demand will likely be reflected in large changes in price rather than supply. The difficulties on the supply side may be a rationale for rent regulation but that issue is beyond the scope of this paper. The lack of supply is relevant for our purposes to the extent that it affects the quality of rental accommodation (for example, by decreasing the bargaining power of tenants).

It is widely acknowledged that equal bargaining power is a fiction in landlord and tenant relationships if the vacancy rate is low and even if it isn't. Truly negotiated leases are very rare and the Ontario Law Reform Commission has said that "the modern lease more often represents a contract of adhesion than an individual contract freely entered into."

Unequal bargaining power may be seen as a market defect to the extent that it leads to monopolistic powers or lack of perfect competition. The notions of exit and voice are very applicable to highlight this situation. Exit is the ability to directly communicate your desires and problems. Inefficiency results when there is a less-than-optimal use of exit and voice. From the above discussion, it is clear that most tenants find it difficult to leave or to complain and enforce their rights. Employees are often in the same position.

27. Hulchanski, supra, note 15 at 34ff.
31. O.L.R.C. supra, note 29 at 44.
33. Ibid. at 8.
A final market failure to consider is with respect to externalities. The benefits of having good quality housing and happy, secure tenants extend beyond the immediate parties in the relationship. For example, the whole neighbourhood benefits as well. Furthermore, as noted by the Ontario Law Reform Commission, "the physical and psychological effects of housing which is below reasonable standards of fitness have become increasingly well known." The landlord who may be acting within its contractual or property rights in keeping an apartment in disrepair or arbitrarily evicting a tenant does not really bear any of the resulting social costs. Therefore, inefficiency may occur because of decisions being made without having to take into account all of the relevant costs and benefits.

The failures in the rental accommodation market appear to be inherent features. High transaction costs and a weaker bargaining position for tenants may justify government intervention on a strictly economic basis, to try to correct the market. In view of the above discussion, the contention of the Fraser Institute that there is only a poverty problem, and not a housing problem, does not seem viable. Simply giving tenants more money will not correct the market. Various forms of intervention will be discussed later.

The market failures involving high transaction costs and weak bargaining position for tenants naturally have some impact on the quality of rental housing, including habitability and security of tenure. The impact of not having any security of tenure will be examined in more detail below.

B. ETHICAL FRAMEWORK

Within the economic framework, some case has been made out for intervention to correct the market if possible, but the form may be minimal. The form of government action that should be taken in the landlord and tenant relationship depends upon the ethical perspective taken. Giving primacy to the economic framework is itself an indicator of one's norms and values.

At one extreme, according to the common conception of anarchy, there would be absolutely no government action. Indeed, there would

34. Chant, supra, note 19 at 139.
35. O.L.R.C. supra, note 29 at 42.
36. Hayek, supra, note 15 at xv.
be no government and no laws. To the extent that private property could still exist, apartments could be rented but there would be no guarantee that the original terms of the lease (if any) would be followed. Violence could result from attempts to evict a tenant.

With a more reasonable scenario, there would be a minimum level of government action or laws in order to ensure the protection of private property rights and the enforcement of contracts. This would form the basis of market transactions. However, in this conception, there may be no recognition of any market failures. Monopolies and unequal bargaining power could be allowed to flourish. Whatever allocation is made by the market would satisfy this view of distributive justice.

Most economists would favour government intervention to correct market failures. However, the acceptance of the perfectly competitive market as the ideal is very value-laden. There is a presumption of rationality, some pre-existing set of preferences and a prior endowment or wealth distribution which is just. Furthermore, monetary values tend to be attached to only some things and many social values which cannot be or are not quantified would simply be ignored. The neo-classical model of utilitarianism connected with economic liberalism (and welfare economics) supports the idea of perfectly functioning markets leading to the most efficient distribution and maximization of welfare for all.

Another ethical perspective is the social contract theory espoused by Kant and later by Rawls. In this view, the distribution of social and economic goods generally should be equal because that is what individuals would have agreed to if they acted rationally under a "veil of ignorance" about what their prospects or endowments would be in life. Following this philosophy would lead to a "radical rejection of the market as an institution capable by itself of producing a just distribution of benefits and burdens." However, this does not necessarily mean that the market is abolished or that economic analysis is ignored. But it does mean that the economic goals of efficiency and

37. For example, see discussion in R. Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974).
38. Dewees, supra, note 2 at 16.
39. Ibid. at 17.
40. Ibid. at 17-18.
41. Ibid. at 18.
maximization of material wealth will be balanced by or perhaps su-
perseded by the social goals related to this particular ethical perspec-
tive.

Our society does not appear to favour general egalitarianism. Or at
least, as a matter of political reality (within the predictive framework),
this philosophy will not be put into practice. Accidents of endowment
or birth still play a large role in determining one's wealth or position
in life. However, it has been noted that many people accept some kind
of specific egalitarianism. That is, certain scarce but basic com-
modities should be distributed more equally than the distribution of
the ability to pay for them. Housing is arguably one of these com-
modities.

The view that housing is a basic commodity which should be dis-
tributed more equally does not necessarily mean everyone is entitled to
live in equally attractive accommodations. It may mean only that
everyone is entitled to a certain minimum quality of housing. This ap-
proach is more in line with the philosophy that inequality is accept-
able so long as no one is living in poverty. The problem is defining
the fundamental needs which society should ensure are met and also
the level to which they should be met.

With respect to shelter, if one accepts that everyone is entitled to a cer-
tain minimum standard of habitability and a certain minimum level
of rights which includes security of tenure, then government action
would be justified to give effect to such fundamental needs. One does
not have to favour general egalitarianism or even specific
egalitarianism (for housing) in order to justify a certain minimum
level of protection for tenants. The main ethical argument would be
over the extent of the protection, not over whether there should be any
or not.

Shelter may be seen as a fundamental need which society should as-
sist people to obtain, or even ensure that they do. To go one step fur-
ther, the fundamental need may be defined as reasonably adequate
accommodation. This would mean looking at the quality of housing.
Two major aspects of quality for rental housing are habitability (physi-
cal features, condition of repair, etc.) and security of tenure.

42. Hulchanski, supra note 15 at 59 and Stanbury, supra, note 3 at 3-13.
43. Stanbury, supra, note 3 at 3-14.
Before considering the significance of security of tenure, several additional ethical rationales should be noted. One is expressed in general terms by the Ontario Law Reform Commission's call for a legal philosophy based on a theory of vital interests. This may be seen in narrow terms as a version of recognizing fundamental needs or it may be seen in broader terms as recognizing and balancing the parties' legitimate interests. Security of tenure is definitely a vital or legitimate interest. If unregulated market forces do not lead to any meaningful kind of security of tenure for tenants (such as through negotiated contractual options to renew or other guarantees of continuing tenure), then the government may be justified in taking action. This may depend on the other legitimate interests which may be affected, such as the landlord's private property rights.

Another ethical rationale for action is the general vague belief that the government should protect the weak. As noted in the discussion within the economic framework, tenants are in a much weaker bargaining position and many likely would not be able to secure the basic attributes of good accommodation through negotiation.

A further ethical rationale stems from the view that the government should seek to protect reasonable expectations and reliance in contractual and other relationships. This rationale would justify having statutorily implied terms, but this rationale alone would not justify a prohibition from waiving or contracting out of these terms. The protection of reasonable expectations and reliance through implied terms (that can be expressly varied) may also be favoured by economists as a means of making exchanges more efficient in the marketplace.

44. O.L.R.C. supra, note 29 at 10.

45. Ibid. at 9. See also Ontario, Ministry of Consumer and Commercial Relations, Policy Options for Continuing Tenant Protection (Toronto: Queen's Printer, 1978) at 4; L.R.C. of B.C., supra, note 28 at 62. It is noted that a 'secure home is a fundamental need'.


A combination of these rationales of protecting vital interests, weaker parties and reasonable expectations can be seen to underlie the modern government's legislation in areas such as consumer protection, occupational health and safety, employment standards and family law. In the employment and family contexts, the element of a long-term relationship is significant. Legislation in these areas, as in landlord and tenant law, should seek to preserve the relationship. Furthermore, it has been argued that once such an important relationship is started, the stronger party may have some continuing obligation to satisfy not just the needs of the weaker party, but perhaps even its expectations.

C. SECURITY OF TENURE

Security of tenure for a tenant means security from being forced to leave, whether the reason is the landlord's threats, the expiry of the lease, a court order, an unaffordable rent increase or intolerable living conditions. There are many reasons why tenants should have some form of security of tenure, on ethical grounds if not on economic grounds. Security of tenure is a crucial part of adequate accommodation. A person's accommodation is his or her home. As mentioned earlier, there is a great psychological interest attached to one's home. The losses (in the widest sense) caused by moving, especially if involuntary, can be very substantial. Security of tenure has been compared to security in employment and in marriage, two other significant, personal and long-term relationships.

Security of tenure for homeowners is often taken for granted. Aside from rare instances of expropriation, a homeowner is basically safe from involuntary eviction as long as the mortgage, if any, is paid according to schedule. It has been argued that tenants should have rights


49. Ibid. at 96.

50. Ibid. See also Security of Tenure (Alberta), supra, note 19 at 6; Makuch, supra, note 47 at 8; de Klerk, supra, note 48 at C2; Reid, supra, note 32 at 1; L.R.C. of B.C., supra, note 28; and Canadian Council on Social Development, Is There a Case for Rent Control? (Background Papers and Proceedings). (Ottawa: CCSD, 1973) at 108.
similar to those of homeowners. The basis of this view rests in the recognition that tenancy is a regular and long-term mode of accommodation for many people. It is not always a mere stepping stone to home ownership.

Homeowners do not have absolute security because they must make payments for taxes, utilities and mortgages at the risk of being dispossessed for failure to do so. Interest rate changes are beyond their control but they can shop around for new mortgages without having to move. More importantly, they cannot be forced out at the whim of someone else.

It has been noted that being evicted without cause can lead to a loss of self-worth. Security of tenure can be seen as a matter of human dignity and something that reduces the status gap between landlord and tenant. It would be difficult to feel good about your accommodation if the landlord had total arbitrary power over how long you could live there. Lack of security of tenure may have far-reaching effects in a manner similar to lack of control and participation in other important areas. Tenants may feel more hostile and alienated towards landlords and society because they have no protection and no stake in the community. Tenants would be less interested in the condition of their premises. Furthermore, they will be less likely to enforce their rights under the lease or under the law if they face arbitrary eviction.

Landlords would have monopolistic type of powers if tenants had no security of tenure. They could extract rents or other benefits beyond


52. Fram *supra*, note 1 at A5.


55. *Ibid.* at 15.

56. M. Gorsky, "An Examination of Some of the Recent Amendments to the Ontario Landlord and Tenant Act" (1976-77) 3 Dalhousie L.J. 661 at 669.


what the market dictated because of a tenant’s “irrational” attachment to his or her home and because of the tenant’s other high transaction costs in moving. Furthermore, landlords who evict tenants for non-economic reasons such as some personal dislike would be causing unproductive transaction costs and inefficiency in the market. It has been suggested that just cause eviction laws benefit everyone because they force the landlords to be more thoughtful and reasonable. But landlords may also become more selective.

Therefore, the results of not granting to tenants some form of security of tenure raise economic as well as ethical concerns. The cost-benefit analysis must look at both frameworks and at all the parties affected, not just the landlord and the tenant. We will return to such an analysis in considering various ways in which the government could grant security of tenure and the evaluation of the alternatives.

5. FORMS OF GOVERNMENT ACTION

In view of the above discussion, it appears that the government should take some action to assist tenants with respect to the quality of accommodation in general, and security of tenure in particular. There are many different ways in which the government could act. Some ways are more interventionist than others. Some actions have a more direct effect than others. The types of action include the provision or regulation of information, the creation of civil liability rules, the use of taxes or subsidies, direct regulation or standard-setting and the direct provision of the product or service by the government. One more possible action is exhortation, negotiation or moral suasion.

In the broad field of rental housing, there are numerous government policies with many objectives and effects. Some of these policies influence the behaviour of landlords and tenants (for example, subsidies for renovations or improvements); other policies involve public housing or encouraging co-ops (providing alternatives to the private rental

62. Dewees, supra, note 5 at 27.
63. Hulchanski, supra, note 15 at 64.
market); rent regulation is a controversial and well-known government action; other interventions involve laws and regulations concerning legal rights and obligations, zoning by-laws, construction standards, etc. Many of these policies or actions are not aimed at improving security of tenure for tenants but they may have varying degrees of indirect impact.

A. PART IV LANDLORD AND TENANT ACT

It is appropriate to begin with a consideration of the government action that has the clear objective and direct impact of granting security of tenure to tenants – this is Part IV of the Landlord and Tenant Act,\(^65\) (hereinafter the Act) with its provisions governing eviction of residential tenants.

Prior to the passage of Part IV of this Act in 1970, with amendments granting substantial security of tenure in 1975,\(^66\) the common law did not offer much protection for tenants. Landlord and tenant law had its origins in a feudal and agrarian society in which a leasehold estate was vested in the tenant (granting exclusive possession) in exchange for rent.\(^67\) The land was the important element and the tenant had to continue paying rent even if the dwelling was unfit for habitation, or indeed even if it burned down.\(^68\) The tenant could be evicted through the self-help of the landlord if the rent was unpaid, upon the expiry of the lease or upon giving a certain period of notice in cases of periodic tenancies.

In modern times, there has been a show recognition that the rigid and anachronistic principles of land law are totally unsuitable for the urban apartment rental context in which tenants are more mobile, more interested in the habitability of the apartment (and not in the land), more interested in having a secure home and less willing to invest in repairs or upkeep that would primarily benefit the landlord or future tenants.\(^69\) Accordingly, there was a shift to applying contract

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68. Makuch, supra, note 47 at 3; O.L.R.C., supra, note 29 at 10; and Fram, supra, note 1 at A2.
69. O.L.R.C., note 29 at 36; Fram, supra, note 1 at A2; and Gautreau, supra, note 15 at 15.
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and tort law so that reasonable expectations and reasonable reliance could be protected.\textsuperscript{70} Legislation was needed because the law had failed to imply into the landlord and tenant relationship those terms which the vast majority of modern day parties would wish to agree to and which maximized the combined welfare of the parties.\textsuperscript{71}

Many provisions in the \textit{Act} affect security of tenure indirectly. Some of these will be noted later. Other provisions directly grant security of tenure by imposing the concept of just cause eviction. These provisions depend on section 121(1), which states:

"Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds he is entitled to possession except under the authority of a writ of possession obtained under section 113 or 114."

In other words, a landlord needs a court order to evict a tenant. This provides the due process guarantee which is so crucial to security of tenure.

Section 114 concerns situations in which the tenant has given notice of termination or signed an agreement to terminate. Section 113 is the main procedural section outlining the process of applying for a writ of possession.

The \textit{Act} sets out certain reasons for termination of tenancies, along with the notice requirements. Section 110 allows termination at the end of a tenancy period or lease, with proper notice (for example, 60 days for monthly tenancies), on any one of five grounds. Sections 107, 108 and 109 provide additional grounds for eviction. Basically, the tenancy can be terminated for cause, with respect to the tenant's behaviour, for the following reasons:

a. non-payment of rent (but 14 days notice required and tenant can avoid eviction by paying up before any final judgment);\textsuperscript{72}

b. persistent late payment of rent;\textsuperscript{73}

\textsuperscript{70} Makuch, \textit{supra}, note 47 at 3-4; O.L.R.C, \textit{supra}, note 29 at 10; and Fram, \textit{supra}, note 1 at A1.

\textsuperscript{71} Fram, \textit{supra}, note 1 at A2.

\textsuperscript{72} \textit{Landlord and Tenant Act, supra}, note 65, s.108.

\textsuperscript{73} \textit{Ibid.} s.110(3)(b).
c. undue damage to the premises or environs;\textsuperscript{74}
d. illegal act on the premises;\textsuperscript{75}
e. conduct which substantially interferes with reasonable enjoyment of premises by landlord or other tenants;\textsuperscript{76}
f. act or omission which seriously impairs safety or other rights of other tenants;\textsuperscript{77}
g. overcrowding in violation of health or safety standards;\textsuperscript{78} and
h. misrepresentation of income by tenant in subsidized housing.\textsuperscript{79}

Note that reasons c) to f) include actions of the tenant's guests.

The tenancy can also be terminated by the landlord on certain no-fault grounds, unrelated to the tenant's behaviour:

a. landlord requires possession for occupation by landlord or landlord's family (60 days notice);\textsuperscript{80} and

b. landlord requires possession for demolition, conversion to non-rental residential use or repairs or renovations so extensive as to require a building permit and vacant possession (120-days notice).\textsuperscript{81}

There are also two more minor reasons specified in s.110(3) concerning tenants who were provided rental accommodation by their landlord but whose employment has terminated, and tenants who rented condominiums they had agreed to buy but whose agreement of purchase and sale has been terminated. The grounds for eviction set out above are the only legally recognized ones in Ontario. There have been suggestions to include more reasons, either related to the tenant's

\textsuperscript{74} Landlord and Tenant Act, supra, note 65 at s.109(1)(a).
\textsuperscript{75} Ibid. at s. 109(1)(b).
\textsuperscript{76} Ibid. at s. 109(1)(c).
\textsuperscript{77} Ibid. at s. 109(1)(d).
\textsuperscript{78} Ibid. at s. 109(1)(e).
\textsuperscript{79} Ibid. at s. 109(1)(f).
\textsuperscript{80} Ibid. at s. 105.
\textsuperscript{81} Ibid. at s. 107.
behaviour (for example, misrepresentation to a prospective buyer)\textsuperscript{82} or strictly no-fault reasons (for example, sale by the landlord or necessity to comply with a health and safety order for vacant possession)\textsuperscript{83} Another reason could be non-compliance with a material term of the lease, although this could make security of tenure an illusory right because leases can be and often are drafted heavily in favour of the landlord. Alternatively, non-compliance with lease terms could be made a ground for eviction only with respect to certain terms, such as those concerning occupancy by children or pets. However, the exclusion of children would now appear to be prohibited by the recent changes to the Ontario \textit{Human Rights Code}\.\textsuperscript{84}

The effects of limiting eviction to the grounds specified in the \textit{Act} should be considered. The reasons which relate to the tenant's own wrongful action are fairly broad. There may be minor disagreements over the list but the basic concept is clear – the tenant's security of tenure is limited to the extent to which the tenant disturbs the enjoyment or safety of other tenants or the landlord, or harms the landlord's economic interest in the property. The Law Reform Commission of British Columbia has noted that if such a scheme is fairly and speedily administered, there should be no disadvantage to the landlord because it is not contrary to its interests to be required to continue renting to tenants who pay the rent on time, fulfill their duties and are not destructive.\textsuperscript{85}

However, in reality, landlords complain bitterly about the time and money that must be spent in going through the legal procedures to obtain an eviction order. Some argue that the difficulty and delay in getting out bad tenants has led to many smaller landlords abandoning the rental field and many other owners not willing to take the risk.\textsuperscript{86} This lessening of supply in a market already characterized by shortage


\textsuperscript{83} \textit{Policy Options, supra}, note 45 at 48.

\textsuperscript{84} \textit{Human Rights Code, 1981}, S.O. 1981, c. 53, as am. S.O. 1986, c. 64, s. 18(14), [repealing s. 20(4)].

\textsuperscript{85} L.R.C. of B.C., \textit{supra}, note 28 at 64.

\textsuperscript{86} See J. Schwartz, "President of the Multiple Dwelling Standards Association" \textit{Toronto Star} (7 December 1987); "Woman keeps flat empty to avoid grief" \textit{Toronto Star} (26 November 1987); see also: \textit{Policy Options, supra}, note 45 at 38.
cannot but have a detrimental effect on tenants.

A further consideration may be that landlords who are frustrated with the notice and court procedures could try to take the law into their own hands. Not all tenants will fight back against harassment or unlawful eviction. Furthermore, landlords may be more selective in choosing tenants and some people will have difficulty in renting.

The "no-fault" reasons for termination are possession for own use (Section 105) and for redevelopment (Section 107). The first reason has a shorter 60-day notice period in recognition of the vital interest of the landlord in having the freedom to move into his or her own property to live in. This encourages owners to rent premises for which they have no immediate need.87

The redevelopment grounds recognizes the benefits of allowing the owner to adjust to the markets by demolishing, converting or renovating the premises whenever the financial incentive exists to do so. This promotes economic efficiency. Furthermore, as with the first reason (Section 105), allowing this grounds for termination maintains some incentive for a property owner to rent because it will not be locked into the particular rental situation forever. In balancing the owner's interest in control over how to use the property with the tenant's interest in security of tenure, the Act has provided a longer notice period of 120 days. However, an additional interest in preserving affordable rental housing stock has led to controls on demolition and conversion. In Ontario, the Rental Housing Protection Acts, 1986 were passed in 1986 and 1989 to give municipalities some power to prevent demolition of residential rental premises or conversion to condominiums or other non-rental or non-residential uses.88 These steps have been made necessarily largely because of rent control making rental housing a less attractive investment than other forms of real estate use.89

Aside from the provisions of the Landlord and Tenant Act that provide security of tenure through requiring eviction for cause, there are also other sections directly protecting security of tenure. Section 95 prohibits the alteration of locks without mutual consent. Section 106 deems a tenancy agreement for a fixed term which expires to be

87. Makuch, supra, note 47 at 28.
renewed as a monthly tenancy agreement upon the same terms. This reaffirms the right of a tenant to stay on despite the expiry of a lease. Sections 121(2) and (3) give some discretion to a judge to refuse to grant the landlord's application for a writ of possession. Furthermore, Section 121(4) prohibits the landlord from cutting off vital services or from substantially interfering with the tenant's reasonable enjoyment with intent to cause the tenant to leave or to refrain from asserting his or her rights. Section 122 also makes it a provincial offence to knowingly contravene certain provisions, including Sections 95 and 121.

Therefore, the law offers some protection against a landlord harassing a tenant to leave but enforcement may be difficult. Other provisions in the Act provide more indirect protection of security of tenure. Section 96 stipulates the landlord's duty to provide and maintain the rented premises in "a good state of repair and fit for habitation." This duty can protect a tenant from being forced out through intolerable living conditions. In addition, there are numerous health and safety standards, construction standards and occupancy by-laws at the provincial and municipal levels that further ensure a minimum quality level for residential accommodation. It has been suggested that these minimum standards raise costs and reduce and freedom of tenants who prefer substandard housing or cannot afford anything except substandard housing. While the quality regulation issue of habitability is beyond the scope of this paper, it should be pointed out that substandard housing has negative effects beyond the landlord and tenant who are parties to the tenancy. There may be externalities affecting the neighbourhood's property values, as well as the health and safety of the occupants or neighbours.

Another section of the Act which enhances security of tenure is Section 93, which gives the tenant a right to privacy by restricting the landlord's right to enter the premises. Privacy is an essential component of having a secure home.

Section 86 prohibits the landlord from seizing the tenant's goods for unpaid rent. Section 84 limits the amount of security deposits to one month's rent. Large security deposits may hinder tenants from being able to obtain apartments, from moving out or from asserting their rights.

Another aspect of security of tenure is the "right to assign, sublet or otherwise part with possession of the rented premises" found in Section 91. The tenancy agreement may provide that the consent of the landlord (not to be unreasonably withheld) is required.

The tenant's interest in assignability of the tenancy is related to security of tenure if the tenant wants the power to pass on the premises to his or her family members, or even close friends. This element of control or having a stake in the premises can be psychologically important. Homeowners have no restraints on alienation. Indeed, if tenants can sell their tenancy to others, then they will have an investment interest in the property, not just a shelter interest. Therefore, they would be willing to invest more effort and money into their apartment and treat it like their home. However, this is unlikely to be acceptable to the landlords. They have an economic interest in who is living in their premises and perhaps some psychological need to feel in control of their property. Property owners may be discouraged from renting if these vital interests are not respected. It has been noted that the tenant should not be provided with a marketable asset. However, on balance, it may be justified to allow tenants to transmit their interest to family members. Furthermore, in these modern times of more mobility, it may be justified to allow more freedom for tenants to sublet or assign their leases of fixed terms in order to give them the flexibility to move out before their lease has expired.

B. RENT REGULATION

Apart from the Landlord and Tenant Act, rent regulation is a major area that affects security of tenure. A scheme of security of tenure needs some form of rent review in order to be effective because otherwise the landlord could raise rents to prohibitively high levels and economically evict the tenant. The statutory 90-day notice period for

91. Hulchanski, supra, note 15 at 43-44.
92. New Zealand Property Law and Equity Reform Committee, supra, note 53 at 17.
93. Residential Tenancies (Alberta), supra, note 28 at 139, and Makuch, supra, note 47 at 22. The new Residential Rental Regulation Act, 1986, S.O. 1986, c.63 s. 101(2) contains provisions to prevent tenants from profiting through "key money" or through subletting at a rent higher than that paid by the tenant to the landlord.
rent increases would not give enough security of tenure.\textsuperscript{95} However, it has been noted that security of tenure can be protected merely by allowing the tenant to challenge any discriminatory rent increases or increases allegedly aimed at evicting the tenant.\textsuperscript{96} In other words, the government does not have to set maximum legal rent levels, unless it wishes to do so for some other rationale such as protecting affordable rents.\textsuperscript{97} Furthermore, it is arguable that the security of tenure concern should not prevent landlords from raising the rent as much as they want after a tenant has moved out.

On the other hand, it would appear to be ineffective to put the onus on the tenant to challenge discriminatory rent increases. Studies have shown a very disproportionate avoidance of the adjudicative system by tenants\textsuperscript{98} and security of tenure may become a myth if tenants must challenge rent increases. It may be that adequate security exists only if the landlord cannot raise rents beyond a certain minimum percentage unless a greater increase is supported by the landlord's particular financial situation. In addition, allowing landlords to raise rents freely after a tenant has moved out may offer too much incentive to landlords to evict tenants by legal or illegal means in order to raise the rent.

Many other government policies may affect security of tenure indirectly by affecting the supply of housing.\textsuperscript{100} Low vacancy rates affect to some extent the relative bargaining power of tenants and the monopo-

\textsuperscript{95} See Residential Rent Regulation Act, 1986, supra, note 93, s. 5 and Landlord and Tenant Act, supra, note 65, s. 129.

\textsuperscript{96} Makuch, supra, note 47 at 18-20. See also Residential Tenancies (Alberta), supra, note 28 at 135 and L.R.C. of B.C. supra, note 28.

\textsuperscript{97} The issue of rent control and its various rationales, costs and benefits is very interesting and has been the subject of much commentary but, as noted previously, it is not within the scope of this paper.

\textsuperscript{98} See criticism of overjudicialization in S.R. Fodden, "Landlord and Tenant and Law Reform" (1974) 12 Osgoode Hall L.J. 44, and in D.L. Martin, "Civil Remedies Available to Residential Tenants in Ontario: The Case for Assertive Action." (1976) 14 Osgoode Hall L.J. 65, 91. Fodden's article presents a detailed look at landlord and tenant actions commenced in Ontario in 1970 to 1973. The lack of access by tenants is demonstrated in the statistic that under 1 per cent of these actions were initiated by the tenant and 2/3 of the actions involved no appearance by the tenant.

\textsuperscript{99} See Chant, supra, note 19, and Adams, supra, note 64.

\textsuperscript{100} Canadian Council on Social Development, supra, note 50 at 108.
listic power of landlords which enables them to evict tenants and then find new tenants without too much difficulty or economic hardship. There are many government policies or programs that provide subsidies for the construction or creation of rental housing. Other government action involves public housing, subsidized housing and co-ops which all provide feasible alternative for tenants.101

C. INDIRECT WAYS

Other indirect ways of increasing security of tenure may be to supplement the tenant's income through shelter allowances or other income redistribution policies. This could help a tenant to withstand rent increases and not be forced to move out.102 However, having more money cannot by itself be relied upon to provide sufficient security of tenure. A tenant cannot buy his or her way out of every situation involving a capricious landlord.

Some creative alternatives come to light when the nature of the market failures is recalled – unequally high transaction costs for the tenant and weaker bargaining power. At a minimal level, the government could assist the tenant who is hunting for an apartment by providing assistance and complete information on vacancies and comparable rents. It could even compel the landlords to furnish such information to the government.

The tenant's high transaction costs could be remedied by compensating the tenant for moving so that his or her mobility and freedom to choose the best deal will be increased. However, whether the government or the landlord compensates the tenant for moving, there may be inefficiency in wasted expenses from encouraging too much moving. If the landlord must pay compensation for terminating the tenancy through no fault of the tenant, these extra costs may result in fewer terminations (and therefore more security of tenure) but also in higher rent, less repair or less supply of rental housing.

To address the issue of unequal bargaining power, some study has been made of having a collective bargaining system for landlords and tenants, similar to the labour relations context.103 But this may not be

101. Chant, supra, note 19 at 223.
102. Reid, supra, note 32.
workable or politically feasible.

Other even more radical alternatives would arise from the logical extensions of the view that good housing is a fundamental right. Since the landlord can affect a tenant’s life in such a close personal way, the government could try to license landlords — that is, license the input. This could also involve training (for example, sensitization to the poor and minorities) and conditions of licence. If a licence is revoked, the government could step in and manage the rental premises. Indeed, the government could decide to create a monopoly and administer all rental housing while leaving the ownership of the capital in private hands. The extreme would be for government to abolish the concept of private rental housing altogether and provide government housing to everyone who could not afford to buy a home (assuming such a government would still allow private property).

6. CONCLUSION

As we can see, there are many possible forms of government action that can be taken to meet the objective of providing security of tenure. This objective is mainly a social one, not an economic one, although there are economic benefits as well.

From a market viewpoint, security of tenure can help to promote more rational action by landlords when evicting tenants and less vandalism by tenants. There is also some economic value to the social benefits of happier and more secure tenants. On the other hand, there are negative economic impacts from having more costs and less flexibility to change tenants or redevelop the property for economic reasons. Security of tenure may be seen as an extra commodity which the law forces the landlord to supply.104 It is arguable that the costs of supplying this protection are not substantial in many cases. But, to the extent that costs are incurred, the landlord may respond by increasing the rent, decreasing expenditure on repair and maintenance, or withdrawing from the rental housing market. It is difficult to speculate on these


104. Ibid. See also Knetsch, supra, note 19 at 5.
costs and these costs and the effect on rents, maintenance levels or supply.\textsuperscript{105}

The cost-benefit analysis within the economic framework may show some loss of efficiency or welfare maximization. However, the rental housing market is a very complex one. The failures involving high transaction costs and weaker bargaining powers for tenants lead to some monopolistic power for landlords. In the economic perspective, these failures may not be properly remedied by granting security of tenure to tenants. But in the ethical framework, a strong case has been made for this kind of tenant protection. Where the unregulated market does not lead to ethically acceptable results, the government must intervene.

The government has already infringed substantially on private property rights, which are themselves made possible only through government. There are many laws regarding zoning, property and occupancy standards, taxation and so forth. The government has also acted to protect weaker parties, especially in long-term relationships which have a direct, substantial and personal impact on the weaker party, such as marriage or employment. Society may believe in housing as a fundamental need or in a stronger view of egalitarianism, or just generally in the protection of legitimate interests and reasonable expectations. In any event, there is a strong ethical rationale for government action to protect tenants and, specifically, to grant security of tenure.

\textsuperscript{105} New Zealand Equity and Property Law Reform Committee, \textit{supra}, note 53 at 16 and \textit{Security of Tenure} (Alberta), \textit{supra}, note 19 at 11.