

Cracks in the Foundation?

**Examining the Justifications for and Unintended Consequences of Residential
Occupancy Standards in Canada**

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Abstract

Residential overcrowding is something that governments wish to avoid. Laws or policies that control the number of occupants in a home are known as residential occupancy standards. Using a historical analysis, a comparative content analysis, and a case law/human rights analysis, this thesis examines the justifications that Canadian governments have used for the adoption of residential occupancy standards and considers the impact of the standards, particularly on low-income renters. While there appears to be a correlation between overcrowding and negative health effects, this thesis challenges certain assumptions about residential overcrowding upon which the standards are based. Residential occupancy standards largely appear to be based on outdated medical evidence and social, economic, and political norms, arguably rendering the use of certain standards inappropriate in Canada's multicultural society. In light of the current challenges facing marginalized groups in terms of accessing affordable housing, this thesis recommends a more nuanced and flexible approach to setting and applying residential occupancy standards.

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To the Gomez family, whose strength, resilience, and search for a safe place to call home
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CHAPTER 1. INTRODUCTION

A. OVERVIEW

When it comes to housing, the term “overcrowding” carries a negative connotation. It conjures up images of large families squeezed into small homes with inadequate and unsafe living conditions. Residential overcrowding is something that governments typically wish to avoid. Legislation and policies designed to reduce residential overcrowding by regulating internal density are known as *residential occupancy standards*. Residential occupancy standards are adopted in order to limit the number of people who may legally reside within a household.

In Canada, residential occupancy standards are incorporated into the legislative/regulatory regime at three levels - federal, provincial and municipal - in order to address the different responsibilities and objectives of each level of government. For example, at the federal level, the Canada Mortgage and Housing Corporation (“CMHC”) has adopted the National Occupancy Standard (“NOS”). The federal NOS is used as a residential occupancy standard with respect to social housing¹ as well as a housing need indicator.² At the provincial level, provinces and territories (though not all) have adopted residential occupancy standards as part of their public health legislation.³ At the

¹ Social housing in this context refers to CMHC’s social housing programs: public housing (projects targeted to low income households who pay rent based on income); non-profit housing (public or private non-profit organizations that build or acquire rental housing for low or moderate income households); co-
² “Housing need indicator” is the term used for a measure adopted by a jurisdiction to assess the magnitude and characteristics of households experiencing housing problems in the jurisdiction. Housing need estimates are used by governments for planning and policy purposes. The NOS’s use as a housing need indicator will be discussed further in Chapter 2. See CMHC, *Housing Market Information Portal, Core Housing Need*, online: <<https://www03.cmhc-schl.gc.ca/hmip-pimh/en/TableMapChart/CoreHousingNeedMethodology>>.

³ See e.g. *Dwelling and Buildings Regulation*, Man Reg 322/88R, ss 5-6 under Manitoba’s *Public Health Act*, SM 2006, c 14.

municipal level, many municipalities have incorporated residential occupancy standards into bylaws that address occupancy matters more generally.⁴

Internal density is an objective measure of the number of persons in a given space. It is a value-neutral term; there is no positive or negative connotation associated with it. When residential occupancy standards are imposed, they limit the internal density of households. *Internal density* can be measured in a number of ways: persons per room (where “room” includes more than just bedrooms); persons per bedroom, which can either be a simple ratio of residents to bedrooms or based on a formula that takes into account household composition; or persons per space measure, where a given number of square metres or feet of habitable space or bedroom space is allocated for each member of the household.⁵

Residential overcrowding can be defined in two ways.⁶ First, it can mean the level at which people in a dwelling unit have an *adverse response* (health, safety or otherwise) to internal density. Second, it can mean the level of internal density *deemed* by policymakers to be overcrowded.⁷ Both definitions of overcrowding express a judgment about internal density levels, implying that there is a threshold above which density becomes problematic. *Residential overcrowding* therefore conveys a negative

⁴ For example, bylaws might include the regulation of basic home maintenance, garbage disposal, drainage, ventilation in addition to maximum occupancy. See e.g. City of Winnipeg, by-law No 1/2008, *Neighbourhood Liveability By-law*, s 50(1).

⁵ See New Zealand, The Ministry of Social Policy, *Definitions of Crowding and the Effects of Crowding on Health: A Literature Review* by Alison Gray, Gray Matter Research Ltd (NZ: The Ministry of Social Policy, 2001)[Gray Matter Report] at 9-12.

⁶ “Overcrowding” and “crowding” seem to be used synonymously in the literature. For the purposes of this discussion, the term “overcrowding” will be used because it is the term used in Canada Mortgage and Housing Corporation publications.

⁷ See Gray Matter Report, *supra* note 5 at 8. The level set by policymakers to regulate overcrowding is typically based on the number of people who may legally live in a unit based either on the absolute number of persons per bedroom or the number of people per square foot.

connotation and is in contrast to the neutral term, *internal density*. While it may appear that the two measures for *residential overcrowding* should arrive at the same standard, this is often not the case. In other words, there may be no correlation between the overcrowding measure set by policymakers and the actual level at which people have an adverse response to internal density.⁸ When a government adopts a law or policy to control internal density it is known as a ***residential occupancy standard***.

Overall, provinces, territories and municipalities (as part of public health legislation or municipal occupancy by-laws) address and limit residential occupancy by reference to number of persons per square feet or metres.⁹ Provincial and municipal standards typically only come into play if a health inspector, having the jurisdiction to investigate complaints, determines that a household exceeds the residential occupancy limit under the relevant legislation.¹⁰

The federal government (predominantly focused on allocating appropriately sized units for household size) on the other hand, addresses residential occupancy by reference to number of persons per bedroom. The NOS typically comes into play at the delivery level, when a household is being assessed for eligibility in the social housing context. The unit assigned to the family will be determined based on the size and composition of the family. Because these two approaches - the provincial and municipal standards on the one hand and the NOS on the other - are applied in different contexts, there is very little

⁸ *Ibid.*

⁹ *Ibid*; See e.g. *Dwellings and Buildings Regulation*, *supra* note 3, ss 5-6. The various provincial and municipal standards will be discussed further in Chapter 2.

¹⁰ See e.g. *Dwellings and Buildings Regulation*, *ibid.*

interaction between them.¹¹ As will be discussed further in Chapter 4, although the NOS is only a guideline to be applied in the social housing context, in many cases its applicability is extended to other types of housing, such as the private rental market, where landlords may use the NOS as an occupancy limit even though this is not mandated by law.¹²

It might surprise many Canadians to learn what constitutes residential overcrowding under the federal NOS. The NOS not only determines *how many* people can reside within a given space but also specifies *who* is permitted to share a bedroom, based on age, gender and relationship amongst the members of a given household:

Enough bedrooms based on NOS requirements means one bedroom for:

- each cohabiting adult couple;
- each lone parent;
- unattached household member 18 years of age and over;
- same-sex pair of children under age 18;
- and additional boy or girl in the family, unless there are two opposite sex children under 5 years of age, in which case they are expected to share a bedroom.

A household of one individual can occupy a bachelor unit (i.e. a unit with no bedroom).¹³

According the NOS, it would be possible for one household to be considered overcrowded and another not overcrowded with an identical number of occupants, simply because of the gender and age composition of the household or the relationship amongst members of the household.

¹¹ The applicability of the two approaches will be discussed in more detail in Chapter 2.

¹² See e.g. Kathy Sherrell, “Legal Status, Place, or Something Else? The Housing Experiences of Refugees in Winnipeg and Vancouver” (Fall 2010) *Canadian Issues* 52 [Sherrell].

¹³ See Canada Mortgage and Housing Corporation, *Housing in Canada Online: Definition of Variables* [CMHC, Housing in Canada], online: <http://cmhc.beyond2020.com/HiCODefinitions_EN.html#_top> [<https://perma.cc/PR8G-RXJ9>].

To illustrate an application of this standard, consider the following example.¹⁴ A newly arrived refugee family, consisting of a mother and her three young children, arrive in Canada. One of the mother's first tasks is to find a place to live. Ideally, she would like to rent a two-bedroom apartment, where the mother and her youngest child would sleep together, while the two older children would occupy the other bedroom. This living arrangement is preferred by the mother because her family has always slept together and because she has a very tight budget with which to support her family. However, when the mother applies for a two-bedroom apartment, she is denied her housing of choice on the basis that her desired living arrangement does not conform to the applicable residential occupancy standard. She is told that she must instead rent a three-bedroom apartment at a higher cost and despite the fact that the third bedroom is likely to go unused. In other words, strict adherence to the federal NOS would mean that this mother would not be able to rent a two-bedroom apartment because every adult requires their own bedroom unless the adult is cohabiting with another adult to whom they are married or in a common law relationship.¹⁵ In addition, her children would only be able to share a bedroom beyond the age of five if they were of the same gender.

As this example illustrates, residential occupancy standards impact on the question of "who can live where?" and demonstrates how a residential occupancy

¹⁴ This is a fictitious example, but not unlike the experiences of many newly arrived refugees. See Sherrell, *supra* note 12 ("[h]ouseholds attempting to alleviate high housing cost burdens by renting smaller, more affordable units face difficulties owing to strict adherence to national occupational standards, which regulate the number and age of persons sharing a bedroom, in the public, and to a lesser extent private, housing markets" at 54).

¹⁵ As will be discussed in subsequent chapters, most provinces and territories are responsible for the management and delivery of federally funded off-reserve social housing through Social Housing Agreements between the province or territory and CMHC. The provinces and territories that sign Social Housing Agreements are obligated to follow CMHC's principles, including a uniform residential occupancy standard as a guideline to assess eligibility at the delivery level.

standard can be used to deny housing to certain families while granting it to others. These standards typically come into play for renters as opposed to homeowners; while a homeowner is free to choose the living arrangements within their home, subject only to complaints made to local authorities,¹⁶ renters must answer to landlords and housing providers, who could deny housing on the basis that the renter's living arrangement does not conform to the applicable residential occupancy standard.¹⁷

Approximately one-third of Canadian households live in rental housing.¹⁸

Compared to homeowners, there is a higher proportion of renters who come from marginalized populations such as low-income, indigenous, new or landed immigrant and refugee status, and single parent families.¹⁹ The challenges facing these groups in terms of accessing affordable housing are well documented.²⁰ Therefore, any government

¹⁶ Residential occupancy standards contained in municipal by-laws and provincial public health regulations are enforced by public health inspectors on a systematic or complaints basis. See e.g. Man Reg 322/88R, ss 5-6.

¹⁷ Strictly speaking, the NOS applies only to social housing. While not required by law, as will be discussed in Chapter 4, anecdotal evidence from social science literature, human rights tribunal decisions and other sources suggests that many private landlords use the NOS to limit internal density in setting their own residential occupancy rules.

¹⁸ Statistics Canada, *Housing Highlight Tables, Number of persons per room by housing tenure, total - number of persons per room, 2016 counts, Canada, provinces and territories, 2016 Census – 100% Data*, online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/housing-logement/Table.cfm?Lang=E&T=31&Geo=00>> [<https://perma.cc/ZB28-4YQF>]. Of the 14,072,080 dwellings included in the study, 9,541,320 were owner-occupied dwellings; 4,747,525 were rented; and 56,230 were band housing.

¹⁹ See Greg Suttor, *Rental Housing Dynamics and Lower-Income Neighbourhoods in Canada* (Toronto: University of Toronto Neighbourhood Change Research Partnership, 2015) at 26; Canada Mortgage and Housing Corporation, *Housing Affordability and Need: A Chapter from the Canadian Housing Observer* (Ottawa: Canadian Mortgage and Housing Corporation, 2014)[CMHC 2014] at Tables I-8; I-13; I-14; I-16.

²⁰ Suttor, *ibid*; Sherrell, *supra* note 12 at 52; Irwin M Cohen & Raymond R Corrado, "Housing Discrimination among a Sample of Aboriginal People in Winnipeg and Thompson, Manitoba" in *Volume 1: Setting the Agenda for Change, Aboriginal Policy Research Series*, (Manitoba: Thompson Educational Publishing, Inc, 2013)[Cohen & Corrado]; Emily Paradis, *Nowhere Else To Go: Inadequate Housing and Risk of Homelessness Among Families in Toronto's Aging Rental Buildings*, (Toronto: University of Toronto Cities Centre, 2014)[Paradis]; Tom Carter et al, *The Housing Experiences of Recently Arrived Refugees: The Winnipeg Experience*, (University of Alberta: Edmonton, 2014) [Carter et al].

policies that limit housing options for such populations should only be implemented if there are compelling justifications for doing so.

Accordingly, this thesis seeks to answer the following questions:

1. *What justifications have Canadian governments used for the adoption of residential occupancy standards?*
2. *Is there a rational connection between the justifications and the current residential occupancy standards?*²¹
3. *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?*

The chapters that follow review the history of residential occupancy standards in Canada and canvass current literature and Canadian human rights decisions where the application of residential occupancy standards or private occupancy rules are at issue in order to identify purported *justifications* that Canadian governments have used to set limits on internal density. An examination of the justifications provides insight into underlying rationale(s) for adopting and setting residential occupancy standards. Having identified the justifications and underlying rationale(s), this thesis considers whether there is a *rational connection* or *coherency* between the justifications, rationale(s) and standards by applying a contextual analysis (described more fully below). Additionally, the thesis proposes refined criteria from which to assess the substance and merits of residential occupancy standards used in Canada.

²¹ The term *rational connection* used here relates to a general notion of coherency for the purposes of this thesis and is not to be taken as akin to the term used in constitutional law analysis.

As will be described, residential occupancy standards largely appear to be based on outdated medical evidence and social, economic and political norms, arguably rendering the use of certain standards inappropriate in Canada's multicultural society. Accordingly, this thesis recommends a more nuanced and flexible approach to setting residential occupancy standards.

Drawing on the argument of critical legal theorists in combination with a discussion of the origin of residential occupancy standards and the evidence/norms upon which their adoption was based, this thesis advances the argument that residential occupancy standards based on social norms, such as the NOS, are used by the dominant class to subtly shape other groups in society to fit with a particular worldview.

While the human rights implications and critical legal theory arguments discussed in this thesis apply to many different marginalized groups, the focus of this argument will be limited in scope to low-income renters, and those groups more likely to encounter residential occupancy standards as a barrier to housing, particularly single parents and new immigrants and refugees.²² Arguments raised about overcrowding as a cultural construct become more pronounced when one considers the impact of residential occupancy standards on those new Canadians who are expected to conform with rules that impact how they are to conduct themselves in their private life and order their household, possibly contributing to settlement barriers.²³ The decision to limit this thesis to these groups should not be interpreted as downplaying the challenges faced by other

²² In considering the experiences of new immigrants and refugees, this thesis is referring to people living in Canada who were not born in Canada, including Permanent Residents and non-Permanent Residents.

²³ Chan et al, *The Profile of Absolute and Relative Homelessness Among Immigrants, Refugees, and Refugee Claimants in the Greater Vancouver Regional District* (2005) Prepared for the National Secretariat on Homelessness, MOSAIC.

marginalized groups, such as indigenous people, the LGBTQ2+ community, or persons living with a disability, all of whom experience challenges in access to housing.²⁴ While it is beyond the scope of this thesis to consider the unique circumstances facing each group when it comes to access to housing, it is acknowledged that there is intersectionality when it comes to different types of disadvantage, and the challenges facing those seeking housing is exacerbated when groups are dealing with multiple layers of marginalization and disadvantage.

Residential occupancy standards are one part of a complex regulatory system that affects access to housing. Where to live is one of the most significant decisions for a family, impacting on many important areas of life such as cost of living, privacy, safety, community resources, schools, and transportation. In short, this thesis argues that Canadians should not be limited in terms of access to housing unless there are compelling reasons for doing so. To this end, this thesis proposes a set of criteria for developing, assessing or setting residential occupancy standards in Canada.

B. LITERATURE REVIEW – KEY FINDINGS AND RELEVANCE OF THIS WORK

i. Overview

In Canada there has been very little academic literature on residential overcrowding and occupancy standards, particularly in the area of legal research. The

²⁴ See e.g. Cohen & Corrado, *supra* note 20.

preponderance of this legal research relates to the right to housing more generally,²⁵ or the problem of overcrowded housing conditions for indigenous people in Canada.²⁶

Accordingly, a review of the literature did not identify current Canadian legal literature that critically explores residential occupancy standards and overcrowding in the contemporary context.

The literature in other disciplines however does reveal some important insights relevant to this study. Residential occupancy standards were first adopted in Canada as a response to poor housing conditions in the 1940s and 1950s.²⁷ A review of historical and current literature suggests that the primary stated justification for establishing residential occupancy standards is the protection of public health and safety.²⁸ However, a closer look reveals that the link between residential overcrowding and negative health outcomes is not entirely clear. Given the apparent absence of conclusive evidence on the relationship between public health and overcrowding, how are policymakers formulating an appropriate standard? The literature further suggests that residential occupancy standards may have more to do with establishing social norms in terms of what is considered the socially appropriate composition of a household. This thesis therefore incorporates and builds upon the current Canadian literature, by assessing through a legal lens: (a) the veracity of the advancement of public health and safety as the principal

²⁵ See e.g. Tracy Hefferman, Fay Faraday & Peter Rosenthal, “Fighting for the Right to Housing in Canada” (2015) 24 J L & Social Pol’y 10.

²⁶ See e.g. Constance MacIntosh, “Indigenous Mental Health: Imagining a Future Where Action Follows Obligations and Promises” (2017) 54:3 Alta L Rev 589; Cohen & Corrado, *supra* note 24.

²⁷ Ontario, Department of Municipal Affairs, *A Better Place to Live: A Study on Occupancy and Maintenance of Dwellings*, Final Report (Toronto: Ontario Department of Municipal Affairs, 1962)[*Better Place to Live*] at 15.

²⁸ *Ibid.*

policy reason underlying residential occupancy standards; and (b) the use of perceived social norms to ground the imposition of residential occupancy standards.

ii. Socio-cultural constructs and subjective dimensions of family, overcrowding and privacy

Moving outside the field of law into other disciplines, and moving outside Canada into the United States, one finds additional research on overcrowding that provides both foundation and insight into the matter of occupancy standards.

Sociologists Lauster and Tester studied the experience of overcrowding in an Inuit community in Nunavut considered to have a high rate of over crowding based on the NOS.²⁹ The authors found that the older generation did not report negative effects associated with overcrowding while the younger generation did. This discrepancy fit with the authors' theory that overcrowding is a cultural construct; the younger generation was exposed to the Canadian mainstream and was made aware of the unequal opportunities they faced compared to other young Canadians, while the older generation did not grow up with exposure to other ways of life. The authors point out the conceptual problems with using residential occupancy standards and argue that they can be used to discipline minority groups into forming "proper households", as defined by dominant cultural standards.³⁰

²⁹ Nathanael Lauster & Frank Tester, "Culture as a Problem in Linking Material Inequality to Health: On residential crowding in the Arctic" (2010) 16 *Health & Place* 523 [Lauster & Tester]. In this article, Lauster and Tester use the U.S.'s Household Crowding Indicator (i.e. the Person-Per-Room Standard), which is a national housing indicator and not the same thing as residential occupancy standards administered by state and local governments.

³⁰ *Ibid* at 538.

In his work on population statistics related to migration and settlement, Haan uses the 2006 Census of Canada statistics to highlight the need for more research in the area of immigrant residential overcrowding in Canada.³¹ He points out that in 2006, immigrants were more likely to live in overcrowded conditions as compared to Canadian-born households.³² This study notes that the research has not asked whether immigrants are more likely to live in overcrowded homes out of economic necessity or preference.³³ After reviewing rates of crowding in different groups based on a number of factors, Haan concludes that “[w]hat these results begin to suggest is that groups relate to crowding differently, and that labeling crowding as something that is always good or bad, cultural or economic, loses some of its meaning.”³⁴ He goes on to suggest that more research is required to understand household overcrowding before policy makers can determine how to best approach the issue.³⁵

In architecture and planning there is a considerable amount of literature on the definition of “family” and how this concept has influenced the design of houses and apartments. Some of this research touches on concepts of overcrowding. For example, Myers *et al.*³⁶ looked at the levels of overcrowding in different populations in the U.S. to find out whether there was variation in overcrowding based on location and ethnicity. The authors argue that the issue of overcrowding exemplifies the problematic nature of

³¹ Michael Haan, “The Residential Crowding of Immigrants to Canada” (Autumn 2010) *Canadian Issues* 16 [Haan].

³² *Ibid* at 16. In this study, overcrowding was defined as one or more persons per room.

³³ *Ibid.*

³⁴ *Ibid* at 19.

³⁵ *Ibid.*

³⁶ Dowell Myers, William C Baer & Deong-Youn Choi, “The Changing Problem of Overcrowded Housing” (1996) 62:1 *Journal of the American Planning Association* 66 [Myers et al]. On this point, see also J Edwards et al, “Why People Feel Crowded: An Examination of Objective and Subjective Crowding” (1994) 16 *Population and Environment* 149 [Edwards et al].

imposing a uniform standard in a multicultural society.³⁷ Their research lends weight to the argument that overcrowding and privacy are cultural constructs.

Anthropologist Pader uses a combination of ethnographic, anthropological and historical approaches to explore the sociopolitical construction of residential occupancy standards in the U.S.³⁸ She draws on anthropological research to make the argument that current occupancy standards in the U.S. are “historical and cultural artifacts that have been accorded the status of universal truth.”³⁹

This thesis draws upon and advances the literature addressing socio-cultural socio-political definitions and constructions of family, overcrowding, privacy and residential occupancy standards by exploring such concepts within the Canadian legal context.

iii. Occupancy Standards as a Barrier to settlement

There is a significant amount of recent literature regarding immigrant and refugee settlement that explores access to housing.⁴⁰ This literature focuses on the challenges faced by newcomers and aptly identifies the various barriers they encounter, including but not limited to various aspects of housing, some of which addresses the impacts and consequences of occupancy standards. For example, in her research on Canadian refugee resettlement, Sherrell explores barriers to public and private housing for government-

³⁷ *Ibid* at 81.

³⁸ Ellen Pader, “Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land” (2002) 19 *Journal of Architecture and Planning Research* 300 [Pader, *Inscribing Ethnicity*].

³⁹ *Ibid* at 304.

⁴⁰ See e.g. Carter et al, *supra* note 20; Sarah Wayland, “Addressing the Housing Needs of Immigrants and Refugees in Canada” (Autumn 2010) *Canadian Issues* 22; Faranak Miraftab, “Sheltering refugees: the housing experience of refugees in metropolitan Vancouver, Canada” (2000) 9:1 *Can J of Urban Research* 42; Chan et al, *supra* note 23; Sherrell, *supra* note 12.

assisted refugees and refugee claimants in Vancouver and Winnipeg.⁴¹ While affordability is cited as the biggest challenge in finding housing, overly restrictive occupancy standards are another identified barrier.⁴² This thesis will build upon the literature related to settlement barriers by situating current evidence and arguments regarding settlement barriers within a legal framework.

iv. Summary

In Canada there has been very little academic literature on residential occupancy standards, particularly in the realm of legal research. The Canadian literature is principally focused on sociological aspects and population statistics related to residential overcrowding without tying in this research to the standards themselves. While there is relevant research from the U.S. on residential overcrowding and the underlying justifications for adopting residential occupancy standards, there has not been equivalent research conducted within a Canadian context, where the NOS is considered the “gold standard” for measuring overcrowding.⁴³

This thesis seeks to make an original contribution to the literature regarding residential occupancy standards by examining in greater detail, the justifications used by governments for establishing particular residential occupancy standards in Canada as well as the underlying rationale(s) that may have led to the adoption of those standards. Seeking to clarify whether these standards actually “make sense”, this thesis applies a contextual analysis by critically examining the purported justifications and underlying rationale(s) within their broader context including the historical context, current

⁴¹ Sherrell, *ibid.*

⁴² *Ibid* at 54.

⁴³ See Haan, *supra* note 31 at 17.

literature, relevant human rights decisions and contextual interplay between legal/regulatory instruments. The definitive question to be considered here is whether the current standards “fit” with the contemporary Canadian experience from the perspective of low-income renters. Finally, this thesis proposes a set of refined criteria that may aid in the development, assessment or setting of residential occupancy standards in Canada.

Drawing on and extending the work of Pader, Myers *et al.*, Haan, Lauster and Tester, and others,⁴⁴ this thesis illustrates that the use of normative justifications for setting residential occupancy standards is highly problematic. Furthermore, an overly restrictive occupancy standard captures living arrangements that may not actually lead to any increased health or safety risk. This not only has a detrimental impact on families who - by reason of culture, consumer preference or economic necessity – want to rent a smaller unit, but it also arguably diverts focus away from addressing real housing concerns facing other segments of the Canadian population such as the housing issues on First Nations.⁴⁵

In short, this thesis adds to the current literature by undertaking preliminary research that lays the groundwork towards achieving a deeper understanding of the justifications for developing, assessing and setting residential occupancy standards in Canada.

C. METHODOLOGY AND CHAPTER SUMMARIES

⁴⁴ For example Tim Iglesias, “Clarifying the Federal Fair Housing Act’s Exemption for Reasonable Occupancy Restrictions” (2004) 31 Fordham L J 1211 [Iglesias, Clarifying]; Edwards *et al*, *supra* note 36; Gray Matter Report, *supra* note 5.

⁴⁵ For a discussion on overcrowding in Canada’s Inuit population in Nunavut, see Senate, Standing Committee on Aboriginal Peoples, *We Can Do Better: Housing in Inuit Nunagat: Report of the Standing Committee on Aboriginal Peoples* (March 2017) (Chair: The Hon. Lillian Eva Dyck).

As described in the foregoing discussion, this thesis is seeking a deeper understanding of the justifications and underlying rationales for the development and continued use of residential occupancy standards within the context of impact on low-income renters. Accordingly, this thesis uses a historical approach, a comparative content analysis, and a case law/human rights decision analysis.

i. Chapter 2: Origins, Development and Adoption of Canadian Residential Occupancy Standards – a Historical Approach

a. Chapter 2 Overview

Chapter 2 describes the origins and development of Canadian residential occupancy standards, including a discussion of the wider social, economic and political environment within which they were developed. This discussion provides insight into the purported justifications and, to some extent, the underlying rationale(s) that Canadian governments have used for the adoption of residential occupancy standards in Canada. This chapter begins with a description of Canada's housing policy when rules relating to occupancy were first established. The chapter goes on to describe the changing residential occupancy standards up to and including current rules at the federal, provincial and municipal levels in order to understand how internal density is regulated and measured.⁴⁶

b. Chapter 2 Methodology

The Historical Approach

⁴⁶ The discussion of provincial and municipal standards is framed at the national level and examples from Canadian jurisdictions are provided throughout. Manitoba is used as the primary case example.

A historical approach helps to understand the justifications and rationales for adopting residential occupancy standards and how those rules have changed over time. The origin of rules meant to address residential overcrowding helps to understand the current rules. As Dubber argues, the historical analysis of law is “relentlessly presentist”⁴⁷ and characterizes it as follows:

The point of historical analysis of law is to trace the genealogy of law, or legality, over the *longue durée* in a particular legal-political project in order to bring into clearer relief its normative features, which then drive the critical analysis of legal norms and practices within that (temporally and spatially limited) project.⁴⁸

This characterization fits with the intended objective of this chapter, which is to look at the development of residential occupancy standards in order to better understand “why the law is the way it is”, or “how we got here in the first place”. While this chapter does not seek to provide a wholesale review of the history of Canadian housing policy, it does seek to include sources that help to provide the context under which the law operates. (The author’s selection of sources and limitations associated with that selection is discussed further below.)

The historical approach described here must be clarified in the sense that it is not only an integral part of the methodology but also an integral part of the analysis within this chapter. This thesis refers to the approach proposed by Dubber in his self-described

⁴⁷ Markus D Dubber, “Legal History As Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law” in *Oxford Handbook of Historical Legal Research*, 2016, online: <<https://ssrn.com/abstract=3002587>> [<https://perma.cc/W73V-7A5Z>].

⁴⁸ *Ibid.*

“manifesto” on a new historical jurisprudence, where historical jurisprudence is not simply the method, but also the critical analysis of law.⁴⁹ As Dubber explains:

Historical analysis contributes to critical analysis in two, related, ways. It can ground and reveal critical norms, through a genealogical inquiry tracing them to foundational moments in the evolution of a particular phenomenon or practice, such as government, state power, or state action. But it can, at the same time, historicize and shape supposed foundational critical norms by placing them in historical context. The critical norms may be foundational, but they are foundational within a specific historical (and systemic) context.⁵⁰

Chapter 2 relies on the approach proposed by Dubber by undertaking a critical analysis of contemporary law and policy (i.e. residential occupancy standards) on the basis of norms that emerged as Canadian governments dealt with housing issues over time.

Equally important to this approach is to further appreciate that methodology for legal history involves not only looking at *why a change* in the law takes place, but also *why* it took place *at a particular time*.⁵¹ As argued by Ibbetson:

Law is largely backward-looking and heavily inertial: it stays the same unless and until it is changed; [...] As well as analyzing why some alteration in the rules occurred, therefore, we need to look at why it occurred at that particular time. There may be pressure for change, from whatever quarter for a variety of reasons, but it is necessary to go further and identify the factors bringing about the tipping point, the straw that breaks the camel's back.⁵²

⁴⁹ Markus D Dubber, “New Historical Jurisprudence: Legal History as Critical Analysis of Law” (2015) 2 *Critical Analysis of Law* 1 at 9.

⁵⁰ *Ibid* at 14.

⁵¹ David Ibbetson, “Comparative Legal History: A Methodology” in Anthony Musson and Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012) at 127.

⁵² *Ibid*.

Some of the more insightful answers about Canada's adoption of residential occupancy standards come from a consideration not only of *why* certain changes were introduced, but also *what* precipitated those changes. Therefore Chapter 2 considers the surrounding housing context in its approach to legal history.

Sources and Limitations

Chapter 2 identifies relevant historical sources using the University of Manitoba Libraries database; Library and Archives Canada database; and CMHC's catalogue.⁵³ It draws on both primary sources, such as statutes and regulations, and secondary sources, such as Royal Commission reports and academic journal articles. Using governmental and non-governmental secondary sources, this chapter makes inferences on why certain rules were adopted. This history of Canadian housing policy begins at Confederation, but it should be noted that the Indigenous people living in what became Canada had their own laws related to housing and land prior to colonization.⁵⁴ For the purposes of this thesis, only post-colonial housing policy is discussed.

One important limitation to this research relates to the challenge in obtaining any authoritative sources on the actual decision-making process used by governments in establishing or modifying residential occupancy standards. Based on a thorough review of government reports, policies and legislative history on housing, it appears that governments rarely provide any explicit explanation of the process by which residential

⁵³ The search terms used include various combinations of "crowding"; "overcrowding"; "internal density"; "land use planning"; "housing"; "National Occupancy Standard"; "residential occupancy standard"; "occupancy restrictions"; and "occupancy limits." Because of the challenges in searching online databases for keywords in historical sources, not all relevant sources were identified in this way. Therefore in some cases, a historical source made reference to other sources that were then reviewed.

⁵⁴ See e.g. John Borrows & Andr e Boisselle, *Indigenous Law and Governance : Challenging Pre-Contact and Post-Contact Distinctions in Canadian Constitutional Law?* (Montreal:  ditions Th mis, 2017).

occupancy standards are established or the justification for doing so. This is perhaps not surprising, given that governments rarely expressly state why one standard was chosen over another.⁵⁵

This presents a challenge for any researcher seeking to understand the justifications for setting residential occupancy standards. Therefore, the approach in Chapter 2 is to canvass the available evidence from governmental and academic sources and extrapolate from those sources, purported justifications and underlying rationales relevant to - and thus likely relied upon - the setting of residential occupancy standards.

A second methodological limitation relates to selecting, obtaining and interpreting historical government documents. The selection of historical data is not an entirely objective process; there is an element of subjectivity in determining what is relevant and how it should be presented. On this point, Robertson, in discussing historical court records, but nonetheless applicable here, notes that presenting evidence in the form of a seamless narrative “obscures the interpretive choices that the historian who created it made about what to take from which document, denying readers the opportunity to assess those decisions.”⁵⁶ Since the development of policies and regulations related to residential occupancy does not necessarily require any explicit or published reasoning, this will require drawing on relevant sources and making inferences from government documents such as briefing notes and Royal Commission reports.⁵⁷

⁵⁵ See Gray Matter Report, *supra* note 5 at 4.

⁵⁶ Stephen Robertson, “What’s law got to do with it? Legal records and sexual histories” (2005) 14 *Journal of the History of Sexuality* 161 at 166-167.

⁵⁷ See e.g. *Better Place to Live*, *supra* note 27; Canada, Royal Commission on Canada’s Economic Prospects, *Housing and Social Capital*, by Yves Dubé et al. (Ottawa: Queen’s Printer, 1957).

Summary

In addition to describing the current residential occupancy standards, sources explored in Chapter 2 are brought together to provide an understanding of how these standards have developed which in turn informs a preliminary analysis in response to the first research question: *What justifications have Canadian governments used for the adoption of residential occupancy standards?*

Chapter 3 builds on Chapter 2 by taking the justifications identified (and underlying rationales, where possible) from the historic analysis and weighing them against the current literature on the concepts of overcrowding and internal density.

ii. Chapter 3: Justifications of Residential Occupancy Standards - Content Analysis

a. Chapter 3 Overview

Chapter 3 applies a content analysis method for review of current literature on overcrowding and internal density in order to: complete an answer for research question one - *What justifications have Canadian governments used for the adoption of residential occupancy standards?*; and to address research question two - *Is there a rational connection between the justifications and the current residential occupancy standards?*. In other words, Chapter 3 seeks to determine whether there is coherency between the justifications and rationale(s), on the one hand, and consequent standards, on the other.

Commentary encountered during the content analysis specific to overcrowding as a *subjective* phenomenon will also be teased out given that it responds to third research

question: *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?* However this third question will be more carefully explored in Chapter 4.

Chapter 3 concludes with a summary and, using a critical legal theory perspective, provides a preliminary critique of justifications and underlying rationale(s) governments have used for the adoption of residential occupancy standards.

b. Chapter 3 Methodology

Content Analysis

The content analysis methodology used in this chapter involves recourse to academic sources and commissioned reports in order to identify categories or recurring justifications for the use of such residential occupancy standards. This research method requires three steps:

- (1) identifying and describing the relevant documents;⁵⁸
- (2) applying reasonable inferences to analyze the documents; and
- (3) interpreting the results.⁵⁹

Once relevant sources are identified, their content is then analyzed in order to determine whether they address the question of what justifications governments use for the adoption of residential occupancy standards. Where justifications are provided (either

⁵⁸ The content analysis is conducted using the University of Manitoba Libraries online search function, which includes 623 databases, as well as searches in Library and Archives Canada; CMHC publications; CanLII commentary; and Index to Canadian Legal Literature. The search terms used include various combinations of “crowding”; “overcrowding”; “internal density”; “housing”; “National Occupancy Standard”; “residential occupancy standard”; “occupancy restrictions”; and “occupancy limits.”

⁵⁹ See Klaus Krippendorff, “Content Analysis” in Neil J Salkind, ed, *Encyclopedia of Research Design* (Thousand Oaks: Sage Publications Inc, 2010) 234 [Krippendorff] at 235-236.

explicitly or inferred, as will be discussed below), they are grouped into categories. As Hsieh and Shannon note, this open-ended approach to content analysis is appropriate in a study such as this, where existing research is limited, as opposed to an approach that starts out with preconceived categories under which the data must fit.⁶⁰

The sources identified and described in this chapter are based on the relevance of the source (in terms of jurisdiction, terminology, and whether the source in fact addresses residential occupancy standards as opposed to something else) and not on the basis of whether they support the position advanced in this thesis.⁶¹

As explained by Krippendorff, what distinguishes a content analysis from other observational methods is that the answers to the research questions are inferred from the available text.⁶² In order to ensure the results of the content analysis are reliable (in the sense that they are reproducible) and valid (in the sense that they actually answer the research questions), this chapter attempts to clearly articulate the basis on which inferences are being made. In some cases, the justification for the adoption of residential occupancy standards is clearly articulated in the document and no inference is required. There are circumstances, however, where an inference is made based on the surrounding context and by reference to other sources (particularly historical sources described in Chapter 2.)

⁶⁰ See Hsiu-Fang Hsieh & Sarah E Shannon, “Three Approaches to Qualitative Content Analysis” (2005) 15:9 *Qualitative Health Research* 1277 at 1279.

⁶¹ See Ian Dobinson & Francis Johns, “Qualitative Legal Research” in McConville & Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) at 31-32. The authors caution that all relevant sources should be extracted, not simply those that support one’s position.

⁶² Krippendorff, *supra* note 59 at 234.

Once justifications and, in some cases, underlying rationale(s), are extrapolated from the documents and categorized, a table categorizing those justifications and underlying rationales is provided, which includes any stated critiques of the justifications.

iii. Chapter 4 – Case Law and Human Rights Tribunal Decisions

a. Chapter 4 Overview

The chapters that precede Chapter 4 seek to answer questions related to the justifications and underlying rationale(s) – or the “why” – for adopting residential occupancy standards. Once some insight into those questions is gained, the next step is to determine the relevance and impact of the standards. After providing a brief overview of census data related to housing to provide some context for the ensuing discussion, Chapter 4 reviews case law and decisions of provincial and territorial human rights tribunals where the application of residential occupancy standards or private occupancy rules are at issue.⁶³ This discussion helps to respond to the third research question: *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?*

Following a review of these decisions, Chapter 4 examines what can be gleaned from the decisions in terms of how the standards are being applied and what impact the standards may have on accessing rental housing in Canada. This chapter concludes with an assessment of what the decisions actually contribute in terms of answering the question of whether the justifications and current standards are an appropriate way to

⁶³ Human rights commissions are established in every province and territory in Canada, as well as the federal level. As Chapter 4 will explain, any regulation, policy or by-law enacting residential occupancy standards and any application of a residential occupancy standard or rule by a housing provider or private landlord must comply with human rights legislation.

regulate concerns about overcrowding in the contemporary Canadian context, including the possible effects on low-income populations.

b. Chapter 4 Methodology

The methodology used in this chapter shares some similarities with the content analysis described in Chapter 3 whereby a search is conducted to identify relevant documents (in this case human rights decisions and case law), which are then analyzed and grouped into categories.⁶⁴

This methodology involves identifying and summarizing relevant case law, decisions from provincial and territorial human rights tribunals, and material published by human rights commissions that relate to residential occupancy standards or private landlords' residential occupancy rules.⁶⁵ Search results are then assessed for relevancy based on whether the source in fact addresses residential occupancy standards/rules as opposed to something else.

Chapter 4 is not limited to discussing decisions only where provincial or federal standards are at issue. Rather, this chapter also includes human rights decisions where private landlords have either relied on the NOS as their residential occupancy rule (while not bound by law to do so) or have applied their own residential occupancy rule. Both scenarios are relevant to the analysis in this chapter for two reasons: first, both contribute

⁶⁴ The search is conducted through WestlawCanadaNext, Lexis Advance Quicklaw, CanLII, and by searching through provincial and territorial human rights commission websites using various combinations of the relevant search terms. The relevant search terms: “housing”; “tenant”; “landlord”; “National Occupancy Standard”; “crowded/overcrowded”; “occupancy standard”; “occupancy restrictions”; “occupancy rules”; and “occupancy limits.”

⁶⁵ The type of material contemplated here includes any reports, notices, policy directives, etc. that a human rights commission issues. See e.g. Manitoba Human Rights Commission Policy #A-6: Rental of Premises – Limitation on the Number of Occupants for a Dwelling.

to an understanding of how residential occupancy standards affect access to housing; and second, the fact that in some cases, private landlords and other housing providers are relying on the NOS is relevant to understanding how the NOS is being used outside the social housing context.

Following a summary of relevant human rights decisions, this chapter identifies themes that emerge from those decisions. The themes are identified based on their relevance in terms of whether they address the research questions posed - in particular, the third research question: *how do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?* Grounded in critical legal theory arguments, this discussion considers the implications beyond the human rights context.

Limitations

Anecdotal evidence suggests there is misinformation and confusion regarding the applicability of residential occupancy standards, in particular the NOS. There is evidence that the NOS is being relied on by some landlords to deny housing to prospective renters.⁶⁶ However, there does not appear to be academic research on the prevalence of the NOS' use in the private context or on landlords' and renters' understanding of the applicability of the NOS. Without the available data, this thesis simply acknowledges this shortcoming and points to anecdotal evidence that shows that the NOS is being relied on by at least some private landlords to the extent that human rights commissions have

⁶⁶ For example see *Cunanan v Boolean Development Ltd*, 2003 HRTO 17 (CanLII); See also *Dubois v Benryk Mews Housing Co-operative*, 2012 BCHRT 224 (CanLII).

issued policies addressing it.⁶⁷ While this limitation is acknowledged here, it should be noted that some insight on application of the NOS in rental housing is gained from provincial and territorial human rights tribunal decisions discussed in this chapter.

This thesis relies on census data from Statistics Canada to inform the discussion on the rates of overcrowding, such as number of persons per household (particularly in rental housing), rates of single parent households, and number of bedrooms per household. As census data relies on self-reporting, there are limitations to its reliability. There is a possibility that statistics on the number of persons per household is not accurate, especially in the case of rental housing. If tenants are housing more people than their landlord will allow, they may not report for fear of eviction. Since this thesis is not reaching any conclusions that depend on this particular data, this limitation arguably does not affect the analysis. However, this limitation is acknowledged as it is relevant to understanding the prevalence of overcrowding and the lengths that people may go to in order to access affordable housing. Although this limitation applies to the research generally, it is particularly relevant to the content in Chapter 4, so it is included here.

iv. Chapter 5: Conclusion

Chapter 5 condenses the findings from the previous chapters into concise responses to the three research questions posed at the outset. It also suggests some areas of further study, where additional research may be warranted in order to answer questions related to this study. Chapter 5 continues on to articulate criteria from which to assess the

⁶⁷ See Manitoba Human Rights Commission Policy #A-6: Rental of Premises – Limitation on the Number of Occupants for a Dwelling; see also Ontario Human Rights Commission, Policy and Guidelines on Discrimination Because of Family Status, Section X, 3.1: Housing, Occupancy Policies. This question would be suitable for future qualitative research to shed light on people’s understanding of the NOS and how it is being applied in practice.

substance and merits of residential occupancy standards used in Canada, having regard to available evidence and contemporary considerations on the effects of overcrowding.

The thesis concludes by noting that residential occupancy standards are one part of a complex regulatory system that affects access to housing. When people are denied access to housing based on the size or composition of the household, there must be a valid justification. Accordingly, the thesis recommends a more nuanced and flexible approach to setting and applying residential occupancy standards.

Chapter 2: ORIGINS, DEVELOPMENT AND ADOPTION OF CANADIAN RESIDENTIAL OCCUPANCY STANDARDS – A HISTORICAL APPROACH

A. CHAPTER OVERVIEW

When were residential occupancy standards adopted in Canada? Why were they adopted in the first place? The sources explored in this chapter are brought together to provide an understanding of how these standards have developed.

Although typically seen as a provincial and local responsibility,⁶⁸ the federal government has long played a role in matters related to housing. This chapter examines the development of residential occupancy standards and surrounding housing policy in Canada, up to and including current rules at the federal, provincial and municipal level. This chapter approaches the chronology of Canadian housing policy by dividing it into four (4) eras.⁶⁹ These eras are marked by changes precipitated by the political, social and economic climate and surrounding events including the Second World War and the Recession in the 1980s. Although there are other ways in which the history of housing policy might be demarcated, this approach is taken in order to illustrate how certain changes in Canada's history led to the adoption of residential occupancy standards and the extent to which those standards have evolved (or not) over time. This in turn leads to a preliminary understanding of the purported justifications that governments have used for the adoption of residential occupancy standards.

⁶⁸ Matters related to housing are generally seen as a provincial responsibility, pursuant to sections 92(8); (10); (13); (16) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. Note that under s 91(24), on-reserve housing comes under federal jurisdiction.

⁶⁹ See Table 2-1.

This chapter discusses how in Canada, two different types of standards ultimately emerged at two different time periods: (1) provincial and municipal standards within maintenance and occupancy rules or public health legislation; and (2) the federal NOS in the social housing context.

Provincial and municipal level standards emerged during the 1940s to 1970s in response to a population increase alongside the emergence of other building codes and occupancy rules. At the provincial level, some provinces and territories adopted residential occupancy standards as part of public health legislation.⁷⁰ At the municipal level, municipalities incorporated residential occupancy standards into bylaws that addressed occupancy more generally.⁷¹ While health is often cited as the primary justification for setting standards at both the provincial and municipal level, a deeper look points to additional justifications based on morality and the desire to shape social norms.

The second type of standard, being the NOS at the federal level, emerged in the late 1980s as a way to assess eligibility for social housing based on social norms at the time.⁷² Therefore, the analysis of the history of Canadian policy suggests that provincial, municipal and federal standards may have more in common in terms of justification than at first glance.

Additionally, in instances where governments reported on residential overcrowding or sought to address it, this chapter reveals that governments often did not provide a definition of *overcrowding*. Without an explicit definition provided, it is difficult to know

⁷⁰ See e.g. *Dwelling and Buildings Regulation*, *supra* note 3.

⁷¹ See e.g. City of Toronto, By-law No 930-2000, *Property Standards* (27 July 2009), s. 629-25.

⁷² Canada Mortgage and Housing Corporation, *National Occupancy Standards*, (Internal Briefing Note, 1991)[1991 Briefing Note] at 4.

what measure or perspectives governments were using to determine whether households were overcrowded and whether the conclusions reached in various reports were based on the same understanding of what constitutes overcrowding.

The history of housing policy described in this chapter is condensed and, out of necessity, simplified. The scope of this thesis does not allow for a complete picture of Canadian housing policy, nor is in-depth narrative required to answer the research questions posed.

B. HISTORY OF CANADIAN HOUSING POLICY & RESIDENTIAL OCCUPANCY STANDARDS

This section reviews the history of Canadian housing standards, divided into four eras. Following this review, the current residential occupancy standards across Canada are summarized. For ease of reference, Table 2-1 below lists the dates and key events from the relevant eras.

Table 2-1. Chronology of housing policy in Canada, four historical eras

| DATES | KEY EVENTS |
|-----------------------|--|
| (i) 1900s to 1930s | Rapid population growth, laws and policies to address land use and housing in early stages of development |
| (ii) 1940s to 1970s | Many provinces/municipalities adopted residential occupancy standards; federal government increased its role in housing policy |
| (iii) 1980s to 1990s | NOS was created; the federal government began scaling back its involvement in housing |
| (iv) 2000s to present | Rental affordability issues remain |

i. Housing in Canada, 1900s to 1930s: Housing Conditions, Policy and the Identification of Need for Occupancy Standards

The connection between housing conditions and public health was forged as early as Confederation.⁷³ Outbreaks of typhus, cholera and yellow fever in the mid- to late-1800s led to amendments to *The Public Health Act*⁷⁴ in Ontario for the creation of a Central Board of Health.⁷⁵ In the late 1800s and into the early 1900s, the powers of health inspectors under the act were strengthened, and allowed health officials to inspect and report on, among other things, housing conditions that, in their view, amounted to public health concerns.⁷⁶

At the turn of the twentieth century, Canada was a new country experiencing rapid population growth. In 1901, Canada's population was just over five million;⁷⁷ between 1901 and 1921, the population increased at a rate of almost 3% per year, a rate never experienced in Canada before or after that period.⁷⁸ The increase was attributed to an influx of immigrants and a high fertility rate.⁷⁹ The immigrants arriving in Canada were primarily from the United Kingdom, with a smaller proportion coming from other

⁷³ Confederation refers to the process in which certain British colonies (New Brunswick, Nova Scotia, Ontario and Quebec) came together to form the Dominion of Canada in 1867 pursuant to the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

⁷⁴ 1873 SO 157.

⁷⁵ John W S McCullough, "Early History of Public Health in Upper and Lower Canada 1910-20, A Review of Ten Years of Progress" (1921) Ontario Provincial Board of Health at 21, as cited in *Better Place to Live*, *supra* note 5 at 41.

⁷⁶ Ontario, First Annual Report of the Provincial Board of Health Ontario, 1882, Ontario Public Health Reports 1878-83 (Toronto: C Blackett Robinson, 1883) at xi as cited in *Better Place to Live*, *ibid* at 42.

⁷⁷ Statistics Canada, Statistics in 1905, online: <https://www65.statcan.gc.ca/acyb07/acyb07_0006-eng.htm> [<https://perma.cc/G7QA-A5BV>].

⁷⁸ Statistics Canada, Population Growth in Canada: From 1851 to 2061, online: <https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-310-x/98-310-x2011003_1-eng.cfm> [<https://perma.cc/6PVD-CLPA>].

⁷⁹ *Ibid.*

areas of Europe.⁸⁰ By 1929, the population of Canada had grown to ten million, thereby doubling in size in less than 30 years.⁸¹ As the division of powers between the federal and provincial governments was still in the early stages of development, government administrations were adjusting to their roles and responsibilities in trying to figure out how to tackle problems such as housing a growing population. There was not yet anything resembling the occupancy and building standards, land use planning, or zoning by-laws seen today. As the push for more rules to address the growing population increased, it appears that the primary motivation was to eradicate slum areas in cities.

The rapid population increase in Canada was most evident in Toronto. Between 1876 and 1921, the population jumped from 68,000 to 522,000.⁸² During this period of growth, there were few rules in place to control development. As middle class residents moved toward suburban areas, lower income residents primarily lived in low-cost neighbourhoods in the city centre.⁸³ During this period, the construct of the slum emerged, and the desire to eradicate the slum became a priority for social reformers. As this section describes, the slum was seen not only as a public health problem or economic problem, but also a moral problem. The historical records demonstrate a belief in a link between morality and health during this time period, such that morality was an underlying rationale for restricting occupancy.

⁸⁰ *Ibid.*

⁸¹ Statistics Canada, Estimated population of Canada, 1605 to present, CANSIM, table 075-0001 (persons), online: <<https://www150.statcan.gc.ca/n1/pub/98-187-x/4151287-eng.htm>> [<https://perma.cc/2YRM-3X2Y>].

⁸² Lawrence Solomon, *Toronto Sprawls: A History* (Toronto: University of Toronto Press Incorporated, 2007)[Solomon] at 17.

⁸³ *Ibid* at 20.

A 1911 report of the Medical Health Officer for Toronto, Dr. Charles J. Hastings, provides some insight into housing conditions at the time, and ways the government sought to address problem areas.⁸⁴ According to the report, Hastings was asked to report on the living conditions in Toronto's so-called slum areas and provide recommendations to improve the housing situation.⁸⁵ Hastings defined slum conditions as poor, unsanitary homes, which were overcrowded and had insufficient lighting and ventilation.⁸⁶ Hastings' report made recommendations to improve housing conditions in Toronto, namely: a good housing by-law with provisions for enforcement; suburban neighbourhoods with rapid transportation to the city centre; and a land use planning scheme.⁸⁷ In his view, "[h]igh rents mean overcrowding and overcrowding is one of the worst evils in the Housing Problem."⁸⁸ While the report asserts there is a correlation between living in slum conditions and disease, such as tuberculosis,⁸⁹ Hastings goes further and argues that slum conditions are correlated with a decline in morality. For example, on commenting on conditions that he observed, Hastings notes there were houses unfit for habitation, conditions that have become "a public nuisance, a menace to public health, a danger to public morals, and, in fact, an offence against public decency"⁹⁰ and that "criminal and moral lepers are born in the atmosphere of physical and moral rottenness pervading the

⁸⁴ Department of Health Toronto, *Report of the Medical Health Officer dealing with the recent investigation of slum conditions in Toronto, embodying recommendations for the amelioration of the same* (1911), City of Toronto Archives, Fonds 200, Series 365, File 14, [Hastings Report].

⁸⁵ *Ibid* at 5.

⁸⁶ *Ibid* at 3.

⁸⁷ *Ibid* at 32.

⁸⁸ *Ibid* at 20.

⁸⁹ *Ibid* at 3; 16.

⁹⁰ *Ibid* at 4.

slums of large cities.”⁹¹ The report provides a breakdown of overcrowding in slum areas but does not define what is considered overcrowding.⁹²

Some records also appear to support the suggestion that in the early 1900s, there was an anti-immigrant sentiment toward immigrants from non-British countries. For example, Dr. Peter H. Bryce, chief medical officer of the Department of the Interior, described the houses of British immigrants:

[W]e have hundreds and thousands of houses, first shacks, put up two or three years ago, which have now become good houses, filled with British-thinking, British-speaking, British-acting citizens.⁹³

This characterization of British immigrants as good and proper citizens can be contrasted with the way the Italian and Jewish immigrants were depicted at the time. Notably, Hastings’ report provides a breakdown of the nationalities of the residents living in the so-called slum areas, with residents of Hebrew, Italian, Polish, Macedonian, German, and Russian descent most heavily represented.⁹⁴ Hastings argued “their ideas of sanitation are not ours.”⁹⁵

In 1918, the federal government began providing loan funds to the provinces in order for the provincial governments to carry out housing initiatives. The federal government justified its interference in property matters (typically a provincial matter) by stating that housing was an issue of national importance that “touches vitally the health,

⁹¹ *Ibid* at 26.

⁹² *Ibid* at 6-7.

⁹³ Solomon, *supra* note 82 at 18.

⁹⁴ *Ibid* at 7.

⁹⁵ *Ibid* at 8.

morals and general well-being of the entire community and its relation to the welfare of the returned soldiers and their families.”⁹⁶

In the same year, Toronto established its first Housing Commission, the aim of which was to promote single-family dwellings and suburban growth as a way to counter overcrowded living conditions.⁹⁷ One of the Housing Commission’s goals was to promote detached, single-family residences that were owner-occupied, arguing that this type of housing provided greater privacy, which, in the Commission’s view, was a feature that appealed to Canadians.⁹⁸ In 1919, the Ontario Housing Committee adopted a similar view to that of the Toronto Housing Commission. In discussing doubled-up households, it stated that:

There necessarily follows a lowering of self respect and a loss of sturdy independence, factors that are essential to sound moral fibre. [...] Tremendous values lie behind the term “our house.”⁹⁹

The Ontario Housing Committee seems to be making a connection between living in doubled-up households and low self-respect, loss of independence, leading to a lack of moral fibre. The second part of this statement seems to be in line with the dominant thinking in terms of housing policy and the value placed on home ownership as opposed to rental or shared spaces.

⁹⁶ National Archives of Canada, Records of the Department of Finance, RG 19, vol 705, file 203-1, PC 2997, 3 December 1918, cited in H Peter Oberlander & Arthur L Fallick, *Housing A Nation: The Evolution of Canadian Housing Policy* (Centre for Human Settlements University of British Columbia for Canada Mortgage and Housing Corporation, 1992)[Oberlander & Fallick].

⁹⁷ Solomon, *supra* note 82 at 29.

⁹⁸ *Ibid.*

⁹⁹ Ontario Housing Committee, *Report of the Ontario Housing Committee including standards for inexpensive houses adopted for Ontario and typical plans* (Toronto: AT Wilgress, 1919)(Chair: John Willison).

The Ontario Housing Committee went so far as to discourage the construction of large single-family homes for fear that the extra space might be used to house lodgers.¹⁰⁰ In 1921, Ontario's *Municipal Act* was amended to permit the establishment of "residence only" streets, so that by-laws could be passed to prohibit forms of construction other than detached single-family homes.¹⁰¹ Although not specifically a residential occupancy standard, this amendment had the effect of limiting internal density in private residences.

The federal government increased its role in Canadian housing policy in the 1920s and 1930s in response to specific events, notably the return of veterans after the First World War and the Great Depression.¹⁰² The rapid population growth up to 1929 followed by an economic downturn led to a shortage of affordable housing. The federal government decided to intervene with initiatives designed to provide affordable housing on a short-term basis in response to a perceived crisis rather than establish a policy-based national strategy.¹⁰³

In the years that followed, the federal government commissioned several Royal Commission reports to study the housing situation and how it ought to be addressed. According to a 1939 study for the Royal Commission on Dominion-Provincial Relations by A. E. Grauer, European immigrants were streaming into cities and agricultural communities at a significant rate, and the supply of housing was not keeping up with the demand.¹⁰⁴ Grauer described the situation at the turn of the century as a "housing

¹⁰⁰ *Ibid.*

¹⁰¹ *The Municipal Amendment Act, 1921*, SO 1921, c 63.

¹⁰² Oberlander & Fallick, *supra* note 96 at 3.

¹⁰³ *Ibid.*

¹⁰⁴ Canada, Royal Commission on Dominion-Provincial Relations, *Housing*, by A E Grauer (Ottawa, 1939)[Grauer Report] at 31-32.

problem” caused by “swiftly increasing population, rapid urbanization and the expansion of the agricultural and mining frontiers.”¹⁰⁵ Grauer was critical of municipal and provincial governments for prioritizing business interests in the newly forming cities rather than land use planning and housing initiatives.¹⁰⁶ In Grauer’s account, the housing shortage led to badly constructed and overcrowded housing for those who could not pay higher rent, while the downtown areas, being the more desirable locations, would charge high rent so that two or three families were sharing a dwelling that was meant for one family.¹⁰⁷ Grauer’s report did not comment specifically on how overcrowding should be addressed, or how the term *overcrowded* was being defined.

The state of housing at the time was summarized by Grauer as follows:

To sum up, in Canada the housing difficulties of low income groups common to all countries have been complicated by conditions peculiar to a young country – rapid growth, inflated real estate values, speculative activity, influx of poor immigrants and lack of planning. The phenomenal growth of urban population in Canada in the past thirty years would of itself have imposed a severe strain on housing accommodation. [...] But on top of this growth came four years of war when the resources of the nation were turned into new channels, a further period of expansion marked by considerable immigration especially into urban centres, and eight years of severe depression resulting in the almost complete cessation of building activity. The inevitable result is a housing problem of unusual magnitude and acuteness.¹⁰⁸

Accordingly, the federal government sought to address some of the problems Grauer cited in his report.

¹⁰⁵ *Ibid* at 31.

¹⁰⁶ *Ibid* at 32.

¹⁰⁷ *Ibid* at 33.

¹⁰⁸ *Ibid* at 34.

By the 1930s, the federal government introduced legislation aimed at housing primarily directed at the goal of increasing home ownership. According to Oberlander and Fallick, both the *Dominion Housing Act*¹⁰⁹ of 1935 and the first *National Housing Act*,¹¹⁰ enacted in 1938, were geared toward homeownership, builders, and stimulating the economy to help the middle class, and did little in the way of assisting low-income renters.¹¹¹

During this time, occupancy standards and building codes were still in their infancy in a relatively new country adjusting to waves of population growth. Municipal governments began to implement measures to deal with situations created by slum landlords, such as health and building by-laws, building codes, zoning by-laws and municipal land use planning.¹¹² However, Grauer noted that these standards were not being enforced, partly because of opposition from property owners, but more significantly, because of the reluctance of health inspectors who did not want to evict tenants when the inspectors knew there was nowhere else for them to go.¹¹³ It appears that residential occupancy standards (i.e. rules to restrict internal density) were not typically part of the building and occupancy rules at this stage. However, concerns about public health, overcrowding, and a decline in morality in the 1900s to 1930s set the stage for the occupancy rules introduced in the 1940s to 1970s.

¹⁰⁹ *Dominion Housing Act*, SC 1935, c 58. The long title of the bill was “*An Act to assist the Construction of Houses*”.

¹¹⁰ *National Housing Act, 1938*, SC 1938, c 49.

¹¹¹ Oberlander & Fallick, *supra* note 96 at 16-19.

¹¹² Oberlander & Fallick, *ibid* at 12; Grauer Report, *supra* note 104 at 46. Notably, the City of Toronto enacted a by-law setting minimum standards of health and decency in 1936: City of Toronto, by-law no 14466, *To Establish a Standard of Housing in the City of Toronto* (10 Feb 1936).

¹¹³ Grauer Report, *ibid*.

ii. Housing in Canada, 1940s to 1970s: Establishment of CMHC, Expansion of Federal Involvement in Housing, and the Adoption of Residential Occupancy Standards

The first forty years of the twentieth century saw housing policy and urban planning emerging in Canada, but not yet fully realized. During the period between 1940 and 1970, the federal government increased its involvement in housing, and further attention was given to occupancy and maintenance standards. It was during this period that most residential occupancy standards were established.

In the post-Second World War era, Canada was continuing to struggle with rapid population growth and an influx of low-income immigrants in what was considered a housing crisis.¹¹⁴ The housing crisis was attributed to returning veterans, rapidly growing families, migration from rural areas to the cities, and immigration.¹¹⁵

In 1945, the Central Mortgage and Housing Corporation (later Canada Mortgage and Housing Corporation, or “CMHC”) was established to implement the *National Housing Act*,¹¹⁶ which again was aimed at supporting the middle class and encouraging home ownership. The *National Housing Act* was amended several times in subsequent years to further define the role and responsibilities of the Central Mortgage and Housing Corporation. For example, the 1949 amendments made it possible for the federal government to create a public housing program.¹¹⁷ Although the 1949 amendment did not

¹¹⁴ *Better Place to Live*, *supra* note 27 at 15.

¹¹⁵ Barbara Wake Carroll, “Post-War Trends in Canadian Housing Policy” (1989) 18:1 *Urban History Review* 64 [Carroll] at 65.

¹¹⁶ *An Act to Amend the National Housing Act*, SC 1945, c 26.

¹¹⁷ *An Act to Amend the National Housing Act*, SC 1949, c 30, s 35. In 1948, the City of Toronto introduced Canada’s first subsidized housing project, Regent Park. For an assessment of the initial success of the

result in a significant shift toward social housing at the time, it would come into play in subsequent decades (most notably the 1970s).

In 1954, the Act was amended to provide that Central Mortgage and Housing Corporation was responsible for “the improvement of housing and living conditions.”¹¹⁸ Federal and provincial governments were concerned about a lack of housing for low-income groups and the amount of existing housing in need of major repair. This problem was given serious attention in the late 1950s and early 1960s, when the federal government commissioned extensive reports in order to determine an appropriate response.

One particularly informative source on this topic is *A Better Place to Live: A Study on Minimum Standards of Occupancy and Maintenance of Dwellings* (“*Better Place to Live*”),¹¹⁹ a 1962 study commissioned jointly by the Central Mortgage and Housing Corporation and the Ontario Department of Municipal Affairs. This report was a culmination of a three-year study on by-laws and other regulations relating to housing standards. The report is relied on throughout this section, as being one of the only authoritative government sources that focuses on minimum occupancy standards in housing during this era.¹²⁰

project, see Albert Rose, *Regent Park: A Study in Slum Clearance* (Toronto: University of Toronto Press, 1958).

¹¹⁸ *An Act to Amend the National Housing Act*, SC 1954, c 23, s 1.

¹¹⁹ *Better Place to Live*, *supra* note 27.

¹²⁰ *Ibid* at 8. The report studied five questions:

1. What legislation already exists at various government levels to control a minimum standard of housing?
2. How are these controls administered?
3. How effective are the controls and what are the special administrative problems?

The report summarizes efforts to regulate occupancy and maintenance in the first half of the twentieth century as follows:

Regulations of structure or of conditions within the structure has taken place for many years. Unfortunately in many instances, the regulations have only been effected long after the problem has been identified or after there has been a general public acceptance or demand for a higher standard. After specific conditions of poor housing have been identified and investigated, existing regulations are not enforced.¹²¹

The authors described what they saw as poor housing conditions, particularly for low-income earners. In 1951, there was an average of 4.07 persons per household.¹²² The rate of “doubled up” families – where two families lived in a single dwelling unit - was steadily on the rise; the rate of doubled up families increased from 188,000 in 1939 to 350,000 in 1955.¹²³ The report attributed overcrowding and doubled up families to economic need. The report notes:

For the most part, families not maintaining their own household are in this situation not because they do not want separate accommodation, but because they cannot afford it. [...] The proportion of families not maintaining their own household declines sharply as incomes rise.¹²⁴

The report does not provide any evidence to support this assertion. While economic need may be one of the main reasons for overcrowded or doubled up families, the report does not explore any other reasons, such as preference or family culture.

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4. Is a separate set of housing standards desirable? How should such standards be administered? What should they contain?
 5. What are the relative roles of housing standards and enforcement programs in planning for community development and maintenance?

¹²¹ *Ibid* at 29.

¹²² Canada, *Census of Canada, 1951, Volume III, Housing and Families* (Ottawa: Queen’s Printer, 1953), Table 1.

¹²³ Central Mortgage and Housing Corporation, *Brief to the Royal Commission on Canada’s Economic Prospects, “Housing and Urban Growth in Canada”* (Ottawa: 1956) at 10, as cited in *Better Place to Live*, *supra* note 27 at 14.

¹²⁴ *Ibid* at 15.

According to researcher Dr. Albert Rose, whose work on housing conditions was relied on by numerous government commissions in the 1950s and 1960s, the problem with sub-standard housing and slum areas was the lack of certain essentials, first articulated by the American Public Health Association's Committee on the Hygiene of Housing in a 1946 report,¹²⁵ and summarized as follows:

- *fundamental physiological needs*, such as pure air, proper lighting, quiet, and adequate space for play and outdoor living;
- *fundamental psychological needs*, such as adequate privacy, cleanliness, and aesthetic satisfaction;
- *protection against contagion*, such as pure water supply, toilet facilities, interior sanitation, and, of note, sufficient sleeping space; and
- *protection against accidents*, such as sound construction, fire protection, protection against electrical defects and injuries in the home.¹²⁶

As the foregoing list suggests, overcrowding was thought to contribute to these health concerns.

It appears that poor housing, doubled-up families and overcrowding issues were disproportionately represented in low-income Canadians, many of whom were post-war immigrants. As reported in the Royal Commission Report on Canada's Economic Prospects, in 1951, 42% of the dwelling units occupied by post-war immigrants in Toronto had doubled up families, in contrast to 20% of the non-immigrant population.¹²⁷

¹²⁵ American Public Health Association, Committee on the Hygiene of Housing, "Basic Principles of Healthful Housing" 2e (1946) at 2-4 as cited in *Better Place to Live*, *supra* note 27 at 13.

¹²⁶ *Better Place to Live*, *ibid* at 13.

¹²⁷ *Supra* note 57 at 160-163.

It also noted that there was overcrowding in 41% of the immigrant homes compared to 12% of non-immigrant homes.¹²⁸ As in previous reports cited above, the term *overcrowding* was not defined.¹²⁹

Residential occupancy standards were brought in as a response to concerns about poor housing conditions and overcrowding, along with regulations related to proper ventilation, fire safety, lighting, and plumbing.¹³⁰ As explained in the report, public health was the basic factor in bringing about improvements to the standards of occupancy.¹³¹ The report points to assertions made in the 1939 Royal Commission Report regarding environmental sanitation:

This aspect of public health is directed to the control of the physical environment by

[...]

(e) making regulations for housing, assuring safe construction, suitable lighting, heating and ventilation and the prevention of overcrowding.¹³²

Accordingly, newly enacted provincial regulations and municipal by-laws addressed overcrowding by limiting the number of persons who could legally live within a dwelling unit.¹³³ The *Better Place to Live* report compared by-laws in select Canadian cities: Toronto, Windsor, Ottawa, St. John, Halifax and Yarmouth. Some cities regulated household occupancy by reference to maximum number of occupants per square foot (one occupant for every 80-100 square feet, two occupants for 100 to 250 square feet, and

¹²⁸ *Ibid.*

¹²⁹ Prior to the NOS, Statistics Canada used a persons-per-room standard, which is likely the measure used here.

¹³⁰ *Better Place to Live, supra* note 27 at 44.

¹³¹ *Ibid* at 29.

¹³² Canada, Royal Commission on Dominion-Provincial Relations, *Public Health*, by A E Grauer (Ottawa: Queen's Printer, 1939) at 104-105 as cited in *Better Place to Live, supra* note 27 at 29.

¹³³ *Better Place to Live, supra* note 27 at 42-45.

so on)¹³⁴ as well as the number of occupants per room used for sleeping purposes.¹³⁵ All the examples cited in the report contained standards that were facially neutral (i.e. did not set any limits based on age, gender or relationship amongst members of the household), the exception being Toronto. Toronto's by-law restricted residential occupancy by gender. It provided that "no greater number of persons shall occupy any dwelling unit than will permit the proper segregation of the sexes over 10 years of age in separate rooms."¹³⁶ As discussed later in this chapter, the standards set when residential occupancy standards were first enacted have not significantly changed in the decades that followed.

The *Better Place to Live* report also pointed to Manitoba as a positive example of occupancy standards. By including occupancy standards in regulations under *The Public Health Act*¹³⁷ rather than municipal by-laws, the standards applied across the province, as opposed to having uneven standards within a province.¹³⁸

A 1955 report commissioned by the City of Winnipeg's Special Committee on Housing Conditions ("City of Winnipeg Report")¹³⁹ provides further evidence as to how maintenance and occupancy standards, including residential occupancy standards, became a priority during this era. The objective of the study was to provide a "definable statement of the need for low rental housing in the city, the exact dimensions of the need,

¹³⁴ City of Toronto by-law, *supra* note 112; City of Ottawa, by-law 123-52 (5 Aug 1952), s 3(1); City of Halifax, by-law No 50 (13 Sep 1956), s 4(2).

¹³⁵ City of Toronto by-law, *ibid*; City of Windsor, by-law 1718 (23 Sep 1957), s 4.15; City of Ottawa, *ibid*, s 3(j); City of Halifax by-law, *ibid*, s 4(1).

¹³⁶ City of Toronto by-law, *ibid*, s II(1)12.

¹³⁷ RSM 1954, c 211.

¹³⁸ *Better Place to Live*, *supra* note 27 at 44.

¹³⁹ City of Winnipeg, Emergency Housing Department, *Report Housing Survey of Central Area of Winnipeg Bounded by Main St., Sherbrook St., Notre Dame Avenue., Canadian Pacific Railway Yards*, William Courage, General Supervisor (Winnipeg, 1955) [City of Winnipeg Report].

where it exists and by whom it is felt.”¹⁴⁰ The report discusses population and housing conditions in the early part of the twentieth century in Winnipeg, which follows a similar trajectory to the situation at the national level.¹⁴¹ The City of Winnipeg Report notes that the City of Winnipeg’s Special Committee on Housing Conditions had previously considered multiple occupancy of single-family dwellings (i.e. doubled up households) a major factor in determining the degree of overcrowding.¹⁴² In one of the statistical calculations in the study, overcrowding is defined as those dwellings where “members of family” have less than 50 square feet of floor space.¹⁴³

The City of Winnipeg Report makes the case for implementing a standard of dwelling occupancy, including a residential occupancy standard. It argues that the regulations under *The Public Health Act*, which were in place at the time, were inadequate to address residential overcrowding.¹⁴⁴ The City of Winnipeg Report notes that:

Based on our experience in dealing with Winnipeg’s housing problem during the past 10 years, we consider [the current minimum standards] to be overcrowding of the worst sort and the kind of thing that produces social maladjustment.

While these conditions may conform with minimum health requirements, they certainly are not consistent with the needs and social well being of the family or any member in it. When this kind of occupancy occurs in sub-standard dwellings the living conditions become intolerable for the families concerned and in the long run proves costly to the municipality.¹⁴⁵

¹⁴⁰ *Ibid* at 1.

¹⁴¹ *Ibid* at 48-54.

¹⁴² *Ibid* at 54.

¹⁴³ *Ibid* at 76.

¹⁴⁴ *Ibid* at 3. Section 185(1) of *The Public Health Act* read at the time that “[a]ll rooms in dwellings or other buildings used for sleeping purposes shall have a gross floor area of at least 60 sq. ft. and shall provide at least 40 sq. ft. of floor area for each occupant.”

¹⁴⁵ *Ibid* at 5.

This statement appears to be based on an assumption about the needs and social well-being of a family without providing any research or evidence to support it. Once again, it appears that there is a level of judgment being applied on low income families and suggests that residential overcrowding is contributing to social “maladjustment.” This statement is also noteworthy because it appears to suggest that residential occupancy standards should be based on something other than (or in addition to) immediate health considerations. While this review did not reveal any sources that show the public health evidence for setting the original standards in Manitoba, the City of Winnipeg Report suggests that the standards should be based on some other reason, characterized here as social adjustment or “needs and social wellbeing.” Without providing specifics, the report further notes:

[w]e are well aware that the many difficult social problems produced by bad housing conditions cannot be expressed statistically. The blighted life resulting from a blighted home in a blighted neighbourhood simply becomes a digit in our statistical tables. This part of the story rests in files of the many health and welfare agencies serving in the district.¹⁴⁶

This excerpt is similar to the language used in the reports referenced above concerning residential blight and/or the desire to conform to certain social norms of how to structure one’s family. Essentially, it is applying a particular judgment on households that live in these conditions. This is not to suggest that the internal density at the time was not problematic; as the report indicates, there were hundreds of households where members were using the kitchens and dining rooms for sleeping purposes.¹⁴⁷ However, the data is not linked to negative health consequences nor is there any consideration of how to

¹⁴⁶ *Ibid* at 7-8. The report notes (at 25) that, of the 4,950 family households in the area studied, there were 1,538 families consisting of two or more persons where overcrowding and the lack of adequate facilities amounted to substandard living conditions.

¹⁴⁷ *Ibid* at 77.

separate out the negative health effects caused by poor housing conditions as compared to overcrowding. Another indication that applying social norms as to how to structure one's family was at least an underlying rationale for the setting of standards is that the sample standards used in the study set limits based on gender without any evidence-based research provided. The study applied certain minimum standards of use and occupancy of dwellings, which the authors considered to be appropriate standards drawn from by-laws in other jurisdictions. Among the standards, the report provides that "[n]o greater number of persons shall occupy, for sleeping purposes, any dwelling unit than will permit the proper segregation of the sexes over ten years of age in separate rooms."¹⁴⁸ It is important to note that The City of Winnipeg Report, however, does not identify any cultural or ethnic groups in its discussion related to housing conditions.

Shift to Increased Social Housing

In the 1960s, housing conditions in Canada improved for the middle class, with new construction and an expansion to the suburbs. However, lack of access to affordable housing remained a problem for low-income families. In order to address the lack of affordable housing, the federal government took measures to facilitate social housing in Canada. In 1954, the federal government made amendments to the *National Housing Act* to address social housing, but these amendments only came into effect in 1964.¹⁴⁹ These changes are considered a turning point for social housing in Canada.¹⁵⁰ The amendments rewrote most of the social housing provisions in the *National Housing Act* so that provincial and municipal governments could enter the social housing sphere independent

¹⁴⁸ *Ibid* at 94.

¹⁴⁹ SC 1953-1954, c 23.

¹⁵⁰ Oberlander & Fallick, *supra* note 96 at 57.

of the federal government, while still receiving funding from the federal government, essentially shifting to more provincial control.¹⁵¹

Social housing programs were expanded following a 1971 Senate Special Report entitled *Poverty in Canada*,¹⁵² which was a culmination of the work of the Special Committee on Poverty, whose study began in 1968.¹⁵³ The report pointed out that the population of low-income Canadians was increasing, particularly young families, young unattached individuals, and single-parent families (mostly single mothers).¹⁵⁴ The report recommended sweeping changes to many aspects of government policy, including social assistance, public health, the administration of justice, childcare, economic policies, and housing.¹⁵⁵ One such recommendation was the enlargement and expansion of social housing programs.¹⁵⁶ The attention given to housing during this period was what Oberlander and Fallick considered “a watershed in the history of Canadian housing”,¹⁵⁷ where the federal government under then-Prime Minister Pierre Elliot Trudeau “fundamentally rethought virtually all its existing housing policy and programs in response to tumultuous economic, social and political events.”¹⁵⁸ Amendments to the *National Housing Act* were brought in to replace most traditional social housing with non-profit, socially mixed housing, and initiated new housing programs.¹⁵⁹ According to Oberlander and Fallick, the shift in housing policy during this era is attributed to two

¹⁵¹ SC 1953-1954, c 23, Part VI. See also Oberlander & Fallick, *supra* note 96 at 57.

¹⁵² Senate Special Committee on Poverty, *Poverty in Canada* (Ottawa, 1971) (Chair: David A Croll.) The Committee was reconstituted by the Senate during the second and third sessions of the Twenty-Eighth Parliament on October 28, 1969, and October 8, 1970.

¹⁵³ *Ibid*, Terms of Reference.

¹⁵⁴ *Ibid* at 133.

¹⁵⁵ *Ibid*, Summary of Recommendations.

¹⁵⁶ *Ibid*.

¹⁵⁷ Oberlander & Fallick, *supra* note 96 at 77.

¹⁵⁸ *Ibid* at 111.

¹⁵⁹ SC 1973, c 18, s 15.1 (non-profit housing assistance); Part III (co-op housing).

phenomena. First, the “rapid urbanization” and growing population of tenants, where the average household size was on the decline (as a result of higher standards of living and a move away from the traditional nuclear family.) Second, it was becoming more apparent that poverty was a serious problem requiring governmental intervention.¹⁶⁰ The federal government committed to enlarge and expand social housing programs, as the evidence was increasingly mounting that the private rental housing system was not working for low-income Canadians.¹⁶¹

During the same era that average household size was declining, local governments were adopting residential occupancy standards, perhaps responding to the concerns raised in the 1950s. By the late 1960s and 1970s, it was commonplace for urban municipalities to have by-laws related to occupancy and the maintenance of property, which were tied to federal funding. For example, the City of Winnipeg’s first residential occupancy by-law was passed in 1973.¹⁶² According to this by-law the maximum occupancy limit was one person per 80 square feet,¹⁶³ which was in line with most other early residential occupancy standards in Canada. Given that the average household size was already on the decline, residential occupancy standards may not have been at odds with measures to address housing affordability.

In the early 1970s, the federal government asserted its commitment to work with provinces and municipalities to improve housing conditions for low-income Canadians.

¹⁶⁰ Oberlander & Fallick, *supra* note 96 at 69.

¹⁶¹ *Ibid* at 71.

¹⁶² City of Winnipeg, by-law no 763/74. Based on the City Council minutes (1088/74), it appears this by-law was passed in order to obtain federal funding as part of a neighbourhood improvement program, the funding for which was contingent on certain requirements being met. The by-law was brought forward by the Committee on the Environment (file EB-1.6, 1178/74).

¹⁶³ *Ibid*, s 55-3. Note that this limit has not changed substantially since it was first passed.

CMHC committed over \$1 billion for public housing programs, building more affordable units, and making homeownership attainable for more Canadians.¹⁶⁴ Despite these initiatives, lack of affordable and adequate housing remained a problem for low-income Canadians.¹⁶⁵ The social housing initiatives brought in in the 1970s were seen as temporary and to improve immediate conditions.¹⁶⁶ However, economic stability did not return until the mid-1980s, after three consecutive recessions (from the 1970s to the mid-1980s) that resulted in higher housing costs, higher unemployment rate, and cutbacks in federal spending.¹⁶⁷ As the next section discusses, these changes led to another shift in the federal government's involvement in social housing and, in an indirect way, in the adoption of the National Occupancy Standard.

iii. 1980s and 1990s: Scaling Back Federal Involvement in Housing and the National Occupancy Standard

The beginning of the 1980s was marked by a recession leading to fiscal restraint. The demographics of Canada's population were changing; the average household size had declined from 5.0 persons in 1901 to 2.8 persons in 1986.¹⁶⁸ The population was aging, and the proportion of single and non-family households, such as young adult roommates, was increasing. This was attributed to baby boom children reaching adulthood, higher standards of living, shifts in values and lifestyle, different attitudes toward marriage, and

¹⁶⁴ Oberlander & Fallick, *supra* note 96 at 106.

¹⁶⁵ Sean Purdy, "“It Was Tough on Everybody”: Low-Income Families and Housing Hardship in Post-World War II Toronto" (2003) 37:2 *Journal of Social History* [Purdy] at 462.

¹⁶⁶ Oberlander & Fallick, *supra* note 96 at 64.

¹⁶⁷ *Ibid* at 63-66.

¹⁶⁸ Statistics Canada, *The shift to smaller households over the past century* (2018), online: <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015008-eng.htm>> [<https://perma.cc/Z2DE-HFJC>].

more women in the workforce.¹⁶⁹ These demographic changes, and the decreasing household size, had an impact on housing policy in Canada.

By the mid-1980s, the federal government began to phase out its responsibility for the planning and social aspects of housing, passing responsibility to the provinces and territories.¹⁷⁰ Two documents released by the federal government signaled its intention to reconsider its role in housing. First, in 1984, the newly elected Mulroney government published *A New Direction for Canada: An Agenda for Economic Renewal*, which accompanied the Minister of Finance's Economic Statement.¹⁷¹ In the report, the federal government suggests that housing policy at the federal level should be reconsidered:

There is much that needs to be determined in establishing the federal government's housing policy. In social housing, program changes or alternatives should ensure that those who receive federal housing assistance are truly in need of such assistance. In the domain of market housing, consideration should be given to improving the conditions under which the private sector operates. The formulation of an effective federal housing policy will require discussion with, and the co-operation of, the provinces and other interested Canadians.

This statement is indicative of the government's priorities at the time vis-à-vis social housing and market housing. In terms of social housing, this statement suggests that the concern was that households may be receiving government assistance who might not actually require it. It also suggests the government's desire to move away from the provision of social housing and a move toward fiscal restraint and reliance on the private sector.

¹⁶⁹ Oberlander & Fallick, *supra* note 96 at 69. See also Statistics Canada, "One hundred years of families", Anne Milan, Catalogue No 11-008 (Ottawa: Statistics Canada, 2000).

¹⁷⁰ Carroll, *supra* note 115 at 67.

¹⁷¹ Canada, Department of Finance, *A New Direction for Canada: An Agenda for Economic Renewal*, presented by the Hon Michael H Wilson, Minister of Finance (Ottawa: 8 Nov 1984) at 70.

The other document released by the federal government in relation to housing policy was a 1985 CMHC consultation paper. The consultation paper was intended to generate discussion on the role of the federal government.¹⁷² The government considered the consultation process on housing as part of its broader economic review.¹⁷³ With respect to social housing, the paper notes that approximately 700,000 households cannot afford “physically adequate, uncrowded accommodation” without paying more than 30% of their income.¹⁷⁴ Again, the term *uncrowded* is not defined or elaborated on. The paper also notes that the majority of households with serious affordability problems are renters as opposed to homeowners and that marginalized groups such as people living with disabilities, victims of family violence, “transients”, and Indigenous Canadians were disproportionately represented in this category.¹⁷⁵

In considering an appropriate strategy to address housing affordability problems, the paper states:

Few would disagree that governments have a responsibility to assist these groups. Whether justified through concepts of basic human rights, social justice or the redistributive role of government, there is a clear rationale for government involvement in alleviating the problems of poverty. The key questions in this area are what is the most appropriate tool for assisting groups in need and at what level of government does this responsibility rest.¹⁷⁶

¹⁷² Canada, CMHC, *Consultation Paper on Housing* (Ottawa: CMHC, 1985).

¹⁷³ *Ibid* at Preface.

¹⁷⁴ *Ibid* at 16. Households that must spend more than 30% of gross income on housing are generally seen as spending too much. CMHC incorporated this measure into its calculation for core housing need.

¹⁷⁵ *Ibid* at 16-17.

¹⁷⁶ *Ibid* at 17.

This passage indicates that the federal government acknowledged the importance of government involvement but was also reconsidering its role in the delivery of social housing. After dominating housing policy for forty years, in the late 1980s to the 1990s CMHC entered into agreements with the provinces and territories to hand over responsibility for delivery of social housing programs, while still providing substantial funding.¹⁷⁷ CMHC explains the process as follows:

While the federal government continues to honor its long-term obligations to housing, the provinces and territories are responsible for ownership, management and administration of the housing stock. Today, about 80% of the existing social housing stock is administered by the provinces and territories under Social Housing Agreements (SHA), or other long-term arrangement.

Provinces and territories who signed an SHA are subject to national principles and an accountability framework that ensures that federal subsidies continue to flow to lower-income households. Provinces and territories can retain savings in federal funding for reinvestment in the existing stock or new assisted housing activity.

CMHC has signed SHAs with Saskatchewan, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Yukon, Manitoba, Nunavut, Ontario, British Columbia and Alberta.¹⁷⁸

As part of this policy shift, CMHC developed the core housing need measurement. All federal subsidies for social housing programs would be allocated to households in core housing need.¹⁷⁹ A household is considered to be in core housing if it does not meet one or more of the adequacy, suitability or affordability standards and it would have to spend

¹⁷⁷ CMHC, “Administration of Social Housing” (31 March 2018), online: *Canada Mortgage and Housing Corporation* < <https://www.cmhc-schl.gc.ca/en/about-cmhc/social-housing-information/administration-of-social-housing> > [<https://perma.cc/87HR-YRF2>].

¹⁷⁸ *Ibid.*

¹⁷⁹ CMHC, *Housing in Canada*, *supra* note 13.

more than 30% of its gross income to access acceptable housing.¹⁸⁰ The suitability measure refers to whether there are enough bedrooms for the household, as determined by the NOS.¹⁸¹ Since 1991, CMHC has used Census and National Household Survey data to estimate and publish core housing need reports every five years.¹⁸²

Adoption of the NOS

The NOS was established as part of the federal government's process for reassessment of housing policy in the late 1980s.¹⁸³ Since the NOS was used to assess eligibility for social housing and not as a regulation or formal policy, there is no definitive statement on when it was first implemented. Therefore, this thesis extracts information from CMHC records and other relevant sources in order to piece together an understanding of how the NOS developed.¹⁸⁴

A CMHC briefing note dated September 10, 1991 indicates that NOS was implemented as a guideline so that there would be a uniform standard for residential

¹⁸⁰ CMHC, *Identifying Core Housing Need* (14 August 2019), online: <<https://www.cmhc-schl.gc.ca/en/data-and-research/core-housing-need/identifying-core-housing-need>> [<https://perma.cc/X93R-Y2LW>]; CMHC, *Housing Affordability and Need: A Chapter from the Canadian Housing Observer* (Canadian Mortgage and Housing Corporation, 2014) at I-2. If a household falls below one or more of these three standards and it would have to spend 30% or more of its total before-tax income to pay the median rent of alternative local housing that is acceptable (meets all three standards), it is classified as being in core housing need.

- Adequate housing is reported by their residents as not requiring any major repairs.
- Affordable housing costs less than 30% of total before-tax household income.
- Suitable housing has enough bedrooms for the size and makeup of resident households according to National Occupancy Standard (NOS) requirements.

¹⁸¹ *Ibid.*

¹⁸² CMHC Housing in Canada, *supra* note 13.

¹⁸³ The precise date of the NOS's adoption is unclear. The 1991 Briefing Note recommends the NOS be amended but CMHC advised that it was unable to locate an earlier briefing note (see 1991 Internal Briefing Note, *supra* note 72.)

¹⁸⁴ The author conducted an informal telephone interview with Jeremiah Prentice, Senior Statistical Researcher with CMHC on July 17, 2018. Based on the telephone interview, it appears that CMHC does not have any earlier briefing notes or other documents that refer to the NOS.

occupancy across provinces and territories.¹⁸⁵ The main concern that CMHC was trying to address was that social housing clients were *overhoused*, meaning tenants were provided with larger units than CMHC thought were required.¹⁸⁶ According to the briefing note, the NOS is “used to determine what size of dwelling (in terms of bedroom count) is suitable for a given household.”¹⁸⁷ It further provides the guidelines are to be followed “as closely as possible for client placement purposes” and that, “[w]hile it is recognized it may be necessary to exercise a degree of discretion in some cases, variations from these guidelines should be considered individually and be fully documented.”¹⁸⁸ Essentially, the federal government developed a needs-based policy to ensure that housing units were the appropriate size in terms of number of bedrooms for eligible families, and it determined that using the NOS formula was an appropriate measure.

Therefore, while provincial and municipal residential occupancy standards were adopted as part of other occupancy rules, purportedly to address public health concerns, the NOS was brought in as part of the federal government’s scaling back from administration of social housing and handing down responsibility to provincial and local government. In other words, the provincial and municipal standards were aimed at reducing overcrowding and the potential negative effects associated with it, while the federal standard was concerned with having the appropriate number of people in a unit.

¹⁸⁵ 1991 Internal Briefing Note, *supra* note 72.

¹⁸⁶ *Ibid.* Interestingly, Quebec never agreed to use standards based on gender or age.

¹⁸⁷ *Ibid.* at 4.

¹⁸⁸ *Ibid.*

By the mid to late 1990s, after another recession in 1993, the federal government carried out its plan for devolution of social housing.¹⁸⁹ Although the programs that were already in place were not terminated, few new initiatives were created, which meant that social housing became a smaller share of the housing system.¹⁹⁰ This resulted in the private sector taking on a bigger role in the provision of low-income housing. As the next section discusses, this shift in housing policy did not improve access to housing for low-income Canadians into the new millennium.

iv. 2000s to the Present

Between 1996 and 2006, Canada experienced what Gregory Suttor characterized as a “home-ownership boom” unmatched since the period following the Second World War.¹⁹¹ The increase in home ownership and corresponding decline of renters was attributed to years of low interest rates and an increase in income level.¹⁹² However, those living in rental housing were experiencing new challenges. The availability of rental housing was declining, and it was becoming more difficult than ever for low-income Canadians to access affordable housing.¹⁹³

According to CMHC, approximately 12.5% of Canadian households were in core housing need in 2011.¹⁹⁴ The vast majority of those in core housing need were below the

¹⁸⁹ Gregory Suttor, *Still Renovating: a history of Canadian social housing policy* (McGill-Queen’s University Press, 2016) at 125.

¹⁹⁰ *Ibid* at 126.

¹⁹¹ *Ibid* at 154.

¹⁹² *Ibid* at 154.

¹⁹³ *Ibid* at 155.

¹⁹⁴ CMHC, *Canadian Housing Observer, Characteristics of Households in Core Housing Need, Canada, 2011* (Ottawa, Canada Mortgage and Housing Corporation, 2015)[CMHC Core Housing Need].

affordability standard (89.7%).¹⁹⁵ Conversely, only 13.3% fell short in housing suitability, meaning that they did not meet the NOS, with only 4.4% falling short in housing suitability but meeting the other housing indicators.¹⁹⁶ The incidence of being in core housing need was higher among certain groups, including renter households (especially low income renters), female single parent households, Indigenous households, and recent immigrants households.¹⁹⁷

Little seems to have improved in terms of core housing need since 2011. According to Statistics Canada, 13.6% of Canadian households in urban areas were in housing need in 2016.¹⁹⁸

Given that there is no standard objective measure of overcrowding, countries must determine which definition to adopt in order to gauge levels of overcrowding. In a 2015, CMHC commissioned a report to assess whether the NOS was appropriate in terms of measuring overcrowding rates compared to measures used in other countries.¹⁹⁹ The authors compared the U.S.'s household crowding indicator (Persons per Room Standard or "PPR") to the NOS to assess the potential applicability to the Canadian housing context. The PPR was applied to Canada's 2011 Census and National Household Survey data to find out how this would affect overcrowding rates compared to the NOS. The study found that the PPR standard would only capture about one-third as many

¹⁹⁵ *Ibid* at I-3.

¹⁹⁶ *Ibid* at I-4. Recall that the NOS is used as a housing indicator in this context, not a residential occupancy limit.

¹⁹⁷ *Ibid* at I-5.

¹⁹⁸ CMHC, "13.6% of Urban Households Were in Core Housing Need in 2016" (22 June 2018), online: *Canada Mortgage and Housing Corporation* <<https://www.cmhc-schl.gc.ca/en/housing-observer-online/2018-housing-observer/13-point-6-percent-urban-households-were-core-housing-need-2016>> [<https://perma.cc/228F-6STU>].

¹⁹⁹ CMHC, *Canada Mortgage and Housing Corporation, International Housing Indicators Research Report*, (Ottawa: CMHC, 30 December 2015).

households as the NOS. The report goes on to state that “[t]he PPR standard does not reflect *Canadian social norms* of what may typically be considered crowded accommodation.”²⁰⁰ The report concludes that the PPR standard is not as effective as an indicator for measuring overcrowding rates based on the fact that it does not take into account the composition of, and relationships between, household members. In the context of this report, authors were comparing housing indicators, not residential occupancy standards. The conclusions reached in this CMHC report appear to support a more nuanced approach to measuring overcrowding that reflects norms as opposed to a facially neutral measure.

After mounting pressure on government to implement some form of a National Housing Strategy to address housing problems,²⁰¹ in 2016 the federal government introduced a 10-year, \$40 billion commitment to address housing in Canada, with the ambitious goal of ensuring that all Canadians have access to affordable housing that meets their needs.²⁰² This strategy includes investments to encourage the construction of new and repair of existing affordable housing.²⁰³ There is no indication that the NOS is being reexamined as part of this strategy.

²⁰⁰ *Ibid* at at 34 [emphasis added].

²⁰¹ For a discussion of the increasing debate regarding social inclusion, income disparity, deepening poverty, and race-class divides and how this discourse relates to housing policy, see Sutter, *supra* note 189 at 157-162.

²⁰² Canada, *Canada’s National Housing Strategy: A place to call home* (Ottawa: 2018), <<https://www.placetocallhome.ca> > [<https://perma.cc/S3YM-FB8M>].

²⁰³ *Ibid*.

v. Summary of the Current Standards

This section summarizes current residential occupancy standards at all three levels of government. For the purposes of the ensuing discussion, a consideration of residential occupancy standards is limited to those regulations, guidelines, and by-laws that restrict the number of persons that may legally reside within a household, typically encompassed in maintenance and occupancy regulations or by-laws, or in public health regulations. It should however be pointed out that there are other policies and laws that address housing and occupancy in Canada. For example:

- Provincial and federal laws in place to enforce the *National Building Code*²⁰⁴ and the *National Fire Code*²⁰⁵;
- Provincial residential tenancy legislation, which sets out the relationship, rights and responsibilities between landlords and tenants;²⁰⁶
- Provincial human rights legislation, which prohibits differential treatment in the rental housing context;²⁰⁷
- Social housing legislation, which address delivery of social housing programs;²⁰⁸ and
- Co-operative housing legislation, which governs the co-operative housing sector.²⁰⁹

²⁰⁴ Government of Canada, *National Building Code of Canada 2015* (Ottawa: National Research Council of Canada, 2015).

²⁰⁵ Government of Canada, *National Fire Code 2015* (Ottawa: National Research Council of Canada, 2015).

²⁰⁶ See e.g. *The Residential Tenancies Act*, SM 1990-91, c 11. [Section 76 provides that “[a] tenant shall not permit so many persons to occupy the rental unit on a continuing basis that a contravention of health, safety or housing standards set out in law or in the tenancy agreement results.”]

²⁰⁷ See e.g. *The Human Rights Code*, SM 1987-88, c 45.

²⁰⁸ See e.g. *Housing Services Act, 2011*, SO 2011, c 6.

a. Federal Level

There is no formal national occupancy standard that applies to privately owned, non-subsidized housing; at the federal level the residential occupancy standard only applies as a guideline for social housing. The NOS has also remained unchanged since it was last amended in 1991. Federal funding for social housing is still linked to the enforcement of the NOS by social housing providers at the provincial and territorial level.²¹⁰

CMHC provides the following definition of “suitable housing” which incorporates the NOS:²¹¹

Suitable housing has enough bedrooms for the size and make-up of resident households, according to National Occupancy Standard (NOS) requirements. Enough bedrooms based on NOS requirements means one bedroom for:

- each cohabiting adult couple;
- each lone parent;
- unattached household member 18 years of age and over;
- same-sex pair of children under age 18;
- an additional boy or girl in the family, unless there are two opposite sex children under 5 years of age, in which case they are expected to share a bedroom.

A household of one individual can occupy a bachelor unit (i.e. a unit with no bedroom).²¹²

²⁰⁹ See e.g. *Cooperative Association Act*, SBC 1999, c 28.

²¹⁰ CMHC, *Social Housing*, *supra* note 177.

²¹¹ Interestingly CMHC provides no standalone definition for the NOS; it is only defined by reference to the definition of suitable housing.

²¹² CMHC, *Housing in Canada*, *supra* note 13 [“CMHC uses Census and National Household Survey data to estimate and publish core housing need reports every five years. A household is considered to be in core housing if it does not meet one or more of the adequacy, suitability or affordability standards and it would have to spend more than 30% of its gross income to access acceptable housing.”]

As noted by CMHC, the NOS represents “one agreed-upon view from among many potential possibilities as to what would constitute crowding.”²¹³ Perhaps it can be understood as an accepted mean between being overcrowded and over-housed for the purposes of social housing.

b. Provincial Level

At the provincial and municipal levels, meanwhile, residential occupancy standards are based on size of space in relation to the number of persons living in a unit. Although residential occupancy is more commonly dealt with at the municipal level, some provinces have established residential occupancy standards through public health legislation. For example, the *Dwelling and Buildings Regulation* under Manitoba’s *Public Health Act*²¹⁴ establishes occupancy standards and creates enforcement mechanisms.²¹⁵ The regulation provides that each dwelling unit must have at least 80 square feet of habitable floor space for each member of the household.²¹⁶ It further provides that each room used for sleeping purposes in a dwelling unit shall have a floor area of at least 60 square feet, and at least 40 square feet for each person that ordinarily sleeps in the room.²¹⁷

Similarly, Alberta has incorporated a residential occupancy standard into its housing regulation under the *Public Health Act*.²¹⁸ The regulation governs the conditions, maintenance, use and occupancy of housing, with the purpose of protecting and

²¹³ CMHC 2014, *supra* note 19 at I-19.

²¹⁴ SM 2006, c 14.

²¹⁵ Man Reg 322/88R.

²¹⁶ *Ibid.*, s 5.

²¹⁷ *Ibid.*, s 6(1).

²¹⁸ RSA 2000, c P-37.

promoting the health and well-being of occupants of rental housing.²¹⁹ Under the *Minimum Housing and Health Standards*, the owner of a “housing premises” has an obligation to ensure that the premises not become or remain overcrowded.²²⁰ The standard is based on square metres for each adult in a bedroom, where children under 10 years are considered half an adult.²²¹ Similar to Manitoba, the standards are enforced by public health inspectors on a systematic or complaints basis.²²²

c. Municipal Level

In addition to provinces and territories, municipalities have the jurisdiction to enact by-laws related to occupancy. Residential occupancy standards are typically included in a municipality’s occupancy by-laws.²²³ Most Canadian municipalities limit residential occupancy by reference to persons per square feet or metres. For example, the City of Winnipeg’s *Neighbourhood Liveability By-law*²²⁴ contains a similar residential occupancy standard as the standard set under *The Public Health Act*.²²⁵ Similar to the provincial regulation, the by-law is enforced by public health inspectors.²²⁶

d. Sample Residential Occupancy Standards by Jurisdiction

Table 2-2 shows the current residential occupancy standards in each Canadian province and territory, as well as select Canadian cities.

²¹⁹ AR 173/99.

²²⁰ *Ibid*, s 4.

²²¹ *Minimum Housing and Health Standards*, MO 57/2012, s 10.

²²² *Ibid*.

²²³ See e.g. City of Toronto, *supra* note 71.

²²⁴ City of Winnipeg, by-law No 1/2008, *Neighbourhood Liveability By-law*, *supra* note 4.

²²⁵ *Ibid*, s 50(1). Since the wording of the by-law and the regulation are similar, it appears that the city was aware of the regulation and wanted its by-law to mirror the language. The by-law covers more topics related to occupancy than the regulation, so rather than have two (or more) separate documents for the City to administer, everything is covered in the by-law.

²²⁶ *Ibid*.

Table 2-2. Residential occupancy standards by jurisdiction

| Jurisdiction | Legislation | Residential Occupancy Standard |
|---------------------|--|--|
| British Columbia | Delegated to municipalities | <p>Example: City of Vancouver, by-law No 5462 <i>Standards of Maintenance By-law</i> (21 July 21 1981), which applies to lodging houses only (i.e. rental units, rooming houses etc. as defined in the by-law):</p> <p>s. 21.2(a) At least 50 sq ft of floor area per occupant</p> <p>- Enforced by city inspectors</p> |
| Alberta | Pursuant to <i>Housing Regulation</i> , Alta Reg 173/1999, (under Alberta's <i>Public Health Act</i> , RSA 2000, c P-37) s. 4, an owner shall maintain housing premises in compliance with <i>Minimum Housing and Health Standards</i> | <p><i>Minimum Housing and Health Standards</i>, MO 57/2012</p> <p>s. 10 The owner of a housing premises shall not permit it to become or remain overcrowded.</p> <p>(a) A housing premises shall be deemed to be overcrowded if:</p> <ol style="list-style-type: none"> 1. (i) a bedroom in it has less than 3m² (32ft²) of total floor area and 5.6m³ (197ft³) of air space for each adult sleeping in the bedroom, 2. (ii) in the case of a dormitory, the sleeping area in the dormitory has less than 4.6m² (49.5ft²) of floor space and 8.5 m³ (300ft³) of air space for each adult sleeping in the sleeping area, or 3. (iii) a habitable room in it that is not a bedroom but is used for sleeping purposes in combination with any other use has less than 9.5m² (102ft²) of floor space and 21.4m³ (756ft³) of air space for each adult sleeping in the habitable room. <p>(b) For the purposes of calculating this section, a person who is more than 1 year of age but not more than 10 years of age shall be considered as a 1/2(one half) adult and a person who is more than 10 years of age shall be considered as 1 adult.</p> <p>- Applies to rental housing only - Enforced by public health officers</p> |
| Saskatchewan | Delegated to municipalities | <p>Example: City of Saskatoon, by-law No 8175, <i>The Property Maintenance and Nuisance Abatement By-law</i> (6 Jan 2003)</p> <p>- Applies to all dwelling units - No restriction on internal density</p> |
| Ontario | Delegated to municipalities | <p>Example: City of Toronto, By-law No 930-2000, <i>Property Standards</i> (27 July 2009)</p> |

| | | |
|----------|--|--|
| | | <p>s. 629-25 [...]</p> <p>C. The maximum number of persons living in a habitable room shall not exceed one person for each nine square metres of habitable room floor area. [...]</p> <p>E. The minimum floor area of a room used by only one person for sleeping shall be six square metres with the room having a minimum dimension on one side of two metres.</p> <p>F. The minimum floor area of a room used by two or more persons for sleeping shall be four square metres for each person so using the room.</p> |
| Manitoba | <p>1. Occupancy standards contained in the <i>Dwelling and Buildings Regulation</i>, Man Reg 322/88R under Manitoba's <i>Public Health Act</i>, SM 2006, c 14; and</p> <p>2. Delegated to municipalities</p> | <p>1. <i>Dwellings and Buildings Regulation</i></p> <p>s. 5 Each dwelling unit shall have at least 7.4 m2 (80 square feet) of habitable floor area for each individual residing in the unit and the floor area shall be calculated on the basis of the total area of the habitable rooms.</p> <p>6(1) Each room used for sleeping purposes in a dwelling shall have a floor area of at least 5.6 m2 (60 square feet), and shall have at least 3.7 m2 (40 square feet) of floor area for each individual that ordinarily sleeps in the room.</p> <p>2. City of Winnipeg, by-law No 1/2008, <i>Neighbourhood Liveability By-law</i></p> <p>s. 50(1) (d) Each room used for sleeping in a dwelling:</p> <p>(i) must have a floor area of at least 5.6 m2 for a single occupant; and</p> <p>(ii) must have at least 3.7 m2 of floor area for each occupant when two or more persons occupy the room;</p> <p>(e) the total area of the habitable rooms in each dwelling unit must total at least 7.4 m2 for each occupant of a dwelling</p> |
| Quebec | Delegated to municipalities | <p>Example: City of Montréal, by-law 94-075, <i>By-law Establishing a Housing Code</i></p> <p>43. A dwelling unit containing only one livable room must have a surface area of at least 17 m2.</p> <p>44. A dwelling unit containing of 2 separate livable rooms must have a surface area of at least 20m2; if it contains more than 2 rooms, 3 additional square metres are required for each additional separate livable room.</p> |

| | | |
|----------------------|--|---|
| Nova Scotia | None found – Halifax By-law M-100 residential occupancy limits for habitable space apply only to rooming, boarding and lodging houses | |
| New Brunswick | <i>Residential Properties Maintenance and Occupancy Code Approval Regulation</i> , NB Reg 84-86, under the <i>Municipalities Act</i> , RSNB 1973, c M-22 | <p>31(2)A dwelling unit shall have at least 9.3 square metres of habitable room floor area for each person resident therein.</p> <p>31(3)Subject to subsection (5), a habitable room used for sleeping purposes shall have a floor area of at least</p> <p>(a) 5.6 square metres, if so used by only one person; and</p> <p>(b) 3.5 square metres per person, if so used by more than one person.</p> |
| Prince Edward Island | <i>Rental Accommodation Regulations</i> , PEI Reg EC 142/70 under the <i>Public Health Act</i> , RSPEI 1988, c P-30 (since replaced by RSPEI 1988, c P-30.1) (Applies to rental housing only) | 2. (1) No person shall rent or allow to be rented or occupied as a sleeping unit or for purposes for sleeping any accommodation unless there is available not less than fifty square feet of floor area for each and every occupant, and also not less than four hundred cubic feet of space for each and every occupant. |
| Federal | Federal (CMHC) Guideline Applies only to social housing | <p>Suitable housing has enough bedrooms for the size and make-up of resident households, according to National Occupancy Standard (NOS) requirements. Enough bedrooms based on NOS requirements means one bedroom for:</p> <ul style="list-style-type: none"> • each cohabiting adult couple; • each lone parent; • unattached household member 18 years of age and over; • same-sex pair of children under age 18; • an additional boy or girl in the family, unless there are two opposite sex children under 5 years of age, in which case they are expected to share a bedroom. <p>A household of one individual can occupy a bachelor unit (i.e. a unit with no bedroom).</p> |

e. Summary

The NOS and provincial and municipal residential occupancy standards all provide a measurement of *internal density*. The standards at the provincial and municipal level can be characterized as facially neutral and less restrictive than the NOS in one

significant way: they do not specify any particular household composition based on age, gender, or relationship amongst members of the household. Even some jurisdictions such as Alberta, that count children as half an adult, are less restrictive than the NOS; by having children under 10 count as half an adult²²⁷ means that rooms that could normally occupy a maximum number of persons could actually accommodate more people if those people were under the age of 10. In contrast, the NOS uses age in conjunction with gender and relationship amongst members of the household to limit the sharing of bedrooms; when two children of opposite sex are over the age of five they may not share a bedroom, and any unattached household member 18 years of age and over may not share a bedroom.

This discussion of the development of residential occupancy standards up to the present raises the question of the government's justifications for adopting standards at certain points in Canadian history.

C. ANALYSIS

Based on the foregoing discussion, what led to the adoption of residential occupancy standards at certain points in Canadian history? This question contributes to a preliminary analysis of the first research question: *What justifications have Canadian governments used for the adoption of residential occupancy standards?*

Two different types of residential occupancy standards emerged at different periods: (i) standards at the provincial and municipal level in the 1950s to 1970s; and (ii)

²²⁷ In this context measuring children as half an adult is a specific concept/term of art which would allow more people to live in the space if children were part of the household.

the NOS in the late 1980s. Since standards developed at different points in Canadian history, each must be considered in turn. As mentioned in Chapter 1, the methodology for legal history involves looking at both *why* the law changed and why it changed *at a particular time*.²²⁸ This analysis involves an examination of the wider social, political and economic context in order to situate the change in the law within the wider context.

i. Analysis of Provincial and Municipal Standards

The main impetus for creating maintenance and occupancy standards (occupancy standards generally, not residential occupancy standards) at the municipal and provincial level in Canada appears to be public health considerations. However, a closer look at the surrounding context suggests that the stated purpose of public health is not the sole justification for adopting provincial and municipal residential occupancy standards.

The federal government turned its attention to housing conditions in the 1950s after Second World War and a population jump due to an increased fertility rate and an influx of immigrants. According to the *Better Place to Live* report, health was cited as the primary stated purpose in bringing about improvements in standards of maintenance and occupancy.²²⁹ Concerns about housing conditions, such as proper plumbing, running water, and ventilation, emerged in the pre-Confederation era, with cholera and typhus epidemics in what was then considered Upper Canada (now Ontario).²³⁰

²²⁸ See Ibbetson, *supra* note 51 at 127.

²²⁹ *Better Place to Live*, *supra* note 27 at 29.

²³⁰ *Ibid* at 41. Interestingly, government records consulted for this thesis made no mention of studies on the relationship between crowding and communicable disease, and nor did those provide any indication of why one particular limit on internal density was chosen over another.

The term *overcrowding* was used throughout the Royal Commission reports cited above, yet the term was never defined. These early reports, which appear to have set the foundation for the municipal and provincial standards that continue today, were crafted without any apparent definition or measure of overcrowding, or at least any explicit definition or measure. While some of the reports make reference to households in slum areas as being overcrowded, they do not state what constitutes overcrowding. This is not to say that overcrowding was not a problem in the early part of the twentieth century; it may well be the case that many households were exceeding the level of internal density above which negative health effects were more likely to occur. However, defining the thing measured is arguably one of the key steps before beginning to understand it, let alone regulate it. Perhaps it is not surprising then, that there appears to be little reference to research that links overcrowding levels to negative health effects.

While public health is cited as a justification for adopting residential occupancy limits at the provincial and municipal levels, the foregoing discussion suggests that ideas of morality were linked to public health, so that the justification for imposing maintenance and occupancy standards may have been concerns about upholding a perception of morality and/or a concept of social well-being based on social norms in addition to public health generally. For example, in Hastings' report, the ideas of health and morality are practically interchangeable.²³¹ Indeed, the City of Winnipeg Report expressly states that standards based on minimum health requirements do not go far

²³¹ See the discussion at 34-36.

enough, and that some more restrictive limit is needed to address “the needs and the social well-being of the family.”²³²

As Canada’s population grew, governments at all levels developed laws and policies to address land use planning, zoning, affordable housing, and housing conditions. Municipalities and provinces, therefore, introduced building codes, sanitary controls, and empowered municipal officials to enforce these new rules. As a young country with an influx of immigrants, Canadian society appears to have also been grappling with ideas as to what it was to be Canadian. As the records suggest, ideas emerged from officials and certain groups as to the proper way to govern one’s household. Therefore, while health may have been the purported justification for residential occupancy standards along with other maintenance and occupancy rules, morality and influencing social norms in housing were certainly part of the subtext.

Scholars have argued that these ideas shaped the first housing laws and policies. For example, in her work on moral reform in English Canada, Mariana Valverde explores the “social purity movement” at the turn of the last century.²³³ The social purity movement, as described by Valverde, was a network of organizations, broadly made up of churches, educators and doctors.²³⁴ She begins with the premise that “[b]y the 1920s the Canadian state had developed, at least in embryonic form, most of the institutions it has today, and in English Canada a certain cultural consensus, based to a large extent on American and British influence but incorporating a new nationalism, had emerged and

²³² City of Winnipeg Report, *supra* note 139 at 5.

²³³ Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McLelland & Stewart Inc, 1991)[Valverde].

²³⁴ *Ibid* at 17.

was being consolidated.”²³⁵ Valverde explores how the social purity movement contributed to the creation of certain social norms in Canada, which helped shape policy as the country grew. She argues that “[m]oral regulation is an important aspect of ruling, helping to constitute class, gender, sexual, and race relations by interpreting both social action and individual identity as fundamentally ethical.”²³⁶ In her view, during the early 1900s, reformers were appealing to British traditions, all the while attempting to define specifically Canadian cultural traits. She notes that the discussion at the time virtually “erased” Indigenous peoples and French Canadians from any discussion of national identity.²³⁷

Valverde’s assertion is compatible with the historical review described herein; in the early part of the twentieth century, housing and public health policies were created with the desire to establish particular social norms, and those policies were later refined with the introduction of by-laws and regulations in the 1940s to 1970s.

Canadian historian Solomon cites Valverde in his work, and notes, “[c]rowded districts were deplored but less as symptoms of poverty than as creators of deviants that reveled in licentiousness and other disreputable conduct, leading to sloth and poverty, lack of hygiene and disease.”²³⁸ Of particular importance, Solomon describes the religious organizations, anti-immigrant groups, doctors, and others in the social purity movement that campaigned to get rid of slum dwellings, noting that “[t]hese reformers

²³⁵ *Ibid* at 15.

²³⁶ *Ibid* at 166.

²³⁷ *Ibid* at 107. See e.g. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 165-176.

²³⁸ Solomon, *supra* note 82 at 27.

seized upon public health laws, and these laws' ability to control where and how people lived, as an instrument in shaping the society they espoused."²³⁹

In his work on housing reform in 1900-1920s, historian Purdy explores the ways that housing reform was intended to "Canadianize" the working class in the early part of the twentieth century.²⁴⁰ Purdy points to concerns about "the large-scale 'infiltration' of non-British immigrants" jeopardizing the future of the "Anglo-Saxon 'race'."²⁴¹

Reform-minded state officials sought popular legitimacy by reinforcing pre-existing notions of the dangerous 'other' – non-British, non-white 'races' and 'nations' and, increasingly, urban native-born and British immigrant workers – in stark opposition to the ideal of the cherished and respectable 'white British Canadian.'²⁴²

Purdy's characterization of the anti-immigrant sentiment at the time and its influence on housing policy is consistent with the discussion above related to housing policy in the 1900s to the 1930s, and, in particular, the language used in Hastings' report.²⁴³

This is not to say that morality and anti-immigrant sentiment were the only underlying rationales. Many government initiatives (often asserted at the federal level and implemented at the provincial or municipal level) were aimed at poverty reduction and improving housing affordability for low-income Canadians. For example, the City of Winnipeg Report cited above made no mention of cultural considerations in its discussion of overcrowding. Therefore, this section is careful to note that there is evidence to support that morality and anti-immigrant sentiment were underlying rationales for introducing residential occupancy standards, but these were not the only ones.

²³⁹ *Ibid* at 29.

²⁴⁰ Purdy, *supra* note 165.

²⁴¹ *Ibid* at 506.

²⁴² *Ibid* at 494.

²⁴³ Hastings' Report, *supra* note 84.

Having explored why provincial and municipal residential occupancy standards were established in the middle of the last century, another question to consider is why have those standards have not changed significantly since first introduced. Since this issue was first identified and regulated in the 1940s to the 1970s, the particular standards set to regulate internal density have not received much attention. Interestingly, the *Better Place to Live* report noted that “there is a constant need to evaluate whether or not existing legislation and practice is meeting current occupancy problems.”²⁴⁴ While other occupancy rules and standards may have changed over time, residential occupancy standards have not changed significantly since first enacted.²⁴⁵ In the absence of any discussion of this matter, one can only speculate as to why residential occupancy standards have not changed significantly since they were first adopted. Inferring from the records, there are at least two possible reasons: (1) no evidence-based research upon which the standards have been set; and (2) improvements in housing conditions over time. First, as mentioned above, the original residential occupancy standards were not linked to any public health or safety evidence, and there is no indication that evidence-based research was used to determine the threshold above which crowding becomes a problem. Recall from Chapter 1 that residential overcrowding can be defined both in terms of the level at which people in a dwelling unit have an adverse response to internal density and in terms of the level of internal density *deemed* by policymakers to be overcrowded. Since the records do not show any consideration of evidence-based research, policymakers may have chosen the particular standard for other reasons. As

²⁴⁴ *Better Place to Live*, *supra* note 27 at 45.

²⁴⁵ Note that Toronto’s By-law, *supra* note 71, s 629-25 no longer restricts occupancy based on gender as did Toronto’s first enactment.

discussed in Chapter 3, it appears there is currently no consensus as to what level of internal density results in adverse health, safety or otherwise; therefore it may be the case that there has been no particular reason for governments to reexamine this issue. A second reason why residential occupancy standards have not been revisited since they were adopted may be because housing conditions have improved over time, while the number of persons per household has decreased. Therefore, if overcrowding is not perceived as a serious issue deserving of governmental attention, then it is unlikely that government would reexamine the particular standards.²⁴⁶

ii. Historical Analysis of the National Occupancy Standard

The NOS was introduced by CMHC in the late 1980s. As canvassed previously, the NOS was intended as a guideline for determining eligibility in social housing. The historical summary shows that the reason the NOS was adopted in the late 1980s was because the federal government was stepping back from its involvement in the administration and delivery of social housing. Under Social Housing Agreements, most provinces and territories would become responsible for the management and delivery of federally funded off-reserve social housing.²⁴⁷ The provinces and territories that sign Social Housing Agreements are obligated to follow CMHC's principles, including a uniform residential occupancy standard.²⁴⁸

²⁴⁶ This is not to suggest that overcrowding is not discussed at all; overcrowded living conditions on reserve are discussed as part of the conversation of housing conditions on reserve. See e.g. Senate, Standing Committee on Aboriginal Peoples, *We Can Do Better: Housing in Inuit Nunangat: Report of the Standing Committee on Aboriginal Peoples*, *supra* note 45. However, in terms of provincial and municipal standards, it does not appear to be on the government's agenda.

²⁴⁷ CMHC Social Housing, *supra* note 177. CMHC has signed Social Housing Agreements with all provinces and territories except Prince Edward Island and Québec.

²⁴⁸ *Ibid.*

CMHC is explicit in its justification for adopting the NOS. As noted by CMHC, the NOS represents “one agreed-upon view from among many potential possibilities as to what would constitute crowding.”²⁴⁹ While the records do not appear to provide any insight as to why the specific limits on gender, age or relationship amongst members of the household are used for the NOS as opposed to others, it is also clear that CMHC justified the NOS on the basis that it reflects “Canadian social norms.”²⁵⁰ In the absence of any evidence showing other factors to justify the decision to adopt the NOS, it appears that reflecting social norms is the primary reason that this particular standard was chosen, adopted as a mean between overcrowding and overhousing in the social housing context.²⁵¹ Therefore the objective in adopting the NOS as a guideline was to apply a social norm to a government activity (i.e. allocating dwelling units to households that qualify for social housing) rather than impose a restriction based on bias.

While applying a social norm for the purposes of ensuring appropriate social housing might be laudable, the application of the NOS appears to have been extended beyond its intended context . Though the NOS is only a guideline, Chapters 3 and 4 explore the effect and use of the NOS in other contexts, and the problematic ways in which it is being used, even now, to shape social norms in Canada.

D. CONCLUSION

The historical analysis leads to a preliminary conclusion of the question: *what justifications have Canadian governments used for the adoption of residential occupancy*

²⁴⁹ CMHC 2014, *supra* note 19 at I-19.

²⁵⁰ CMHC International Housing Indicators Report, *supra* note 199.

²⁵¹ *Ibid.*

standards? Based on the historical review, public health was the asserted justification for the adoption of provincial and municipal residential occupancy standards. However, a deeper examination of the development of the standards and the surrounding context suggests that, while certain public health objectives - like reducing the spread of communicable disease - were on the political agenda, in the absence of medical evidence to support public health as a foundation, one underlying rationale appears to be morality and the desire for new immigrants and low-income Canadians to conform to certain social norms or standards.

The NOS, meanwhile, was adopted as a guideline in social housing several decades later in order for there to be uniform standards for the delivery of needs-based social housing across the country. CMHC justified the NOS on the basis that it reflects “Canadian social norms.”²⁵²

While provincial and municipal residential occupancy standards, on the one hand, and the NOS, on the other, were introduced at different points in Canadian history, a historical analysis suggests that all levels of government justified their adoption because governments either wanted to influence social norms or reflect/implement what they considered social norms.

A historical review is helpful to understand how the law evolved to present day. This in turn allows us to reflect on whether the pressing needs of yesterday are still pressing today, or whether the law ought to shift to accommodate new realities. Chapter 3 builds on Chapter 2 by taking the justifications identified (and rationales, where possible)

²⁵² *Ibid.*

and weighing them against the current literature. Along with deepening and refining an understanding of what are the justifications, Chapter 3 allows the discussion to move to the second research question: *Is there a rational connection between the justifications and the current standards?*

CHAPTER 3: JUSTIFICATIONS FOR RESIDENTIAL OCCUPANCY STANDARDS – COMPARATIVE CONTENT ANALYSIS

A. INTRODUCTION

The historical review in Chapter 2 suggests that public health was the principal justification for the adoption of residential occupancy standards at the provincial and municipal level; however the underlying rationale appears to have included desire to apply social norms through policy. At the national level, the adoption of the NOS explicitly identified social norms as the justification for choosing the criteria to ensure appropriately-sized housing units were allocated to families in need of social housing. Chapter 3 explores current scholarly literature on residential occupancy standards to find out if the justifications observed in the historical review are found in the literature as well.

There are two parts to the content analysis below. First, the justifications from the literature are grouped together and categorized. Second, critiques arising out of the literature that challenge the assumptions underlying the justifications are teased out. This provides some insight into the second research questions, namely: *Is there a rational connection between the justifications and the current residential occupancy standards?* This analysis contributes further to the consideration of whether the justifications and current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters (addressed in Chapter 4). Following the content analysis, a table of justifications and underlying rationales is provided at Table 3-1. Table 3-1 includes any critiques of the justifications as identified in the literature.

The analysis focuses on studies from Canadian as well as American, European and Australian sources from legal literature, social science, architecture and planning. There is not a great deal of Canadian literature on this topic. Several American scholars have made important contributions in this area and help to inform this analysis. To fully appreciate the range of arguments by American scholars on U.S. residential occupancy standards, this thesis would need to devote a chapter to the U.S. housing system. Since this type of comparative legal analysis is outside the scope of this thesis, the U.S. scholarship included and presented herein is that which conveys the general arguments most able to respond to the research questions posed in this thesis.²⁵³ What is ultimately of most interest however is to obtain a broad understanding of different justifications and rationales used to support residential occupancy standards generally.

That said, it is important to note that each study conducted on overcrowding must apply a definition of what is considered *overcrowding*. This is important because different definitions of overcrowding have an effect on the results of the study. The fact that studies conducted in other parts of the world may be applying different definitions of overcrowding adds another layer of uncertainty as to whether the results would be applicable to the Canadian experience. It appears that *persons per room* is the definition most commonly used by researchers, although, as noted in the Gray Matter Report, the rationale for choosing this definition is often not provided.²⁵⁴

²⁵³ For a comprehensive analysis of U.S. housing policy and residential occupancy standards, see Tim Iglesias, “Moving beyond Two-Person-per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards” (2012) 28 Ga St U L Rev 619.

²⁵⁴ Gray Matter Report, *supra* note 5 at 11.

Based on current literature in social science, architecture and planning, and law, public health is again the primary justification for the use of residential occupancy standards, with several authors questioning whether the evidence supports this justification. As this thesis is grounded in law and legal theory, the comparative content analysis does not attempt to critique the medical research cited in some of the scholarly literature; rather it simply points to the conclusions made in social science, architecture and planning, and legal scholarship regarding the medical evidence.

As with the historical review in Chapter 2, a common theme in the academic literature appears to be the shaping and/or imposition of social norms through residential occupancy standards. Several authors advance the argument that public health is used as a justification for imposing a standard even though the true reason may be normative rather than evidence-based.

B. KEY FINDINGS REGARDING JUSTIFICATIONS FOR RESIDENTIAL OCCUPANCY STANDARDS

This section describes sources that identify, and, in most cases, critically assess, the justifications for the adoption and continued use of residential occupancy standards. The results are grouped into categories based on the justifications identified: (i) public health; (ii) safety; (iii) controlling neighbourhood density; and (iv) normative justifications. Each section begins with a discussion of sources that cite the justification or underlying rationale and then proceeds to describe critiques the use of the justification.

i. **Public Health**

The link between overcrowding and negative health effects is not new:

One of the more widely held and cherished notions in medicine is that the spread of infectious disease is facilitated by crowding. This assumption underlies many of the research endeavors seeking to establish a relationship between housing and health, and has been accepted as a truism by policy makers. There is little question that under certain circumstances crowding may be linked to an increased incidence of communicable diseases, but in other circumstances, no such relationship has been discovered.²⁵⁵

A canvass of academic literature from the past twenty years suggests that public health is most commonly identified as the basis upon which governments introduce occupancy standards. This justification appears not only in Canadian literature (related to Canadian residential occupancy standards) but in other jurisdictions as well.

In his extensive work on U.S. residential occupancy standards, American legal scholar Iglesias identifies public health and safety as the primary policy justifications for imposing limits on residential occupancy.²⁵⁶ Similar to the Canadian experience, Iglesias notes that concerns about public health relate to transmission of communicable disease, and psychological distress.²⁵⁷

This assertion is consistent with other American academic sources.²⁵⁸ Textbooks on land use planning often include residential occupancy standards as part of discussions

²⁵⁵ J Cassel, "The relation of the urban environment to health: Toward a conceptual frame and a research strategy" in Hinkle, L E & Loring, W C, eds, *The Effect of the Man-Made Environment on Health and Behavior* (London: Castle House, 1979) at 129.

²⁵⁶ Iglesias, Clarifying, *supra* note 44.

²⁵⁷ *Ibid* at 1213.

²⁵⁸ See e.g. Myers et al, *supra* note 36 at 67.

on occupancy standards and building codes more generally, noting that governments will limit the number of persons in a household for public health and safety reasons.²⁵⁹

The Gray Matter Report reviews the available literature on measuring overcrowding.²⁶⁰ The authors conclude that physical and mental health appears to be the primary justification for adopting residential occupancy standards.²⁶¹

The Gray Matter Report cites a study out of England, which finds that overcrowding has been linked to biological mechanisms that can increase the risk and intensity of infection, including but not limited to: the risk of multiple infections; proximity of other members of the household and hence risk of disease transmission; risk of infection in early stages of life which may lead to more serious infection; risk of prolonged exposure; and risk of long-term adverse effects from infections.²⁶² The authors of the Gray Matter Report argue that while it appears that there is some level of overcrowding that results in an increase in communicable disease such as tuberculosis, there are other factors at play that make it very difficult to come up with an objective standard of overcrowding.²⁶³ The conclusions from the Gray Matter report suggest that public health as a justification for restricting residential occupancy must not be accepted without scrutiny. The authors highlight the complexity of the relationship between overcrowding and health, and confounding variables such as socio-economic factors and

²⁵⁹ See Julian Conrad Juergensmeyer & Thomas E Roberts, *Land Use Planning and Development Regulation Law* 3d ed (West Academic Publishing, 2003)[Juergensmeyer & Roberts] at 309. See also Peter Salsich Jr & Timothy Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* (Chicago, Ill: Real Property, Probate and Trust Law, American Bar Association, 1998)[Salsich Jr & Tryniecki] at 379.

²⁶⁰ Gray Matter Report, *supra* note 5.

²⁶¹ *Ibid* at 34.

²⁶² *Ibid*.

²⁶³ *Ibid* at 4-5.

housing conditions.²⁶⁴ Pointing to the work of several researchers, the Gray Matter Report notes that factors such as the nature and physical condition of the housing, such as dampness, cold, mould, health and hygiene practices, access to health care, income, employment status and education are all relevant to the spread of communicable disease.²⁶⁵

The Gray Matter Report also considers the research on the psychological effects of overcrowding. The research indicates an association between overcrowding and psychological distress, including depression, increased stress, lack of sleep and tension within the household.²⁶⁶ The authors once again note the influence of other socio-economic factors, and the difficulty in establishing causation as opposed to simply correlation.²⁶⁷ Likewise, the research cited on the relationship between children's physical and psychological health and overcrowding yields conflicting results.²⁶⁸ The authors note that "[a]lthough research on the relationship between crowding and psychological distress among children tends to show a consistently positive relationship, more research is needed to establish whether crowding does in fact have similar consequences for children in different cultural settings."²⁶⁹

The findings in the Gray Matter Report are consistent with the conclusions reached in Myers *et al.* Their American study found that the scientific literature on

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid* at 18. See e.g. Robin Kearns, "Worried sick about housing: Extending the debate on housing and health" (1995) 9:1 *Community Mental Health in New Zealand*; Dowell Myers, *supra* note 255.

²⁶⁶ *Ibid* at 24.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid* at 22. See e.g. Gary Evans, "Chronic residential crowding and children's well-being: an ecological perspective" (1998) 69 *Child Development* 1514; Jes Clauson-Kaas, *Crowding and Health in Low-Income Settlements* (Avebury, England: United Nations Centre for Human Settlements, 1997).

²⁶⁹ *Ibid* at 23.

overcrowding suggest that the linkage between overcrowding and negative effects on physical and mental health is inconclusive. As Myers *et al.* point out:

[i]mplicit in all discussions of overcrowding is the assumption that it is a policy problem – that the effects from crowding, and especially *overcrowding*, are deleterious to people’s physical and mental health. Although much analysis has been marshaled to support this conclusion, it has never been definitively established. After a century of debate it is still in question whether so-called over-crowding is harmful to the people affected, or merely distasteful to outsiders who observe its presence among others.²⁷⁰ [emphasis in original]

The myriad of studies that challenge the assertion of a direct correlation between overcrowding and negative health outcomes do so on the basis of two main criticisms. Both relate to the reality that most subjects living in what are considered overcrowded living conditions are also dealing with the effects of poverty: first, it is difficult to separate this issue from the link between health and housing conditions (for example, lack of running water, mold, and dampness) as opposed to overcrowding; and second, it is difficult to separate this issue from the link between health and socio-economic factors; people living in overcrowded homes are more likely to be unemployed, living on a fixed income, or have lower paying job, all factors that also show a correlation with negative health effects.²⁷¹

A recent study by sociologists Lauster and Tester provides some insight into the relationship between overcrowding and mental health in Canada. The authors conducted qualitative research, looking at the subjective experience of overcrowding in an Inuit

²⁷⁰ *Supra* note 36 at 67.

²⁷¹ See Helen Ekstam, “Residential Overcrowding in a “Distressed” and a “Gentrified” Neighbourhood – Towards an Understanding of Crowding in “Gentrified” Neighbourhoods” (2015) 32:4 *Housing Theory & Society* 429 [Ekstam] at 430-431.

community in Nunavut with a high rate of overcrowding based on the NOS.²⁷² They found that the younger generation experienced negative mental health effects which the authors linked to the overcrowded living conditions.²⁷³ Interestingly, the authors found that older generation did not report negative effects associated with overcrowding while the younger generation experienced poor mental health (feelings of depression, stress, and suicidal thoughts.) This discrepancy fit with the authors' theory that overcrowding is a cultural construct; the younger generation was exposed to the Canadian mainstream and was made aware of the unequal opportunities they faced compared to other young Canadians, while the older generation did not grow up with exposure to other ways of life.²⁷⁴ In the authors' view, the subjective feeling of overcrowding contributes to negative mental health outcomes.²⁷⁵ They argue that "there does not appear to be a ready biological process by which material conditions translate into a subject sense of crowding."²⁷⁶ If this proposition is accepted, then an objective standard to regulate overcrowding for public health reasons may be unattainable.

Earlier studies lend weight to the argument that a subjective sense of overcrowding is more closely linked to negative health outcomes than any objective measure of the relationship between overcrowding and health.²⁷⁷ This argument suggests a more nuanced approach to using public health justifications for establishing residential

²⁷² Lauster & Tester, *supra* note 29.

²⁷³ *Ibid.*

²⁷⁴ *Ibid* at 529.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ See Donnelly Beeghley, "The Consequences of Family Crowding: a Theoretical Analysis" (1989) 10:1 *Lifestyles: Family and Economic Issues* 83; Edwards et al, *supra* note 36; Ekstam *supra* note 271.

occupancy standards and that more is required to improve health outcomes than simply restricting residential occupancy.

ii. Safety

Safety is sometimes cited alongside public health as a justification for setting residential occupancy standards.²⁷⁸ As noted in the Gray Matter Report, there is evidence to suggest that at some level of overcrowding there is an increase in fire risks and the ability to exit a dwelling safely in an emergency.²⁷⁹ However, for the same reasons noted in the discussion on public health, there are socio-economic factors at play that make it very difficult to come up with an objective standard of overcrowding to show the level of internal density above which safety risks increase.²⁸⁰ This is not to say that some restriction on the total number of people within a unit would not logically be warranted from a safety perspective. Similar to the research linking negative health effects and overcrowding, the challenge is separating out the other factors to come up with an objective measure.

The discussion surrounding this justification seems to focus almost entirely on health as opposed to safety. Iglesias' works suggests that safety does not appear to be given the same weight as public health concerns.²⁸¹ Rather, safety concerns such as the ability to exit a dwelling in an emergency are more typically dealt with through building codes that

²⁷⁸ See e.g. Iglesias, Clarifying, *supra* note 44 at 1216; Juergensmeyer & Roberts, *supra* note 259.

²⁷⁹ Gray Matter Report, *supra* note 5 at 18.

²⁸⁰ *Ibid* at 4-5.

²⁸¹ Iglesias, Clarifying, *supra* note 44.

deal with the safe construction of buildings, such as provincial and federal laws in place to enforce the *National Building Code*²⁸² and the *National Fire Code*.²⁸³

iii. Controlling Neighbourhood Density

The literature discusses some other related factors that can be used to inform residential occupancy standards. According to Iglesias, residential occupancy standards can also be used to control neighbourhood density.²⁸⁴ By limiting the number of persons in each dwelling unit, residential occupancy standards can work like a form of exclusionary zoning, similar to minimum lot size or floor space requirements to exclude unwanted households. It is suggested that, because families with children need schools and make demands on social services, local governments can use residential occupancy standards as a form of fiscal zoning.²⁸⁵

Local governments can validly exercise their powers to enact by-laws to control density. Zoning is the primary tool for municipalities to control how land is used. It dictates what land uses are permitted in a given zone as well as the number, dimensions and density of dwelling units permitted on a parcel of land.²⁸⁶ While zoning decisions directly control the use of land, they effectively control people who may or may not use the land. Residential occupancy standards operate in a similar way: the municipality can limit the number of the people in dwelling units to control neighbourhood density and fewer people in each household means fewer people in the neighbourhood.

²⁸² Canada, *National Building Code of Canada 2015*, *supra* note 204.

²⁸³ Canada, *National Fire Code 2015*, *supra* note 205.

²⁸⁴ Iglesias, *Clarifying*, *supra* note 44 at 1216.

²⁸⁵ Salsich Jr & Tryniecki, *supra* note 259 at 379-80.

²⁸⁶ Mary Sullivan Mann, *The Right to Housing: Constitutional Issues and Remedies in Exclusionary Zoning* (New York: Praeger Publishers, 1976) at 12.

While zoning is a valid way for municipalities to control land use, there can be negative consequences for some groups when zoning is used to control neighbourhood density; if a neighbourhood is zoned for single family dwelling units on large lots, then many people are priced out of the market. Exclusionary zoning is the term used to refer to zoning practices that set particularly high standards for what is permitted in residential areas, making some areas inaccessible for lower-income groups.²⁸⁷ This concern can also be applied to situations where municipalities use residential occupancy standards to control neighbourhood density; a restrictive standard (i.e. allowing fewer people per household) will mean that larger families must rent three or possibly four-bedroom units, which are more expensive and difficult to find.

This factor is perhaps not as much of a concern in Canada, where residential occupancy standards are applied on a larger scale, namely on a provincial or municipal level rather than the neighbourhood level. That is, residential occupancy standards are not an appropriate way to control the density in certain neighbourhoods because the standards are applied across a jurisdiction (city or province) rather than at the neighbourhood level. It is also important to point out that any regulation or by-law enacting residential occupancy standards must comply with human rights legislation, so any standard that prevents certain groups from accessing housing would be subject to human rights scrutiny.²⁸⁸

²⁸⁷ *Ibid* at 13.

²⁸⁸ See *Manitoba Human Rights Code*, supra note 207, s 58.

iv. Normative Factor

Although not typically stated in any authoritative sense, the literature does lend support to the idea that governments determine residential occupancy standards to reflect social norms in terms of household composition. The Gray Matter Report, for example, notes that “definitions of crowding reflect majority standards, the resources available, and the general philosophy about needs and the responsibilities of the state and the individual.”²⁸⁹

The World Health Organization (“WHO”) conducts research and makes recommendations on housing as a social determinant of health to address health problems in countries where housing policies are not yet in place.²⁹⁰ In a 2011 report, the WHO notes the link between negative physical and mental health effects of overcrowding, and recommends that housing policy adopt minimum occupancy standards to help prevent the negative effects of overcrowding.²⁹¹ It goes on to note however that standards related to social norms may not reflect cultural values in all population groups. Citing the work of Lauster and Tester, the report suggests that policymakers should work with communities to explore their preferences and the potential health impacts of any contemplated residential occupancy standards.²⁹² In making this statement, the WHO appears to

²⁸⁹ Gray Matter Report, *supra* note 5 at 14.

²⁹⁰ World Health Organization, *Housing: shared interests in health and development, Social Determinants of Health Sectoral Briefing Series 1* (Geneva: World Health Organization, 2011) [WHO Report], online: https://apps.who.int/iris/bitstream/handle/10665/44705/9789241502290_eng.pdf [<https://perma.cc/HFL3-F3VW>] (“The bulk of the global burden of disease and the major causes of health inequities, which are found in all countries, arise from the conditions in which people are born, grow, live, work, and age. These conditions are referred to as *social determinants of health* - shorthand that encompasses the social, economic, political, cultural and environmental determinants of health.” at 3).

²⁹¹ *Ibid* at 8.

²⁹² *Ibid* at 9.

recognize the subjective experience of overcrowding, and suggests that subjective experience of overcrowding should be taken into account in setting standards.

The NOS is perhaps one of the best examples of a government imposing a particular view about appropriate living arrangements. Unlike facially neutral residential occupancy standards, as described the NOS explicitly determines the number of bedrooms a household requires based on the composition of the household, including gender, age and relationship amongst members for the purpose of ensuring that appropriately sized housing is allocated to households in social housing. As discussed in Chapter 2, the standard is defined and justified without reference to factors such as health or safety; rather, CMHC justifies the NOS on the basis that it reflects social norms. Recall that in Chapter 2, there was no explicit articulation by the Canadian government to provide any insight as to how it came up with the particular household composition that it considered appropriate to reflect Canadian social norms.

The Gray Matter Report notes that there have been few studies on the reasonableness of the normative assumptions that underlie standards that limit occupancy based on age, gender, and composition of households.²⁹³ One exception noted is a small Australian study, which includes a survey on sleeping arrangements. The authors found no consistency in the age at which respondents thought children of the opposite gender should sleep in separate bedrooms.²⁹⁴

²⁹³ Gray Matter Report, *supra* note 5 at 15.

²⁹⁴ A Burbridge & G Gondor, “Housing: reflections on economic inequality in Berwick” in *The Australian Living Standards Study: Berwick Report*, Australian Institute of Family Studies at 93, as cited in Gray Matter Report, *ibid* at 15. Note that the Australian Bureau of Statistics adopted the Canadian NOS as its

There are several academic sources that critique using social norms to measure or understand the effects of overcrowding. The Gray Matter Report argues that “[d]efinitions that make assumptions about appropriate sleeping arrangements reflect moral and value judgments as much as beliefs about health.”²⁹⁵ The Gray Matter Report cites a study by Mitchell from the 1970s that challenges the normative justifications for residential occupancy standards:

[w]e have vague conceptions of germ theories, good homes, and what we personally like and dislike. But it is another thing to claim that there are universal physiological, psychological and social needs that can be translated into minimum standards for the physical environment.²⁹⁶

A 2014 European housing study by Sunega uses a subjective measure of residential overcrowding to decide which objective housing indicator is best able to capture people’s perception of residential overcrowding, using both a simple one person per room standard and the normative standard adopted by Eurostat in 2005.²⁹⁷ The author notes that both objective standards are based on normative assumptions of what is considered overcrowded.²⁹⁸ The study uses statistical analysis to compare the overcrowding rates in European Union countries with the perceptions of overcrowding as

standard housing indicator to “conform reasonably to social norms in Australia”: W McLennan, *Australian Housing Survey: Housing Characteristics, Costs and Conditions*, (Australian Bureau of Statistics, 1994).

²⁹⁵ *Ibid* at 14.

²⁹⁶ RB Mitchell, “Cultural and health influences on building, housing and community standards: cost implications for the human habitat” (1976) 4 *Human Ecology* as cited in Gray Matter Report, *ibid* at 15.

²⁹⁷ Petr Sunega, “Subjective or Objective? What Matters?” (2014) 1:1 *Critical Housing Analysis* 35.

Eurostat gathers and provides statistical information to the European Union. (The objective measure used by Eurostat is similar to the NOS. It provides that a person is considered as living in an overcrowded household if “the household does not have at its disposal a minimum number of rooms equal to: one room for the household; one room per couple in the household; one room for each single person aged 18 or more; one room per pair of single people of the same gender between 12 and 17 years of age; one room for each single person between 12 and 17 years of age and not included in the previous category; one room per pair of children under 12 years of age.” at 36.)

²⁹⁸ *Ibid* at 39.

reported by individuals in those countries. The study shows that in more “advanced” countries the percentage of the population that reports that their living situation is overcrowded is significantly higher than the objective standards. In post-socialist countries, however, the opposite is true; fewer people report feeling that their living conditions are overcrowded, while the objective standards show a higher rate of overcrowding.²⁹⁹ This finding is relevant to this thesis, as it provides further evidence that different groups experience the negative effects of overcrowding at different levels of internal density. This suggests that further scrutiny is required when looking at the use of normative assumptions for setting residential occupancy standards. It also raises the question of whether subjective experience of overcrowding should be accommodated in setting the standards, consistent with the approach of the WHO.

Another important finding from the study is that the one person per room standard for calculating the overcrowding rate is closer to the subjective overcrowding rate compared to the Eurostat standard.³⁰⁰ This is important to note because the Eurostat standard is similar to the NOS. While this was a European study and its findings cannot be directly applied to the Canadian experience, the conclusions support the contention that overcrowding is subjective and that a normative residential occupancy standard does not reflect the actual perceived experiences of households.³⁰¹ It should also be noted that this study measures housing indicators, as opposed to residential occupancy standards.

²⁹⁹ *Ibid* at 41-42.

³⁰⁰ *Ibid* at 42.

³⁰¹ See also Ekstam, *supra* note 271; Petr Sunega & Martin Lux, “Subjective perception versus objective indicators of crowding and housing affordability” (2016) 31 *J Hous and the Built Environ* 695. Both articles lend further support to the idea that subjective overcrowding does not equate with objective standards/indicators.

However, the idea of one's perception of overcrowding versus an objective standard is applicable to the questions posed in this thesis.

Anthropologist Ellen Pader reviews the history of occupancy standards in the U.S. and traces their origins to policies directed at "Americanizing" the largely low-income, immigrant residents that were settling in the Eastern U.S. She points to government documents citing "health and morality" as the rationale for setting the *two persons per bedroom standard* that persists today.³⁰² Pader's assertion that influencing social norms is the underlying rationale for the adoption of residential occupancy standards in the U.S. parallels the conclusions drawn in Chapter 2 regarding the underlying rationale for municipal and provincial residential occupancy standards in Canada.

Pader argues that the residential occupancy standards in the United States (typically *two persons per bedroom*) can only be justified by "outdated medical arguments and empirically unsupportable moral and cultural dictates."³⁰³ Pader attempts to discredit two purported justifications upon which the U.S. residential occupancy standard are said to be based: (1) that the current standards are reasonable to the ordinary person; and (2) the standards provide for the health, safety, comfort and convenience of households.³⁰⁴ With respect to the first point, she argues that the standards "explicitly derive from upper-class, English and Anglo-American definitions of reasonable" and that this definition does not fit with what is reasonable for people who are less privileged or who belong to other ethnic groups.³⁰⁵ With respect to the second point, she argues that the standards do not

³⁰² Pader, *Inscribing Ethnicity*, *supra* note 38 at 314.

³⁰³ *Ibid* at 304.

³⁰⁴ *Ibid* at 305.

³⁰⁵ *Ibid*.

actually protect the health and safety of households; rather, the standards are trying to protect “a very specific, culturally constructed definition of moral health, safety, comfort and convenience.”³⁰⁶

Pader uses a combination of ethnographic, anthropological and historical approaches to explore the sociopolitical construction of residential occupancy standards in the U.S. She concludes that current residential occupancy standards in the U.S. are “historical and cultural artifacts that have been accorded the status of universal truth.”³⁰⁷ Pader bases her argument on ethnographic fieldwork in Mexico and California, which looks at the way in which different cultures value privacy, individualism, private property, and attitudes toward the body.³⁰⁸ She finds that the Mexicans in her study have a very different idea of appropriate living arrangements, preferring to share bedrooms or beds even when there are more bedrooms available. She argues that the standards in the U.S. originate from a combination of white, upper-class ideals and outdated scientific knowledge.³⁰⁹

The argument that overcrowding is a subjective experience that varies from culture to culture is consistent with Canadian-specific research by Haan, who studies residential overcrowding in immigrant populations. Haan uses 2006 Census of Canada data to provide an overview of potential explanations for the differences in levels of overcrowding between immigrants and Canadian-born households, and to highlight some

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ Ellen Pader, “Spaciality and Social Changes: Domestic Space Use in Mexico and the United States” (1993) 20:1 *American Ethnologist* 114; Ellen Pader, “Spatial Relations and Housing Policy: Regulations the Discriminate Against Mexican Origin Households” 13:2 *Journal of Planning Education and Research* 119 [Pader, *Spatial Relations*]

³⁰⁹ Pader, *Spatial Relations*, *ibid* at 305.

of the knowledge gaps around residential overcrowding.³¹⁰ In his article, Haan defines “residential crowding” as more than one person per room, where all rooms – not only bedrooms – are included.³¹¹ He notes that the difference between rates of overcrowding in the Canadian-born population and the immigrant population have become drastically more pronounced in recent years; in 1971, both the Canadian-born and immigrant population had crowding rates of approximately 1 in 13 households. This rate has stayed roughly the same for the immigrant population (1 in 14 in 2006) while the rate has dropped to 1 in 60 for the Canadian-born population.³¹²

Haan reviews the data and makes some observations about residential overcrowding in Canada. First, residential overcrowding declines as age, education, and time spent in Canada increase. Second, residential overcrowding is more likely to occur in households below the low-income cutoff or where members of the household are unemployed. And finally, even controlling for the factors described above, there are cultural differences in the levels of residential overcrowding.³¹³

Based on his assessment of the data, Haan concludes that groups relate to overcrowding differently, and “that labeling [over]crowding as something that is always good or bad, cultural or economic, loses some of its meaning.”³¹⁴ He suggests that more research is required, cautioning that “[i]n our era of evidence-based social policy [...] it is

³¹⁰ Haan, *supra* note 31.

³¹¹ *Ibid* at 17. In order to stay consistent, this thesis will nonetheless use the term “overcrowding”.

³¹² *Ibid* at 18.

³¹³ *Ibid* at 20.

³¹⁴ *Ibid* at 21.

important to first identify the factors behind a policy-relevant occurrence before responding to it.”³¹⁵

v. A Word on Private Landlords

Private landlords and housing providers may have other justifications for setting residential occupancy limits, but these are not included in the content analysis because they are not government justifications. The literature suggests that private landlords may limit the number of people living in their rental units for reasons such as avoiding higher management costs, higher insurance costs, and extra maintenance and repair.³¹⁶ Although an indirect consideration, Iglesias also points out that neighbours may be concerned about external density because they fear that more people living in a dwelling unit will cause excessive noise and increased traffic.³¹⁷

vi. Summary of Factors

Drawing on the literature related to residential occupancy standards a comparative content analysis reveals that public health is the primary stated justification for imposing residential occupancy standards. However, a closer examination suggests that normative factors play a key role, although not always explicitly stated.

³¹⁵ *Ibid.* See also Daniel Hiebert, “Newcomers in the Canadian Housing Market” (2010) *Canadian Issues / Thèmes Canadiens* 8 (author notes overcrowding decreased as time living in Canada increased. The author also notes that for some households in the study “large households are assembled in an effort to pool incomes and enable homeownership. In other words, many immigrants trade crowding for equity in the housing market.” at 13.).

³¹⁶ Iglesias, Clarifying, *supra* note 44 at 1217. Note that in setting their own residential occupancy rules, private landlords are limited by residential tenancy legislation and human rights legislation, which will be discussed further in Chapter 4.

³¹⁷ *Ibid.*

Table 3-1. Summary of factors used to justify residential occupancy standards

| Factor | Objectives (stated or implied) | Critique |
|-----------------------------------|--|---|
| Public health | <ul style="list-style-type: none"> - reduce the spread of communicable disease - prevent negative mental health effects of overcrowding | <ul style="list-style-type: none"> - No consensus in literature on level of internal density which leads to negative health outcomes - Confounding variables (socioeconomic factors and housing conditions) |
| Safety | <ul style="list-style-type: none"> - ability for members of a household to safely exit the premises in an emergency | <ul style="list-style-type: none"> - Lack of evidence on level of internal density which leads to safety risks - Confounding variables (socioeconomic and housing conditions) - Can be addressed in building codes |
| Controlling neighbourhood density | <ul style="list-style-type: none"> - control population at the local level to reduce strain on social services | <ul style="list-style-type: none"> - Can segregate communities- similar critique to exclusionary zoning |
| Morality/Normative | <ul style="list-style-type: none"> - conform with what is deemed an appropriate or acceptable way to order one's household and sleeping arrangements based on certain perspective | <ul style="list-style-type: none"> - overcrowding is subjective/ a cultural construct - imposes the dominant view on other groups in society, denies housing to those who do not conform |

C. CONCLUSION

The comparative content analysis contributes to our understanding of the first research question: *what justifications have governments used for the adoption of residential occupancy standards?* The findings from the analysis are consistent with the historical review in Chapter 2; public health is the primary stated factor for setting residential occupancy standards. Also consistent with Chapter 2, morality/shaping social norms is often cited in the literature as a justification or underlying rationale. In addition to these two justifications, the literature also suggests that safety and controlling neighbourhood density play a role.

The sources identified in the comparative content analysis allow for an assessment of the second research question regarding *whether there is a rational connection or coherency between the justifications and the current residential occupancy standards*. Looking at public health as the justification, several sources, including the Gray Matter Report, which analyzes studies on overcrowding across many jurisdictions, conclude that there is no consensus as to the level of overcrowding which results in negative health outcomes.³¹⁸ It appears that there are confounding variables, such as poverty and housing conditions, which render an objective assessment of overcrowding extremely difficult. Therefore, while there may indeed be a threshold above which internal density causes negative health effects, this threshold has so far not been proven. Additionally, not all groups experience the negative effects of overcrowding in the same way. Myers et al. argue that the issue of overcrowding exemplifies the problematic nature of imposing a uniform standard in an evolving and multiethnic society. The authors contend that “[o]vercrowding is a highly complex problem, involving household structure, racial and ethnic diversity, housing availability, and consumer preferences.”³¹⁹

Recall that at the municipal and provincial level, the standards are based on numbers of persons per square metre or foot. The historical review in Chapter 2 did not reveal any discussion of why the particular space requirement was chosen over another; it appears that after the first jurisdictions enacted regulations or by-laws specifying a particular space requirement, the other provinces and municipalities followed suit. The NOS restricts occupancy based on number of persons per bedroom with specific

³¹⁸ Gray Matter Report, *supra* note 5 at 34.

³¹⁹ Myers et al, *supra* note 36 at 66.

restrictions based on the age, gender, and relationship between members of the household. This standard was explicitly chosen to reflect and implement social norms. Because of the two different types of residential occupancy standard at play, it is necessary to deal with each in turn – the provincial and municipal standards on the one hand and the federal NOS on the other.

With respect to the provincial and municipal standards and the public health justification, the literature suggests that there is no consensus as to the level of internal density above which negative health effects arise. While it may be the case that the 50 or 80 square feet of habitable floor area per person standard in several municipal by-laws would address the adverse effects of overcrowding if enforced, there is no apparent coherence between the justification and the standard. Therefore, based on the conclusions reached in several sources noted in the comparative content analysis, it appears that while there is some correlation between overcrowding and negative health effects, there are many confounding variables and therefore it is not possible to determine the threshold above which internal density becomes problematic.³²⁰ Further, the author did not uncover evidence that the government considered research on health effects of overcrowding before implementing residential occupancy standards. This conclusion is consistent with the historical analysis in Chapter 2. If the government purports to use residential occupancy standards to avoid the negative health effects of overcrowding, there appears to be no explicit evidence that the current residential occupancy standards are rationally connected to that objective. That being said, the historical review in Chapter 2 shows that levels of internal density were much higher in the first half of the twentieth century, and

³²⁰ See the conclusions reached in the Gray Matter Report, *supra* note 5.

it is possible that overcrowding was contributing to negative health effects along with other variables. In the first half of the twentieth century, it was not unusual for a household to include parents and children, other relatives, or even boarders. In 1941, 38.2% of Canadian households had five or more people living in the home.³²¹ Therefore, while the sources considered in this thesis do not allow for a conclusion as to whether the specific measurements chosen were rationally connected to the objective of public health, it can be concluded that it was rational to impose some sort of a standard to deal with the situation in housing at the time.

Given that morality and shaping social norms appears to be an underlying rationale for provincial and municipal standards, a consideration of coherency should also consider morality or shaping social norms as a rationale. Pader's position - that the standards are actually trying to protect a culturally constricted definition of moral health - ties into critical legal theories that examine the way laws and policies are created and applied by the dominant class, which holds a particular view of what is socially or morally acceptable. It is interesting that Pader makes these arguments about the U.S.'s residential occupancy standards, which are neutral on their face. She argues that, while the standards may be facially neutral, they have a disproportionate effect on certain groups whose cultural construct or economic reality may not fit with the *two persons per bedroom standard*.³²² Likewise, it could be argued that provincial and municipal standards, while facially neutral, were really trying to target those low-income and new

³²¹ Statistics Canada, *The shift to smaller households over the past century*, Chart 1, online: <<<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015008-eng.htm>>. The data for Chart 1 is attributed to: 1851 to 1921—B Ram 1990, *New Trends in the Family*, Statistics Canada Catalogue no 91-535E, Appendix Table 5.1; 1931 to 1971—S Wargon 1979, *Canadian Households and Families*, Statistics Canada, Catalogue no 99-753; 1976 to 2011—Statistics Canada, censuses of population, 1976 to 2011.

³²² Pader, *Inscribing Ethnicity*, *supra* note 38 at 305.

immigrants who did not fit the mould of proper Canadians. As Valverde argues, housing policy in the early twentieth century was influenced by moral reform movement, and it appears that public health and morality were inextricably linked.³²³ Therefore, it could perhaps be argued that the adoption of provincial and municipal residential occupancy standards was also rationally connected to the goal of shaping “less desirable” households to fit with a particular construct of a proper home.

At the federal level, the NOS was introduced as a guideline to be used in the social housing context, for the specific purpose of ensuring housing units were assigned to families of the appropriate size. The stated justification for adopting the NOS as the measure is to fit with Canadian social norms. While there are problems inherent in using a standard based on social norms, as explored in this chapter, there appears to be coherency between the justification and the standard. To illustrate, if two households were both eligible for social housing, and one household consisted of two parents and two daughters, based on the NOS formula the household would be eligible for a two-bedroom apartment. If the household consisted of two parents, one young daughter and one teenaged son, the household would be eligible for a three-bedroom apartment. Based on the standard, the second household would not be expected to have the young daughter and the teenaged son share a bedroom, which is perhaps consistent with the preferences of many Canadian households. If used only in the social housing context and only as a guideline, it appears that there is a rational connection between the justification and the chosen standard. Where this conclusion begins to fall apart however is in situations where the NOS is extended beyond its intended use.

³²³ Valverde, *supra* note 233.

More generally, as discussed in Chapter 2, morality and the desire to shape social norms appear to be the underlying rationale for adopting provincial and municipal residential occupancy standards as well as the NOS. So the question should also be posed: *Is there a rational connection between shaping social norms and the current residential occupancy standards?* The comparative content analysis did not provide any insight into whether using residential occupancy standards is an effective way to shape social norms. This may be because the more important consideration here is not whether there is evidence that residential occupancy standards help to shape social norms of how to order one's household, but rather whether governments are justified in imposing standards to dictate how all groups should order their private lives if there is no connection to health or safety.

Another way to look at this issue is to consider how those justifications and the current residential occupancy standards fit with the contemporary Canadian experience, which is the third research question in this thesis, explored further in Chapter 4. The literature above critically assesses government policy for attempting to influence social norms through residential occupancy standards in an attempt to "Americanize" or rather "Canadianize" newcomers. If a government policy restricts access to housing based on one idea of what constitutes a household, then it is denying access to housing for those groups who have different concept of family, household or privacy.

Criticisms about the current residential occupancy standards are arguably irrelevant unless they actually impact on people's lives. Chapter 4 will consider the impacts of the current residential occupancy standards on Canadian society. Canvassing human rights decisions and the surrounding discussion regarding discrimination in rental housing,

Chapter 4 will address the question: *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?*

CHAPTER 4. IMPLICATIONS OF RESIDENTIAL OCCUPANCY STANDARDS: CASE LAW/HUMAN RIGHTS ANALYSIS

A. CHAPTER OVERVIEW

What impact do residential occupancy standards have in terms of access to housing? Having explored some of the critiques of using social norms to set residential occupancy standards in Chapter 3 and suggesting a possible lack of coherency between the justifications and the standards, Chapter 4 approaches the research questions from another angle, by looking at the impact of residential occupancy standards and assesses the third research question: *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?* In other words, the question is not just whether the standards make sense in terms of coherency, but whether they are appropriate.

Given that residential occupancy standards and private occupancy limits are more likely to impact renters as opposed to homeowners, Chapter 4 takes a closer look at “who the renters are” before moving onto a case law and human rights analysis. Chapter 4 canvasses case law, human rights and other administrative decisions where residential occupancy standards or rules imposed by social housing providers or private landlords are addressed. This methodology involves identifying the relevant case law and decisions from provincial and territorial human rights tribunals, and grouping the decisions into themes. (When discussing the case law, human rights decisions and other administrative decisions generally, the term *decisions* will be used.) Only decisions from the year 2000 onwards are included in a search, so as to capture the contemporary Canadian

experience.³²⁴ While the residential tenancy legislation in most provinces and territories has its own adjudication processes, those administrative processes are not accessible via the ordinary databases and are excluded from the scope of this chapter, save for one decision as it directly relates to the research question posed and it was captured by the search methods employed for this chapter.

The process for administering human rights complaints varies from jurisdiction to jurisdiction. All provinces and territories have a complaints process that typically moves through stages of attempted mediation and investigation. Only those complaints that have merit and are neither resolved nor abandoned along the way will end up in a hearing before a human rights tribunal³²⁵ or referred to the superior court of the enacting jurisdiction.³²⁶ Therefore, only a fraction of complaints result in reported decisions. This chapter will not analyze jurisdictional discrepancies or comment on why certain jurisdictions have produced more decisions than others. Rather, it will simply identify the relevant decisions and base the analysis on those decisions, noting the potential limitations of this methodology. What emerges from this analysis is arguably a “snapshot” of the highest profile cases, which provides a useful starting point from which to understand the impact of the standards.

Following a canvass of decisions, Chapter 4 analyzes the emerging themes. An analysis of these particular decisions highlights a curious and significant issue: there

³²⁴ Note that there are a number of pre-2000 human rights decisions that address discrimination on the basis of family status in the housing context, which are not part of this analysis. See e.g. *Dudnik v York Condominium Corp No 216* (1990), 12 CHRR D/325; *Thurston v Lu* (1993), 23 CHRR D/253; *Andrews v Ptasznyk*, [1998] OHRBID No 4; *Leonis v Metropolitan Toronto Condominium Corp No 741*, [1998] OHRBID No 12; *Desroches v Quebec* (1997), 30 CHRR D/345.

³²⁵ See e.g. *Human Rights Code*, RSBC 1996, c 210, s 31.

³²⁶ See e.g. *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2, s 35.

appears to be a general lack of understanding of the legal status of the NOS and the restrictions that both social housing providers and private landlords are entitled to impose while still complying with human rights legislation. This chapter goes on to consider what can be gleaned from the decisions and how residential occupancy standards may be creating a barrier for accessing housing in some situations. It concludes with an assessment of what the decisions contribute in terms of answering the question of whether the justifications and current residential occupancy standards are an appropriate way to regulate concerns about overcrowding.

B. DEMOGRAPHICS OF RENTERS IN CANADA

A description of the demographics of renters in Canada helps to situate the analysis of human rights decisions. This section does not attempt to provide a comprehensive review of the rental housing market in Canada, but merely seeks to provide some insight into who the renters are.

Residential occupancy standards and occupancy rules imposed by private landlords have a greater impact on renters as opposed to homeowners; while homeowners may allow as many people as they wish to live in their home,³²⁷ renters are subject to residential occupancy standards (in the case of social housing and cooperatives) and occupancy limits set by landlords (in the case of private rental housing.) When applying for rental housing, typically the prospective renter must disclose who will be living in the home, and often has a contractual obligation to notify the landlord when there has been a change in the identity and/or number of occupants. The residential tenancy legislation in

³²⁷ Subject only to the complaints-based enforcement regime under the applicable provincial or municipal residential occupancy standards.

provinces or territories typically contains a provision that addresses overcrowding in rental units, such that the tenant can be evicted if the tenant allows the unit to contravene “health, safety or housing standards set out in law or in the tenancy agreement.”³²⁸

The number of renter households in Canada rose slightly from 4.0 million to 4.6 million between 2015 and 2016.³²⁹ Rental housing demand is outpacing supply, with vacancy rates decreasing to 2.4% nation-wide.³³⁰ The increase in demand for rental housing is attributed to two main factors: (1) an aging population along with a decline in homeownership rates for young Canadians; and (2) an increase in new immigrant families. In terms of the aging population, there is a trend for older adults (65+ years) to move into rental housing, while younger adults (20-34 years) are less likely to buy a home compared to the “baby boom generation” when they were the same age in the late 1970s and 1980s.³³¹ The decision to rent as opposed to buy for younger adults appears to be driven by both preferences and shelter costs.³³² In terms of immigration, the majority of new immigrants and refugees rent when they first arrive in Canada, given their often precarious financial situation and lack of credit history.³³³

³²⁸ See e.g. *The Residential Tenancies Act*, *supra* note 206, s 76. Manitoba’s statute does not provide clarification as to the health, safety or housing standards to which it is referring. Section 96(1)(a)(viii) provides that a landlord may give the tenant a termination notice if the tenant fails to comply with s 76.

³²⁹ CMHC, Canadian Observer Data Table: Number of Renters Households (x1000) – Canada, Provinces and Selected Metropolitan Areas, 2006-2015, online: < <https://www.cmhc-schl.gc.ca/en/data-and-research/data-tables/number-renter-households-renter-canada-provinces-cmas> > [<https://perma.cc/PCV8-675A>].

³³⁰ CMHC, Rental Market Report, Canada Highlights (2018) [CMHC Rental Market Report], online: < http://publications.gc.ca/collections/collection_2018/schl-cmhc/NH12-249-2018-eng.pdf > [<https://perma.cc/LAC2-XZVW>].

³³¹ *Ibid* at 2.

³³² *Ibid*.

³³³ *Ibid*.

The challenges for low-income Canadians in terms of finding affordable rental housing are well documented.³³⁴ With vacancy rates on the decline, it is becoming increasingly difficult for low-income Canadians to find appropriate housing. For example, the cost of a two-bedroom apartment increased by 3.5% between 2017 and 2018, which is higher than the rate of inflation during that time.³³⁵ The challenges for larger families are even more pronounced when one considers that the vacancy rate in 2018 was 1.0% for two-bedroom apartments and only 0.8% for 3+ bedroom apartments.³³⁶

Recall that a household is considered to be in core housing need if it does not meet one or more of the adequacy, suitability (i.e. not meeting the NOS) or affordability standards and it would have to spend more than 30% of its gross income to access acceptable housing.³³⁷ Based on 2011 census and 2011 National Household Survey data, low-income renters, single parents, indigenous households, and new immigrant and refugee households are more likely to be in core housing need as compared to other Canadians.³³⁸

26.4% of renter households were in core housing need, compared to 6.5% of homeowner households.³³⁹ The vast majority of those renters fell into the core housing need category because they were below the affordability standard. Only 1.4% of renters

³³⁴ Suttor, *supra* note 19; Sherrell, *supra* note 12 at 52; Cohen & Corrado, *supra* note 24; Paradis, *supra* note 20; Carter et al, *supra* note 20.

³³⁵ CMHC Rental Market Report, *supra* note 330 at 4. The annual inflation rate was 1.9% based on Consumer Price Index between December 2017 and December 2018.

³³⁶ CMHC, Renting in Canada, online: <<https://www.cmhc-schl.gc.ca/en/rental-housing>> [<https://perma.cc/QU3M-4PCE>].

³³⁷ CMHC Core Housing Need, *supra* note 194.

³³⁸ *Ibid.*

³³⁹ *Ibid.*

in core housing need were only below the suitability standard, while still meeting the other standards.³⁴⁰

The number of households in core housing need climbs when the focus is on certain populations. For example, 43% of single parent families were considered to be in core housing need (45.4% for single mother households and 29.3% for single father households).³⁴¹ 37.6% of recent immigrants (defined as arriving in Canada between 2006 and 2011) were in core housing.³⁴² Recent immigrants tend to have larger households compared to the general population, which may contribute to challenges in finding suitable and affordable housing.³⁴³ 25.9% of Aboriginal households³⁴⁴ were in core housing, and the number climbs to 45% for renters identifying as Inuit.³⁴⁵ In fact, based on 2016 census data, Inuit households are the group most likely to fall below the suitability standard (either alone or in combination with other standards) than any other group.³⁴⁶ When households fall into several marginalized groups the incidence of core housing need is more pronounced, with Indigenous single parent households having some of the most pronounced incidences of core housing need.³⁴⁷

While many low-income Canadians would qualify for social housing programs, a shortage of social housing units means that many households in need must seek out

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ Carter et al, *supra* note 20 at 5.

³⁴⁴ CMHC defines the term “Aboriginal household” as “any family household in which at least one spouse, common-law partner, or lone parent self-identified as Aboriginal, or any household (family or non-family) in which at least 50% of household members self-identified as Aboriginal.”

³⁴⁵ *Ibid.*

³⁴⁶ CMHC, *Socio Economic Analysis: The Housing Conditions of Off-Reserve Aboriginal Households* (Ottawa: Canada Mortgage and Housing Corporation, 2019) at 10.

³⁴⁷ *Ibid* at 12.

housing in the private rental market. For example, Paradis found that almost all households sampled in a 2013 survey of Toronto families with children living in rental high-rise apartments would qualify for subsidized housing based on income, yet with approximately 23,000 households on the waitlist in Toronto, they were not able to access those programs.³⁴⁸ Housing providers and families surveyed responded that overcrowding is often a strategy to cope with high housing costs. For instance, some households will use a living room as a bedroom, or parents will share a bedroom with their children.³⁴⁹ The survey also showed that doubling up was more common among new immigrant households, a phenomenon that is likely not reflected in census data since this would be taking place informally for fear of eviction.³⁵⁰ Paradis points to affordability and discrimination as barriers to access housing for marginalized groups, noting that risk of homelessness is related to race, immigration status, gender (in particular single mothers), and socioeconomic status.³⁵¹ This conclusion is consistent with other scholarly works such as Carter et al., who find that “[c]ompared to non-newcomers, immigrants and refugees are at a greater risk of living in precarious housing, in overcrowded conditions, or in housing that does not meet standards conditions.”³⁵²

While this is merely a brief description of the rental housing market and the challenges for low-income groups in the rental market, it provides some context for the analysis of decisions that follows.

³⁴⁸ Paradis, *supra* note 20 at 27.

³⁴⁹ *Ibid* at 11.

³⁵⁰ *Ibid* at 12.

³⁵¹ *Ibid* at 13; 17-18.

³⁵² Carter et al, *supra* note 20 at 5.

C. CASE LAW/HUMAN RIGHTS ANALYSIS

A search of databases using the relevant search terms yields only thirteen decisions where residential occupancy standards or occupancy limits imposed by private landlords are at issue. Nine out of thirteen decisions are related to human rights complaints (decisions of human rights tribunals, applications to summarily dismiss human rights complaints, or appeals); one is a judicial review of an Indigenous Services Canada decision; two are evictions from condominiums due to violating the occupancy limit; and one is an administrative decision in the social housing context.

Based on search results, the human rights decisions where the complainant alleged discrimination are all based on family status as the protected characteristic. While a broader search of discrimination claims based on other protected characteristics such as race or national or ethnic origin in the housing context yields hundreds of results, those cases are not related to occupancy limits or the application of residential occupancy standards, which is why they are not included in this chapter.

After summarizing the relevant decisions, this section will tease out themes and provide an analysis of what the cases and human rights decisions tell in terms of the impact of residential occupancy standards.

i. *Relevant Decisions*

Two main themes emerge from an analysis of the decisions: (i) the meaning of family and alleged discrimination based on family status is often at issue; and (ii) there is a general lack of understanding of the legal status of the NOS. This section provides a summary of the decisions in Table 4-1 and summarizes the relevant themes. Following a

discussion of the decisions, this chapter analyses the themes using critical legal theory arguments, to help understand the impact of residential occupancy standards.

Table 4-1. Relevant case law & administrative decisions

C = Complainant; R = Respondent

| Name/Citation | Jurisdiction | Nature of Decision | Outcome |
|---|--|--|--|
| <i>Moore v. Wellington Society</i> , 2012 BCHRT 316 | BC (application to dismiss complaint) | C claimed discrimination on basis of family status (mother & child, sought 1 bedroom) | R's application dismissed |
| <i>Johnson v. Cheng</i> , 2012 BCHRT 408 | BC (application to dismiss complaint) | C claimed discrimination on basis of family status (mother and child, sought 1 bedroom) | R's application dismissed |
| <i>Bone v. Mission Co-op</i> , 2008 BCHRT 122 | BC (hearing) | C claimed discrimination on the basis of family status (C living in 2 bedroom; after wife's death co-op wanted him to move to 1 bedroom) | Complaint dismissed (accommodating the preference would cause undue hardship on co-op) |
| <i>McGovern v. Avalon</i> , 2012 BCHRT 408 | BC (application to dismiss complaint) | C claimed discrimination on the basis of family status (co-op would not provide 3 bedroom unit to grandmother) | Complaint dismissed (no evidence C needed unit for her grandchildren who were in child welfare system) |
| <i>Dubois v. Benryk Mews</i> , 2012 BCHRT 224 | BC (hearing) | C claimed discrimination based on family status (co-op would not provide 3 bedroom for married couple and child) | Complaint dismissed (accommodating the preference would cause undue hardship on co-op) |
| <i>Cha and Cha v. Hollyburn Estates (No 2)</i> , [2005] BCHRT 409 | BC (hearing) | C claimed discrimination based on family status (landlord would not rent one-bedroom unit to couple + baby) | Complaint allowed |
| <i>Abernathy v. Stevenson</i> , [2017] BCHRT 239 | BC (application to dismiss complaint) | C claimed discrimination based on family status (landlord would not rent three-bedroom unit to family of six) | R's application dismissed |
| <i>Hiebert v. Martin-Liberty Realty Ltd.</i> , 2009 MHRC (available only on MHRC website) | MB (hearing) | C claimed discrimination based on family status (mother with child denied rental housing on upper floor because R would only rent ground-floor units to renters with children) | Complaint allowed. R could not show the restrictive rule was reasonably justified. |

| | | | |
|---|--------------------------------------|---|--|
| <i>Cunanan v. Boolean Developments</i> , 2003 HRTO | ON (hearing) | C claimed discrimination on the basis of family status (mother with 3 sons denied 3 bedroom unit) | Complaint allowed. R's unwritten policy of "Canadian standards" was discriminatory |
| <i>Nipissing Condominium Corp No. 4 v. Kilfoyl</i> , [2009] O.J. 3718 (Upheld by ONCA: 2010 ONCA 217) | ON SC (not a human rights complaint) | Plaintiff sought declaration that defendant violated Condo Act by allowing roomers/boarders to live in unit that were not part of the family | Condo's restriction to "one family residence" to exclude roomers or boarders is valid and does not infringe the Human Rights Code. |
| <i>Killam Properties Inc. v. Frail</i> , [2009] NSJ No 653 | NS (appeal of small claims decision) | Appellant evicted because had too many people living in unit (Father + 2 children in one bedroom) | Small claims did not have jurisdiction to interpret human rights legislation. (Would have found in favour of landlord. Can evict for too many occupants) |
| <i>Stagg v Canada (Attorney General)</i> , 2019 FC 630 | Federal Court | Judicial review of termination of evacuee benefits after flood. Plaintiff argued gov't has not provided enough housing (argument partly based on NOS) | Dismissed; Plaintiff not able to show decision was unreasonable |
| <i>K'Aodee v Mackenzie</i> , 2013 CanLII 24050 (NWT RO) | NWT (Rental Officer) | Applicant living in 4 bedroom social housing unit, refusing to move into 1 bedroom – no human rights argument | Dismissed; applicant could not stay in 4 bedroom when other families in need of larger units |

ii. *Meaning of Family and Alleged Discrimination Based on Family Status*

One of two important themes that emerge from an analysis of the decisions is that residential occupancy standards and the occupancy limits of private landlords are creating a barrier in terms of access to housing. This barrier appears to be affecting families with children, and, in particular, single mothers. Before discussing the decisions, some background into human rights legislation is required.

All human rights legislation in Canada prohibits discrimination in a variety of contexts, including tenancy.³⁵³ While definitions of discrimination vary slightly from jurisdiction to jurisdiction, essentially discrimination is treating a person or group differently (to their disadvantage) without reasonable cause, on the basis of a protected characteristic or failing to reasonably accommodate a person or group's special needs.³⁵⁴ The list of protected characteristics, also known as prohibited grounds, is quite similar in human rights statutes (with some variations) and typically includes: ancestry, including colour and perceived race; nationality or national origin; ethnic background or origin; religion or creed, or religious belief, religious association or religious activity; age; sex; gender identity; sexual orientation; physical or mental disability; and family status.³⁵⁵ Family status as a protected characteristic has developed over the years and a body of jurisprudence has developed that considers what is encompassed within family status under human rights legislation.³⁵⁶ The definition of family status is not uniform across human rights statutes: some define it as "related by blood, marriage or adoption"³⁵⁷; some provide a more limited definition of "being in a parent-child relationship"³⁵⁸; while others do not define family status to allow for judicial interpretation.³⁵⁹

The test for discrimination under human rights legislation was established by the Supreme Court of Canada in *British Columbia (Public Relations Commission) v. British*

³⁵³ See e.g. *Manitoba Human Rights Code*, *supra* note 207.

³⁵⁴ See e.g. *ibid*, s 9(1).

³⁵⁵ See e.g. *ibid*, s 9(2). Some jurisdictions include other protected grounds such as source of income or criminal record.

³⁵⁶ For an in-depth discussion of family status as a prohibited ground of discrimination, see British Columbia Law Institute, "Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada – A Study Paper" 2012 CanLII Docs 375.

³⁵⁷ See e.g. *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 44(1)(f).

³⁵⁸ See e.g. *Human Rights Act*, RSNS 1989, c 214, s 3(h).

³⁵⁹ See e.g. *Manitoba Code*, *supra* note 207.

Columbia Government and Service Employee's Union (B.C.G.S.E.U.) ("Meiorin").³⁶⁰

First, the complainant must show that they were treated differently on the basis of a protected characteristic. If the first step is established, then the onus shifts to the respondent to show a bona fide reasonable justification for the discriminatory treatment.³⁶¹ The Supreme Court of Canada has long held that human rights legislation ought to be interpreted in a liberal and purposive manner in order to advance its broad underlying policy considerations.³⁶² An obvious example of discrimination on the basis of family status in the housing context is when a landlord denies rental accommodation to a family because the family has young children and the landlord only wants to rent to families without children. As the following discussion illustrates, the issues are often less obvious than that.

In *Cunanan v. Boolean Developments*,³⁶³ the Ontario Human Rights Tribunal heard the complaint of a single mother with three children who was denied rental accommodation because the respondent did not want to rent to a single parent with three children. The Ontario Human Rights Tribunal looked at the respondent's unwritten policy of "Canadian standards" which it used to determine appropriate families for its units.³⁶⁴ In finding that the respondent discriminated against the complainant on the basis of family status, the Ontario Human Rights Tribunal commented on the purpose of human rights protection in this context:

³⁶⁰[1999] SCJ No 46, [1999] 3 SCR 3 [*Meiorin*].

³⁶¹ *Ibid.*

³⁶² *B v Ontario (Human Rights Commission)*, 2002 SCC 66 at para 44.

³⁶³ 2003 HRTO 17.

³⁶⁴ *Ibid* at para 65.

The purpose of prohibiting discrimination on the basis of family status with respect to the occupancy of accommodation is to remedy the hardship experienced by families with children, who have traditionally experienced difficulty in obtaining equal access to the rental of living accommodation, particularly in high-density urban areas. The importance of enforcing the prohibition reflects the reality that: (i) the family is the natural and fundamental group unit of society;³⁶⁵ and (ii) housing represents a basic need of every individual in our society.

The tribunal cited an earlier decision in *Fakhoury v. Las Brisas Ltd.*,³⁶⁶ which was decided on a similar issue. In that decision, the Ontario Human Rights Tribunal held:

The respondents will readily rent a two-bedroom apartment to four persons, provided only that no more than two of those persons are children. Two parents and two children can, therefore, occupy the unit that is the subject of this dispute. The complainant, being in the position of a single parent with three children was denied access to the apartment...A nuclear family of two parents and two children could freely have the unit while a single parent with three children could not. In these circumstances, I find it impossible to conclude other than that the distinction drawn by the respondents in denying the unit to the complainant was based solely on “family status.”

That is a distinction the legislation will not countenance. In the eyes of the Ontario *Human Rights Code* a family of four is a family of four...The Legislature has deemed it appropriate, indeed urgent, to protect families and their children in their access to reasonable living accommodation. The Code does not permit landlords to impose their vision of the “normal” family to deny equal access to accommodation to single parents solely because of their family status.³⁶⁷ [emphasis added]

These two paragraphs succinctly capture one of the main themes that emerges from the decisions, and indeed, one of the main themes of this thesis. If residential occupancy limits are in place to limit internal density for public health and safety (as in the case of governmental standards) or maintenance costs, wear and tear, etc. (for private housing providers), then only the number of occupants should matter; not the composition of the household. The point that the Ontario Human Rights Tribunal makes here is similar to the

³⁶⁵ *Ibid* at para 77.

³⁶⁶ (1987), 8 CHRR D/4028 (Ont Bd Inq).

³⁶⁷ *Ibid* at 4036.

critiques from the previous two chapters regarding the use of residential occupancy standards to shape social norms and apply a certain construct of what constitutes a proper family. It appears that conceptions surrounding suitable families persist today and operate to deny housing to some families.

The decisions in *Moore v. Wellington Society*³⁶⁸ and *Johnson v. Cheng*³⁶⁹ provide further examples of private landlords or co-ops refusing to rent one-bedroom apartments to single mothers. In both instances, the mother sought to rent a one-bedroom apartment, largely for financial reasons, and was told she could not because a mother and child were required to rent a two-bedroom apartment, based on the NOS.³⁷⁰ Whether the co-operative and private housing provider truly believed they were obliged to follow the NOS or whether they were falling back on it to try to justify their discriminatory behaviour is unknown. However, these decisions demonstrate how residential occupancy standards can be used as a sword against marginalized groups who might not fit the mould of what constitutes a nuclear family, as opposed to their intended use as a shield to protect people from the negative effects of overcrowding.

The decisions cited here seem to show that the use of the NOS in the rental housing context is having a detrimental impact on certain groups, including low-income renters and households who do not fit the construct of a nuclear family. These decisions suggest that residential occupancy standards and their use in private housing contexts needs to be more flexible to allow for a broader range of household arrangements.

³⁶⁸ 2012 BCHRT 316.

³⁶⁹ 2012 BCHRT 408.

³⁷⁰ *Ibid* at para 20.

iii. *Understandings of the Legal Status of the NOS*

The identified decisions provide some insight into housing providers, private landlords, and tribunals/courts understanding of the legal status of the NOS. A troubling theme that emerges is that there is much confusion when it comes to the applicability of the NOS. This section provides some examples from the decisions and considers the implications of the apparent lack of understanding. However, not all decisions get it wrong. Before examining the misconceptions surrounding the NOS, this section will provide examples where the NOS appears to have been applied correctly.

a. Correct Applications of the NOS

*Dubois v. Benryk Mews*³⁷¹ is perhaps one of the better examples of a decision correctly stating the legal status of the NOS. In the decision, the complainant alleged he was discriminated against on the basis of family status. He moved into a co-operative unit where his girlfriend and her daughter lived. He requested a 3-bedroom unit and was denied. The co-operative argued that couples must share a bedroom, noting that it takes its guidance from the NOS in drafting its own occupancy standards.³⁷² In the decision, the adjudicator notes that the NOS “are non-statutory guidelines published by the CMHC” which provide that (i) there shall be no more than 2 or less than 1 person per bedroom; and (2) spouses and couples share a bedroom.³⁷³ Here, the adjudicator correctly characterized the NOS as a non-statutory guideline, rather than a standard that co-operatives must strictly adhere to.

³⁷¹ 2012 BCHRT 224.

³⁷² *Ibid* at para 20.

³⁷³ *Ibid* at para 38.

K'Aodee v. Mackenzie,³⁷⁴ a decision of the Northwest Territories Rental Officer, dealt with the issue of a household being over-housed. The applicant, an 84 year-old woman, had been living in a four-bedroom unit in social housing and did not want to move to a one-bedroom unit. She argued that she required the two freezers and outdoor shed in the larger unit so that she could carry on her traditional ways of life (note that no human rights argument was advanced from that perspective.) The Rental Officer found the applicant could no longer stay in a four-bedroom unit as it was not reasonable for her to remain in this space while larger families were in need of housing:

The NWT Housing Corporation requires it's agents [sic] to use the *National Occupancy Standards* when allocating units to households. These standards specify appropriate unit sizes depending on household size. The respondent, having a household size of just one is eligible for a one-bedroom unit. Because household size does change from time to time, the tenancy agreement used in Public Housing sets out in Article 3 that the tenant agrees to accept a transfer to other premises when the premises are no longer suitable. This provision is, in my opinion, completely reasonable for subsidized public housing.

Matching unit size with household size is important. Subsidized public housing is both expensive and scarce. The applicant stated that there are currently 15 families in the community on the waiting list for a four-bedroom house. Some are overcrowded in smaller units and others are living in substandard units which urgently require extensive renovations. Permitting over-accommodation is an inefficient use of a valuable and scarce public resource which deprives other community members of adequate and suitable housing.³⁷⁵

This excerpt captures the purpose of the NOS, which is to ensure that appropriately-sized units are allocated for households. It highlights the scarcity of affordable housing and the NOS's role in a needs-based approach to social housing.

b. Incorrect Applications of the NOS

³⁷⁴ 2013 CanLII 24050.

³⁷⁵ *Ibid* at para 4-5.

In *Moore v. Wellington Society*,³⁷⁶ the complainant alleged she was discriminated against on the basis of family status when she was denied a one-bedroom for herself and her child. The respondent co-operative claimed that its actions were not discriminatory because it was adhering to the NOS, which, in its view, prevents parents and children from sharing a bedroom.³⁷⁷ Although the adjudicator was not considering the complaint on the merits as it was an application to dismiss, it commented on the evidence regarding the NOS:

In this case, the Respondents acknowledge that part of their mission is to provide or increase, the availability of affordable housing. As such, they receive support from CMHC, a criterion for which is to comply with N.O.S. requirements. The Respondents also adhere to B.C. Housing standards.

The Respondents do not, however, provide information which clarifies whether these policy requirements are non-negotiable, mandatory requirements of operation, or merely non-statutory policy guidelines. They do not describe the implications of non-compliance. It is not clear whether compliance is monitored or enforced or voluntary, or whether there are consequences for non-adherence.³⁷⁸

This decision suggests a lack of understanding about the applicability of the NOS and whether a co-operative can use it as an occupancy standard to deny a one-bedroom apartment to a single mother and her child. It also suggests a lack of understanding about human rights legislation on the part of the co-operative, as there is no acknowledgment that, regardless of the legal status of the NOS, it cannot be applied in a way that violates the human rights of prospective renters. Similarly, in *Johnson v. Cheng*, the respondent landlord argued that the NOS prohibits parents from sharing bedrooms with children.³⁷⁹

³⁷⁶ *Moore v Wellington Society*, *supra* note 368.

³⁷⁷ *Ibid* at para 5.

³⁷⁸ *Ibid* at para 22-23.

³⁷⁹ *Supra* note 369 at para 43.

*Stagg v. Canada (Attorney-General)*³⁸⁰ was a judicial review of a decision by Indigenous Services Canada. Dauphin River First Nation (“DRFN”) was evacuated in 2011 due to flooding, which destroyed many homes in the community. In 2018, Indigenous Services Canada declared that new homes were ready for occupancy and terminated evacuee benefits. DRFN argued that Indigenous Services had not provided enough housing and compared its occupancy rates with the NOS. The Federal Court of Canada dismissed the application for judicial review on the basis that DRFN was not able to show the decision of Indigenous Services was unreasonable.³⁸¹ In the decision, the Federal Court noted that the occupancy rate of DRFN was lower than the average for First Nations (without making any comment on overcrowded living conditions in First Nations or the government’s responsibility in that regard). Of relevance to this section, the Federal Court noted that:

To define what is appropriate, DRFN referred to “national occupancy standards” published by CMHC. Those standards define the number of rooms that a house should have depending on the composition of the family. I have no information as to the legal status of those standards.³⁸²

This statement suggests once again that courts and those putting forth argument to the courts are unclear as to the legal status and authority of the NOS. The NOS was likely being referred to as a housing indicator rather than a residential occupancy standard in this context, but this excerpt from the judgment demonstrates confusion in this regard.

Human rights legislation has primacy over other statutes, so even if bound to follow the NOS, social housing providers would not be required to do so where a strict

³⁸⁰ 2019 FC 630.

³⁸¹ *Ibid* at para 132.

³⁸² *Ibid* at para 113.

adherence to the NOS would result in human rights violations. Both the Manitoba Human Rights Commission and the Ontario Human Rights Commission have issued policy directives aimed at addressing residential occupancy limits and potentially discriminatory treatment in the rental housing context.³⁸³ The Ontario Human Rights Commission's

Policy on Human Rights and Rental Housing provides:

The "National Occupancy Standard," developed by the Canada Mortgage and Housing Corporation, suggests that parents should have a bedroom separate from their children and opposite sex children above age five should not share a bedroom. However, it is not consistent with human rights principles for a housing provider to apply and enforce such policies if they do not meet the tests for *bona fide* requirements established by the Supreme Court of Canada in *Meiorin*. If social housing providers identify barriers that are imposed on them by government (or others) then they have an obligation to follow up with government to seek changes or the removal of those barriers. The OHRC is also of the view that government, in turn, has an obligation to work with the provider to remove those barriers.³⁸⁴ [footnotes omitted.]

It is unclear whether these policy directives are reaching landlords and housing providers.

Given that the Manitoba Human Rights Commission's policy was issued in 2005 and Ontario's policy was issued in 2009, it appears that the message has not reached everyone.

D. ANALYSIS

What do the decisions and identified themes contribute to the question of: *How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?* Every time a

³⁸³ Manitoba Human Rights Commission, Policy #A-6: Rental of Premises – Limitation on the Number of Occupants for a Dwelling; Ontario Human Rights Commission (2005), online: <<http://www.manitobahumanrights.ca/v1/education-resources/resources/policies-pages/policies-a-6.html>> [<https://perma.cc/V7RN-E9PB>].

³⁸⁴ Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing* (2009) at 95.

prospective renter applies for rental housing, the housing provider or landlord will apply either a residential occupancy standard or a private occupancy limit as one consideration of whether to rent the unit to the prospective renter. And, as discussed, vacancy rates are decreasing across the country.³⁸⁵ Low-income renters, in particular single parent households, Indigenous households, and new immigrant and refugee households face challenges in accessing affordable housing, and are more likely to be in core housing need compared to other groups.³⁸⁶ Shortages in social housing in many cities in Canada means that many low-income Canadians are forced into the private rental market. For financial reasons, some families may want to rent a smaller, less expensive unit even if it means members of the household share a bedroom, or another room such as a living room is converted to a bedroom.³⁸⁷ There may be other reasons households wish to live in smaller units, such as cultural reasons or preference.³⁸⁸ When households are denied their rental home of choice because it does not conform to the applicable residential occupancy standard or private occupancy limit, this creates a barrier to access affordable housing. It is appropriate to set occupancy limits when there are justifiable reasons for doing so, but the themes from the decisions suggest that this is not always the case.

The decisions shed some light into how the standards are being used. Based on a canvass of the decisions, it appears that the NOS has achieved a sort of status as a

³⁸⁵ CMHC Rental Market Report, *supra* note 330.

³⁸⁶ CMHC Core Housing Need, *supra* note 194.

³⁸⁷ See e.g. *Cunanan v Boolean Developments*, *supra* note 363. See also *Abernathy v. Stevenson*, [2017] BCHRT 239, where a family of six wanted to rent a three-bedroom apartment and was denied because the household size exceeded the landlord's occupancy policy. The complainant argued that the rental market was "so bad" that "squishing is better than the alternative" (at para 8.) See also *Cha and Cha v. Hollyburn Estates (No 2)*, [2005] BCHRT 409, where the complainant couple applied to rent a one-bedroom apartment for their family of three. The complainants were told they could only rent a two-bedroom apartment, which they were unable to afford (at para 9.)

³⁸⁸ *Paradis*, *supra* note 20 at 27.

universal rule, where at least some housing providers and landlords believe that: (i) it must be strictly applied by social housing providers and co-operatives; and (ii) it can or should be used as a residential occupancy limit in the private rental context. As the over-housing decisions indicate, clearly the NOS plays a useful role in the social housing context to ensure that households are allocated to units based on number of bedrooms. In situations where a single person wishes to remain in a three-bedroom unit while larger families are on waitlist, the NOS is being used effectively to ensure the units go to families in need. However, this analysis reveals a misconception whereby the NOS is being applied incorrectly and, in some cases, in violation of human rights legislation.

While the decisions and anecdotal reports seem to suggest that the NOS is being used as a residential occupancy standard in rental housing,³⁸⁹ there appears to be little academic research looking at how the NOS is being used. One notable exception is Sherrell's work on housing and settlement issues. Sherrell explores barriers to public and private housing for government-assisted refugees and refugee claimants in Vancouver and Winnipeg.³⁹⁰ Of particular importance to this thesis, Sherrell finds an unequal application of the NOS within the private rental market:

Strict adherence to national occupancy standards, lack of stock of adequately sized housing and long waitlists in the public housing market are

³⁸⁹ See e.g. Katherine Pavlik, Manitoba Immigrant and Refugee Settlement Sector Association, "Renting a Home in Manitoba: A Literacy Partners of Manitoba Publication" (Literacy Partners of Manitoba), online: <http://www.whrc.ca/documents/housing_booklet_final_002.pdf> [<https://perma.cc/B8DS-3RP4>] (information booklet provided by Literacy Partners Manitoba, which directly refers to the NOS, stating "[h]ow many bedrooms you need depends on how many people live with you, their ages and whether they are male or female. The National Occupancy Standards (NOS) rules say you need one bedroom for [...]"); Yvette Brend "Bedroom-sharing rules shut door on affordable housing for some families", *CBC News* (19 Sep 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/national-occupancy-standards-housing-canada-bc-co-op-vancouver-couple-denied-girl-baby-1.4295849>> [<https://perma.cc/PX84-ZQ8W>]. ("there's no dispute that national guidelines do exist and are being used elsewhere in the country.")

³⁹⁰ Sherrell, *supra* note 12.

aggravated by the sporadic and unequal application of national occupancy standards within the private rental market. Landlords and building managers in the private and to a lesser extent the public, housing markets play a significant role in shaping housing outcomes among respondents.³⁹¹

Sherrell also points out the challenge the NOS poses for multi-generational families accustomed to living together, where the household does not necessarily fit into the structure contemplated by the NOS.³⁹² Sherrell recommends that the NOS should be reconsidered in light of these challenges, and that the role of landlords and building managers in influencing access to housing requires further research.³⁹³

CMHC did not intend that the NOS be used as a national residential occupancy standard to limit the number of occupants in rental housing, although naming it the National Occupancy Standard may understandably add to the confusion. Rather, it was created for the purpose of allocating housing units to families in social housing and uses a formula based on social norms to decide what an appropriate sized unit would be.³⁹⁴ When used for this limited purpose and only as a guideline – not a hard-and-fast rule – the NOS’s justification and use is not at odds with contemporary Canadian society. However, the problem arises when its use goes beyond simply a guideline in social housing and is the basis for denying housing to households that do not fit the social norm. In these situations, the perspective of policymakers and property owners is imposed on groups who might have very different needs and understandings of, *inter alia*,

³⁹¹ *Ibid* at 55.

³⁹² *Ibid* at 54.

³⁹³ *Ibid* at 56.

³⁹⁴ 1991 Internal Briefing Note, *supra* note 72 (the guidelines are to be followed “as closely as possible for client placement purposes” and “[w]hile it is recognized it may be necessary to exercise a degree of discretion in some cases, variations from these guidelines should be considered individually and be fully documented”).

overcrowding, family, or ways of living together as a household; understandings that are based on culture, economic reality, or preference.

When used improperly, the NOS is constraining housing because it is imposing a particular view of what constitutes a family. The use of normative occupancy limits by landlords can likewise have the same effect. As the adjudicator in the earlier decision of *Fakhoury v. Las Brisas* put it, “[human rights codes] do not permit landlords to impose their vision of the “normal” family to deny equal access to accommodation to single parents solely because of their family status.”³⁹⁵

The analysis presented here ties into arguments advanced by critical legal theorists, who argue that family is a social construct. When governments and the dominant class set policies and rules regarding families, they are really only addressing a specific definition of family. When that definition of family is imposed on other groups in society who do not fit the particular definition, they can be negatively impacted.

In her work on law and land use planning, Silbaugh argues that housing policy and design needs to be more responsive to the changing concept of a family and a household. She points out that:

[w]hat was so often called the *normative family* can now be called *the old normative family*, with a rapidly deepening understanding among researchers, policy-makers, and the public of *the new normative family*. Slightly harder to characterize than the old normative family, its attributes often include multigenerational households, the absence of a marriage, family members spread among more than one household, multi-partner

³⁹⁵ *Supra* note 366 at 4036.

attachments over time and multi-partner fertility, meaning adults with more than one co-parent.³⁹⁶

Silbaugh goes on to note that even the construct of the *old normative family* is actually only the nuclear family from post World War II; prior to that time it was commonplace to have multigenerational families.³⁹⁷ Returning to the historical analysis in Chapter 2, recall that most provincial and municipal residential occupancy standards were adopted in the 1950s and 1960s, the period during which, as Silbaugh argues, the construct of the normative family was taking shape. Although the provincial and municipal standards are neutral in that they do not restrict occupancy based on the composition of members of the household, one could argue that the underlying rationale for setting the standards (which, as indicated in Chapter 2, appears to be morality and conforming to a social norm) took root in the first half of the twentieth century and still continues to influence people's notions about proper households.

In his work in urban design and planning, Mandanipour looks at the meaning of the home and concept of the family. In considering the concept of the modern nuclear family, Mandanipour argues that “[w]hat is often at stake is the discrepancy between the reality of most people's lives and an idealized pattern of family, a pattern that is used as a basis for moral discussions and policy decisions.”³⁹⁸

As Martha Fineman argues, dominant ideologies are “subtly and conclusively expressed and repressed in the very creation and recreation of social norms and

³⁹⁶ Katharine Silbaugh, "Distinguishing Households from Families" (2016) 43:4 Fordham Urb U 1071 at 1074.

³⁹⁷ *Ibid.*

³⁹⁸ Ali Mandanipour, *Public and Private Spaces of the City* (Routledge, 2003) at 88.

conventions” and “define the contours of culture, society and its institutions.”³⁹⁹

According to this view, the perspective of policymakers and property owners is imposed on other groups who might have very different needs and understandings of, *inter alia*, family, privacy or ways of living together as a household. The problem with imposing a particular social construct of the family or household is that, as Mandanipour argues, concepts of privacy and control of space may vary due to the cultural and behavioural patterns of the household.⁴⁰⁰

As discussed earlier, residential occupancy have a more direct effect on renters as opposed to homeowners. As Williams describes in her work on American property law,⁴⁰¹ housing policy in the United States has always treated homeownership as the best living arrangement. She notes that “[t]he family and the good citizenship that homeownership is believed to instill are equally idealized and, therefore, equated.”⁴⁰² The idea of the American dream conjures up images of a middle-class two-parent family in a single-family dwelling house. Williams points out that image of the ideal is class-based, race-based, and based on cis-gendered norms.⁴⁰³ The problem with adopting the ideal of the traditional nuclear family living in a single-family dwelling is that it excludes many groups from the housing needs narrative.

The social norms upon which standards such as the NOS are based are not necessarily the norm for many of the people who are impacted by those standards. When

³⁹⁹ Martha Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995) at 22.

⁴⁰⁰ Mandanipour, *supra* note 398 at 67.

⁴⁰¹ Joan Williams, “The Rhetoric of Property” (1998) 83:2 Iowa L Rev 277.

⁴⁰² *Ibid* at 326.

⁴⁰³ *Ibid* at 327.

a prospective renter is told they cannot rent an apartment because their household does not fit the norm (for example, a single mother who wishes to share a bedroom with their child), this sends the message that their family is “less than” other, more traditional nuclear families, and, by forcing families to seek out other housing options which may be more expensive or in less desirable neighbourhoods, perpetuates the disadvantage of marginalized groups. Residential occupancy standards in Canada were, at least in part, born out of a desire to shape the morals of certain groups in society, such as low-income households living in slum areas and new immigrants. It appears that the NOS, when used improperly, is continuing to impose outdated norms on low-income renters to their disadvantage.

E. SUMMARY

Chapter 4 provides insight into the implications of residential occupancy standards for households in the rental housing and social housing contexts. It appears that in some cases, residential occupancy standards (in particular the NOS) are being used in a discriminatory way, which is creating a barrier in terms of access to rental housing. This barrier seems to have a disproportionate effect on marginalized populations, such as single mothers, who do not fit in the construct of a traditional, nuclear family.

Based on an analysis of the decisions therefore, how do the justifications for having the current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters? Recall that, in the case of provincial regulations and municipal by-laws, the standards were brought in for public health reasons (although shaping social norms and morality appear to be at least an underlying

rationale.) The decisions do not provide any insight into whether landlords and social housing providers are looking to the provincial regulations and by-laws to determine the maximum occupancy based on square footage and number of occupants. At the same time, given that provincial and municipal standards are only enforced when someone makes a complaint to authorities there is no evidence to suggest that the provincial and municipal standards are inappropriate. Perhaps by serving in the background, ready to be invoked if a complaint is made, provincial and municipal standards are being used appropriately as a shield to protect Canadian households from potentially negative effects of overcrowding.

An analysis of the decisions provides insight into the appropriateness of the NOS and allows for an assessment of whether the justifications for and use of the NOS fits with the contemporary Canadian experience. As it is being used and understood, it appears that the NOS is not an appropriate way to regulate concerns about overcrowding. The NOS was never meant to be used as a residential occupancy standard to address concerns about overcrowding; it was only created to allocate units in the social housing context. It appears to have been accorded legal status without being prescribed, and therefore is positioned to have a detrimental impact on low-income renters and marginalized groups. It appears that a more nuanced approach is required that moves away from the traditional view of the nuclear family as the appropriate or default way to determine who can live where.

The decisions cited in this chapter provide some insight into the impact of residential occupancy standards in the rental housing context. It is important to note that human rights complaints are only made if a prospective renter understands their legal rights and

has the time and resources to make a complaint and see it through. While more research would be required to understand the prevalence of prospective renters being turned away for exceeding occupancy limits, it is reasonable to assume that it is taking place much more frequently than the number of reported decisions identified in this chapter would suggest.

The Conclusion ties together and summarizes the discussion in Chapters 2 to 4 to answer the research questions posed in this thesis and proposes a set of criteria upon which residential occupancy standards ought to be based.

CHAPTER 5 - CONCLUSION

A. CHAPTER OVERVIEW

The previous three chapters approached the justifications for and implications of residential occupancy standards in Canada from three different angles: a historical analysis; a comparative content analysis; and a case law/human rights law analysis. Following a summary of the findings from the previous three chapters, this chapter makes recommendations and proposes a set of criteria that should be used to assess the justifications underlying and use of residential occupancy standards.

Residential occupancy standards based on social norms directly or indirectly shape households to fit into a particular worldview. When used improperly, residential occupancy standards can be used as a sword to restrict housing options, particularly for low-income Canadians, rather than their intended use as a shield to prevent overcrowding or ensure social housing units are allocated efficiently. This chapter concludes by recommending a more nuanced and flexible approach to regulating overcrowding and proposes a set of criteria from which to assess the substance and merits of residential occupancy standards.

B. FINAL THOUGHTS ON THE RESEARCH QUESTIONS

This thesis makes the distinction between provincial and municipal residential occupancy standards, on the one hand, and the federal NOS, on the other. In keeping with the analysis from the previous three chapters, this section summarizes the findings with respect to the research questions by addressing the provincial and municipal standards separately from the NOS.

i. What justifications have governments used for the adoption of residential occupancy standards?

a. Provincial and Municipal Standards

Provincial and municipal standards were adopted in most provinces and cities in the 1950s to the 1970s in response to a population increase alongside the introduction of building codes and other occupancy rules.⁴⁰⁴ The stated justification for adopting provincial and municipal standards was public health. However, it appears that upholding a particular perception of morality was at least one underlying rationale.

In the first half of the twentieth century, Canada was just beginning to lay the framework for its laws and policies related to land use planning, health and housing. Governments at all levels were contending with a rapidly growing population and an influx of immigrants. Along with this rapid population growth came a housing crisis as many low-income Canadians were forced to live in inadequate housing, and for many families, sharing a home with another family was the only feasible option.⁴⁰⁵ Piecing together the historical sources cited in Chapter 2, it appears the problems associated with slum areas were characterized not only as public health problems but also moral problems, with low-income households (many of whom were non-British immigrants) seen as moral deviants.⁴⁰⁶ In this housing climate, municipal governments began to implement measures to deal with poor housing and slum areas, such as land use planning

⁴⁰⁴ See e.g. Toronto By-law, *supra* note 71; *Dwellings and Buildings Regulation*, *supra* note 3.

⁴⁰⁵ Grauer Report, *supra* note 104 at 34.

⁴⁰⁶ See e.g. Hastings Report, *supra* note 84 at 4-5.

and maintenance and occupancy codes.⁴⁰⁷ As a young country, it appears that policymakers were grappling with the idea of what it meant to be Canadian. Valverde, Solomon, and Purdy argue that the dominant British class, influenced by the moral reformers, advanced certain ideals about what constituted a proper home and a proper family.⁴⁰⁸ Those ideals helped to shape housing policy in the first half of the twentieth century and led to the adoption of residential occupancy standards in the mid twentieth century.

b. *The NOS*

CMHC adopted the NOS in the late 1980s as a guideline to be used in the allocation of housing units in the social housing context. The standard was explicitly chosen to reflect Canadian social norms.

After federal involvement in affordable housing initiatives in the 1970s, the federal government began to scale back its involvement in the management and delivery of federally-funded off-reserve social housing programs in the mid-1980s.⁴⁰⁹ In the late 1980s and early 1990s, CMHC entered into agreements with most provinces and territories to hand over the responsibility for the delivery of social housing programs.⁴¹⁰ CMHC, in still providing financial support for social housing programs, sought to ensure that there would be a uniform standard that provinces and territories would use in allocating appropriately-sized housing units based on the number of bedrooms for

⁴⁰⁷ Oberlander & Fallick, *supra* note 96 at 12; Grauer Report, *supra* note 104 at 46.

⁴⁰⁸ Valverde, *supra* note 233 at 166; Solomon, *supra* note 82; Purdy, *supra* note 165 at 494.

⁴⁰⁹ CMHC Social Housing, *supra* note 177.

⁴¹⁰ *Ibid.*

households in need.⁴¹¹ The stated reason for adopting the particular standard, which determines who may and may not share a bedroom based on gender, age and relationship amongst members of the household, was to conform with “Canadian social norms.”

ii. Is there a rational connection between the justifications and the current residential occupancy standards?

a. *Provincial and Municipal Standards*

In considering whether there is a rational connection between the justifications for adopting provincial and municipal standards and the standards chosen, the answer is not entirely clear. Based on the content analysis in Chapter 3, there is no consensus as to the level or internal density above which negative health or safety effects result.⁴¹² The Gray Matter report and other sources highlight the complexity of the relationship between overcrowding and health, and confounding variables such as socio-economic factors and housing conditions, which render a direct correlation between overcrowding and negative health or safety effects essentially not yet possible to prove.⁴¹³

The sources reviewed in Chapter 2 do not provide any insight into why a certain space restriction was chosen over another; all provincial and municipal residential occupancy standards use a neutral space restriction (e.g. 50 or 80 square feet per occupant). Therefore, it is not possible to make a determination as to whether there is coherency between the public health justification and the standard adopted. However, given that household density in Canada was much higher in the first half of the twentieth

⁴¹¹ 1991 Internal Briefing Note, *supra* note 72.

⁴¹² See e.g. Gray Matter report, *supra* note 5; Myers et al, *supra* note 36.

⁴¹³ *Ibid.*

century than it is now, it is plausible that internal density levels were above a threshold at which negative health effects would result, and, in adopting a standard, the government was attempting to address the negative effects of overcrowding.

Given that an underlying rationale for adopting provincial and municipal residential occupancy standards appears to be morality or normative, the discussion below regarding the NOS relates to provincial and municipal standards as well.

b. The NOS

The NOS was adopted as a normative standard in the allocation of units in the social housing context. Chapter 3 concludes that there appears to be coherency between the justifications and the NOS based on the NOS's narrow intended use. However, if its use is extended beyond the allocation of housing units in the social housing context, or if treated as a hard and fast rule, there is less of a rational connection between the justification and the standard chosen.

Chapter 3 identified the critiques in the literature regarding normative justifications for setting residential occupancy standards. The Gray Matter Report, for example, notes that there is a lack of evidence regarding the reasonableness of the normative assumptions upon which some residential occupancy standards appear to be based.⁴¹⁴ The argument advanced by several scholars is that overcrowding is subjective, and different groups experience the negative effects of overcrowding at different levels of internal density. Therefore, if a government chooses to base a standard on "social norms", that standard may only be reasonable for the portion of the population represented in

⁴¹⁴ Gray Matter Report, *supra* note 5 at 15.

what constitutes the *norm*. Norms can be used to bring conditions up to a minimum standard of living but they can also become tools of oppression.

Based on the comparative content analysis, there is no evidence to support the idea that using a normative standard would somehow alleviate negative effects of overcrowding. While it appears that there is some threshold of internal density above which negative effects result, there is no evidence to support that normative standards such as the NOS – if used as a residential occupancy standard more broadly - are coming close to this threshold.

iii. How do the justifications and the use of current residential occupancy standards fit with the contemporary Canadian experience, particularly for low-income renters?

a. Provincial and Municipal Standards

Given that the case law and human rights decisions do not implicate provincial and municipal standards, it is necessary to look beyond the decisions to reach a conclusion as to whether provincial and municipal standards (and their use) fits with the contemporary Canadian experience, particularly for low-income renters.

As set out in Chapter 2, provincial and municipal standards are but one piece of a wider regulatory regime to ensure occupancy and maintenance standards for homes. As the average household size declined over the past century⁴¹⁵ and housing conditions in general vastly improved, it may be that provincial and municipal residential occupancy

⁴¹⁵ Statistics Canada, *supra* note 168. The number of 5+ person households dropped to 8.4% in 2011, with 1 or 2 person households being the most common type.

standards are rightfully being used as a shield to prevent the worst cases of overcrowding yet, absent complaints, the standards are not interfering with people's ability to organize their household in any way they see fit.⁴¹⁶ The average household may not even be aware of the standards unless they are subject to a complaint and investigation.

Returning to the discussion of morality and shaping social norms as an underlying rationale for setting provincial and municipal residential occupancy standards, an argument could be advanced that the desire to shape Canadian households into a certain ideal may be continuing to influence policy and, indirectly, shape how occupancy limits are used in the private rental context, and the design of the NOS. This argument will be explored further below.

b. *The NOS*

Several decisions in Chapter 4 highlighted the problem with the way the NOS is being used in the social housing context and private rental market. It appears that some housing providers and landlords believe that the NOS must either be followed or that it is an appropriate standard to be followed even where strict adherence amounts to discrimination counter to human rights legislation.

As it is being used and understood, it appears that the NOS is not an appropriate way to regulate concerns about overcrowding. Based on an analysis of the decisions, it appears that when used as a residential occupancy standard, the NOS does not fit with the contemporary Canadian experience, particularly for low-income households who, for

⁴¹⁶ This is not to say that the negative effects of overcrowding are not an issue for certain populations in Canada - such as First Nations and Inuit groups - as referenced in Chapter 4.

economic reasons, may wish to rent a unit with fewer bedrooms than a strict application of the NOS would allow. Nor does an application of the NOS fit with groups, who, for cultural reasons, wish to order their household differently than what has been envisioned as “Canadian social norms.”

Although it is beyond the scope of this paper, as part of a larger study it would be helpful to have a better understanding as to how residential occupancy standards are being applied and enforced in practice. In particular, it would be useful to gather data on landlords’ understanding of residential occupancy standards and what rules and standards are being applied in practice.

C. BEST PRACTICE CRITERIA

This section proposes a set of criteria that should be taken into account in setting residential occupancy standards, having regard to available evidence and contemporary considerations on the effects of overcrowding discussed in the previous chapters.

The overarching conclusion in this thesis is that residential occupancy should not be restricted unless there are compelling justifications for doing so. Provincial and municipal governments have primarily justified implementing residential occupancy standards to reduce the health risks associated with overcrowded living conditions. While there appears to be a connection between overcrowding and negative health effects, this thesis has demonstrated the difficulty in identifying a single threshold of internal density above which negative effects result. Therefore, it is important to ensure that any standard is sufficiently flexible to allow for social and cultural differences in how to order one’s household. The criteria that could achieve this result might include the following:

1. The standard chosen must be evidence-based, drawing on the best available and most current evidence on the effects of overcrowding.
2. The standard chosen should be flexible enough to allow households to choose how to configure their living arrangements in whatever way they choose, so long as the total number of persons living in the dwelling unit does not exceed the maximum the space allows.
3. The standard should be revisited and refined as better evidence regarding overcrowding emerges, recognizing that there is not an objective measure of overcrowding.

D. RECOMMENDATIONS

In addition to the criteria above, this thesis makes recommendations to limit the improper use of the NOS; highlight the need for better education regarding the standards; and argue for a more nuanced approach to setting residential occupancy standards. Based on an assessment of the research questions, this thesis does not recommend that the current residential occupancy standards be amended. Although the NOS's limits based on gender, age, and relationships are problematic when used to restrict housing options, if used as a needs-based guideline in the allocation of units in social housing, the limits serve a valid purpose. Any time a change to a law or standard is contemplated, it is important to consider the unintended consequences of the change. If the NOS were changed to a facially neutral standard (two persons per bedroom, for example), then this could mean that the household used in an earlier example, composed of two parents, a teenage son and a young daughter, would be allocated a two-bedroom unit rather than a

three-bedroom unit, which is what they would currently qualify for according to the NOS. While acknowledging that any normative standard of acceptable household composition is necessarily subjective, it would not be desirable for the NOS to be amended to a standard that would have the potential of under-housing families.

Although not a topic of this thesis, it is also important to consider that the NOS is used by CMHC as the suitability indicator in assessing core housing need. The data collected regarding core housing need helps to set housing priorities. If the NOS were changed to a facially neutral standard (such as two persons per bedroom), it may have the effect of reducing the number of households that count under the core housing need categories, which would potentially impact on policies and funding. While this thesis does not provide an opinion as to the appropriateness of the NOS as a housing indicator, it is important to note that any contemplated change could have an effect on housing policy and funding.

That said, the use of the NOS needs to be clarified so that it does not continue to restrict access to housing for low-income families and operate to discriminate against households on the basis of family status. Accordingly, this thesis makes the following recommendations:

1. *Limit the improper use of the NOS:* The provinces and CMHC should work together to alleviate some of the unintended consequences of the application of the NOS.
2. *Better education regarding residential occupancy standards and their use:* Landlords and private housing providers should be educated regarding the

types of restrictions on occupancy they can make in compliance with human rights law. Tenants should be equipped with knowledge of their rights in the rental housing context, so that they might advocate for themselves or seek legal recourse if they have been discriminated against by a landlord.

3. *Need for a nuanced approach:* In light of the evidence regarding overcrowding as a subjective experience, residential occupancy standards should be applied in a more flexible way that allows for variations in cultural values and economic realities. In any possible updates to residential occupancy standards, policymakers should be aware of the uneven access to housing for disadvantaged populations, such as low-income renters – in particular single parent households, Indigenous households, and new immigrant and refugee households.

E. CONCLUSION

This thesis contributes to the literature by synthesizing government and academic sources that address factors for limiting internal density in housing in order to better understand the rationale for limiting access to housing on this basis.

Drawing on and extending the work of Pader, Myers *et al.*, Haan, Lauster and Tester, and others, this thesis illustrates that the use of normative justifications for setting residential occupancy standards is highly problematic. Further, an overly restrictive occupancy standard captures living arrangements that may not actually lead to any increased health or safety risk. This not only has a detrimental impact on families who - by reason of culture, consumer preference or economic necessity – want to rent a smaller

unit, but it also arguably diverts focus away from addressing real housing concerns facing other segments of the Canadian population.⁴¹⁷

Residential occupancy standards are one part of a complex regulatory system that affects access to housing. Where to live is one of the most significant decisions for a family, impacting on many important areas of life. Canadians should not be limited in terms of access to housing unless there are compelling reasons for doing so.

⁴¹⁷ For a discussion on overcrowding in Canada's Inuit population in Nunavut, see Senate, Standing Committee on Aboriginal Peoples, *We Can Do Better: Housing in Inuit Nunagat: Report of the Standing Committee on Aboriginal Peoples*, *supra* note 45.

BIBLIOGRAPHY

LEGISLATION

- Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5.
- An Act to Amend the National Housing Act*, S.C. 1945, c. 26.
- An Act to Amend the National Housing Act*, S.C. 1949, c. 30.
- An Act to Amend the National Housing Act*, S.C. 1954, c. 23.
- City of Montréal, by-law 94-075, *By-law Establishing a Housing Code*.
- City of Saskatoon, by-law No. 8175, *The Property Maintenance and Nuisance Abatement By-law* (6 Jan 2003).
- City of Toronto, By-law No. 14466, *To Establish a Standard of Housing in the City of Toronto* (10 Feb 1936).
- City of Toronto, By-law No. 930-2000, *Property Standards* (27 July 2009).
- City of Winnipeg, by-law No. 1/2008, *Neighbourhood Liveability By-law*.
- City of Winnipeg, by-law No. 763/74.
- City of Vancouver, by-law No. 5462, *Standards of Maintenance By-law* (21 July 1981).
- Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.
- Cooperative Association Act*, S.B.C. 1999, c. 28.
- Dominion Housing Act*, S.C. 1935, c. 58.
- Dwelling and Buildings Regulation*, Man Reg 322/88R.
- Housing Regulation*, Alta Reg 173/1999.
- Housing Services Act, 2011*, S.O. 2011, c. 6.
- Human Rights Code*, R.S.B.C. 1996, c. 210.
- Human Rights Act*, R.S.N.S. 1989, c. 214.
- Minimum Housing and Health Standards*, M.O. 57/2012.
- Minimum Housing and Health Standards*, A.R. 173/99.
- Municipalities Act*, R.S.N.B. 1973, c. M-22.
- National Housing Act*, R.S.C. 1985, c. N-11.

National Housing Act, S.C. 1973, c. 18.

National Housing Act, S.C. 1953-1954, c. 23.

National Housing Act, 1938, S.C. 1938, c. 49.

Public Health Act, R.S.A. 2000, c. P-37.

Public Health Act, RSPEI 1988, c. P-30.

Public Health Act, RSPEI 1988, c. P-30.1.

Rental Accommodation Regulations, PEI Reg EC 142/70.

Residential Properties Maintenance and Occupancy Code Approval Regulation, NB Reg 84-86.

The Human Rights Code, S.M. 1987-88, c. 45.

The Municipal Amendment Act, 1921, S.O. 1921, c. 63.

The Public Health Act, 1873 S.O. 157.

The Public Health Act, R.S.M. 1954, c. 211.

The Public Health Act, S.M. 2006, c. 14.

The Residential Tenancies Act, S.M. 1990-91, c 11.

The Saskatchewan Human Rights Code, 2018, S.S. 2018, c. S-24.2.

JURISPRUDENCE

Abernathy v. Stevenson, 2017 BCHRT 239.

B. v. Ontario (Human Rights Commission), 2002 SCC 66.

Bone v. Mission Co-op, 2008 BCHRT 122.

British Columbia (Public Relations Commission) v. British Columbia Government and Service Employee's Union (B.C.G.S.E.U.), [1999] SCJ No 46, [1999] 3 SCR 3.

Cha and Cha v. Hollyburn Estates (No 2), [2005] BCHRT 409.

Dubois v. Benryk Mews, 2012 BCHRT 224.

Cunanan v. Boolean Developments, 2003 HRTO 17.

Fakhoury v. Las Brisas Ltd. (1987), 8 CHRR D/4028 (Ont Bd Inq).

Hiebert v. Martin-Liberty Realty Ltd., 2009 MHRC.

Johnson v. Cheng, 2012 BCHRT 408.
K'Aodee v. Mackenzie, 2013 CanLII 24050 (NWT RO).
Killam Properties Inc. v. Frail, [2009] NSJ No. 653.
McGovern v. Avalon, 2012 BCHRT 408.
Moore v. Wellington Society, 2012 BCHRT 316.
Nipissing Condominium Corp. No. 4 v. Kilfoyl, [2009] O.J. 3718.
Stagg v. Canada (Attorney General), 2019 FC 630.

GOVERNMENT REPORTS

Canada, Department of Finance, *A New Direction for Canada: An Agenda for Economic Renewal*, presented by the Hon Michael H Wilson, Minister of Finance (Ottawa: 8 Nov 1984).

Canada, *Canada's National Housing Strategy: A place to call home* (Ottawa: 2018), <<https://www.placetocallhome.ca> > [<https://perma.cc/S3YM-FB8M>].

Canada Mortgage and Housing Corporation, *International Housing Indicators Research Report*, (Ottawa: CMHC, 30 December 2015).

Canada Mortgage and Housing Corporation, *Consultation Paper on Housing* (Ottawa: CMHC, 1985).

Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996).

Canada, Royal Commission on Canada's Economic Prospects, *Housing and Social Capital*, by Yves Dubé et al. (Ottawa: Queen's Printer, 1957).

Canada, Royal Commission on Dominion-Provincial Relations, *Housing*, by A E Grauer (Ottawa, 1939).

Canada, Royal Commission on Dominion-Provincial Relations, *Public Health*, by A E Grauer (Ottawa: Queen's Printer, 1939).

City of Toronto, Department of Health, *Report of the Medical Health Officer dealing with the recent investigation of slum conditions in Toronto, embodying recommendations for the amelioration of the same* (1911), City of Toronto Archives, Fonds 200, Series 365, File 14.

City of Winnipeg, Emergency Housing Department, *Report Housing Survey of Central Area of Winnipeg Bounded by Main St., Sherbrook St., Notre Dame Avenue.*,

Canadian Pacific Railway Yards, William Courage, General Supervisor (Winnipeg, 1955).

New Zealand, The Ministry of Social Policy, *Definitions of Crowding and the Effects of Crowding on Health: A Literature Review* by Alison Gray, Gray Matter Research Ltd (NZ: The Ministry of Social Policy, 2001).

Ontario Housing Committee, *Report of the Ontario Housing Committee including standards for inexpensive houses adopted for Ontario and typical plans* (Toronto: AT Wilgress, 1919)(Chair: John Willison).

Ontario, Department of Municipal Affairs, *A Better Place to Live: A Study on Occupancy and Maintenance of Dwellings*, Final Report (Toronto: Ontario Department of Municipal Affairs, 1962).

Senate Special Committee on Poverty, *Poverty in Canada* (Ottawa, 1971) (Chair: David A Croll.)

Senate, Standing Committee on Aboriginal Peoples, *We Can Do Better: Housing in Inuit Nunangat: Report of the Standing Committee on Aboriginal Peoples* (March 2017) (Chair: The Hon. Lillian Eva Dyck).

SECONDARY MATERIAL: MONOGRAPHS

Borrows, John & Andrée Boisselle, *Indigenous Law and Governance : Challenging Pre-Contact and Post-Contact Distinctions in Canadian Constitutional Law?* (Montreal: Éditions Thémis, 2017).

Fineman, Martha, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

Juergensmeyer, Julian Conrad & Thomas E Roberts, *Land Use Planning and Development Regulation Law* 3d ed (West Academic Publishing, 2003).

Mandanipour, Ali, *Public and Private Spaces of the City* (London: Routledge, 2003) at 88.

Oberlander, H Peter & Arthur L Fallick, *Housing A Nation: The Evolution of Canadian Housing Policy* (Centre for Human Settlements University of British Columbia for Canada Mortgage and Housing Corporation, 1992).

Rose, Albert, *Regent Park: A Study in Slum Clearance* (Toronto: University of Toronto Press, 1958).

Salsich Jr, Peter & Timothy Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* (Chicago, Ill: Real Property, Probate and Trust Law, American Bar Association, 1998).

Solomon, Lawrence, *Toronto Sprawls: A History* (Toronto: University of Toronto Press Incorporated, 2007).

Sullivan Mann, Mary, *The Right to Housing: Constitutional Issues and Remedies in Exclusionary Zoning* (New York: Praeger Publishers, 1976).

Sutter, Gregory, *Still Renovating: a history of Canadian social housing policy* (McGill-Queen's University Press, 2016).

Valverde, Mariana, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McLelland & Stewart Inc, 1991).

SECONDARY SOURCES: ARTICLES

Beeghly, Donnelly, "The Consequences of Family Crowding: a Theoretical Analysis" (1989) 10:1 *Lifestyles: Family and Economic Issues* 83.

British Columbia Law Institute, "Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada – A Study Paper" 2012 *CanLII Docs* 375.

Carter, Tom et al, *The Housing Experiences of Recently Arrived Refugees: The Winnipeg Experience*, (University of Alberta: Edmonton, 2014).

Cassel, J, "The relation of the urban environment to health: Toward a conceptual frame and a research strategy" in Hinkle, L E & Loring, W C, eds, *The Effect of the Man-Made Environment on Health and Behavior* (London: Castle House, 1979).

Cohen, Irwin M & Raymond R Corrado, "Housing Discrimination among a Sample of Aboriginal People in Winnipeg and Thompson, Manitoba" in *Volume 1: Setting the Agenda for Change, Aboriginal Policy Research Series*, (Manitoba: Thompson Educational Publishing, Inc, 2013).

Dobinson, Ian & Francis Johns, "Qualitative Legal Research" in McConville & Chui, eds, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007).

Dubber, Markus D, "New Historical Jurisprudence: Legal History as Critical Analysis of Law" (2015) 2 *Critical Analysis of Law* 1.

Edwards, John N et al., "Why People Feel Crowded: An Examination of Objective and Subjective Crowding" (1994) 16 *Population and Environment* 149.

Ekstam, Helen, "Residential Overcrowding in a "Distressed" and a "Gentrified" Neighbourhood – Towards an Understanding of Crowding in "Gentrified" Neighbourhoods" (2015) 32:4 *Housing Theory & Society* 429.

Evans, Gary W et al, "Chronic residential crowding and children's well-being: an ecological perspective" (1998) 69 *Child Development* 1514.

- Haan, Michael, "The Residential Crowding of Immigrants to Canada" (Autumn 2010) *Canadian Issues* 16.
- Hefferman, Tracy, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 *J L & Social Pol'y* 10.
- Hiebert, Daniel et al, *The Profile of Absolute and Relative Homelessness Among Immigrants, Refugees, and Refugee Claimants in the Greater Vancouver Regional District* (2005) Prepared for the National Secretariat on Homelessness, MOSAIC, online: <homelesshub.ca>.
- Hiebert, Daniel, "Newcomers in the Canadian Housing Market" (2010) *Canadian Issues / Thèmes Canadiens* 8.
- Hsiu-Fang Hsieh & Sarah E Shannon, "Three Approaches to Qualitative Content Analysis" (2005) 15:9 *Qualitative Health Research* 1277.
- Ibbetson, David, "Comparative Legal History: A Methodology" in Anthony Musson and Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012).
- Iglesias, Tim, "Clarifying the Federal Fair Housing Act's Exemption for Reasonable Occupancy Restrictions" (2004) 31 *Fordham L J* 1211.
- Iglesias, Tim, "Moving beyond Two-Person-per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards" (2012) 28 *Ga St U L Rev* 619.
- Kearns, Robin, "Worried sick about housing: Extending the debate on housing and health" (1995) 9:1 *Community Mental Health in New Zealand* 5.
- Krippendorff, Klaus, "Content Analysis" in Neil J Salkind, ed, *Encyclopedia of Research Design* (Thousand Oaks: Sage Publications Inc, 2010).
- Lauster, Nathanael & Frank Tester, "Culture as a Problem in Linking Material Inequality to Health: On residential crowding in the Arctic" (2010) 16 *Health & Place* 523.
- MacIntosh, Constance, "Indigenous Mental Health: Imagining a Future Where Action Follows Obligations and Promises" (2017) 54:3 *Alta L Rev* 589.
- Miraftab, Faranak, "Sheltering refugees: the housing experience of refugees in metropolitan Vancouver, Canada" (2000) 9:1 *Can J of Urban Research* 42.
- Myers, Dowell et al, "The Changing Problem of Overcrowded Housing" (1996) 62:1 *Journal of the American Planning Association* 66.
- Pader, Ellen, "Housing Occupancy Standards: Inscribing Ethnicity and Family Relations on the Land" (2002) 19 *Journal of Architecture and Planning Research* 300.
- , "Spaciality and Social Changes: Domestic Space Use in Mexico and the United States" (1993) 20:1 *American Ethnologist* 114.

- , "Spatial Relations and Housing Policy: Regulations the Discriminate Against Mexican Origin Households" 13:2 *Journal of Planning Education and Research* 119.
- Paradis, Emily, *Nowhere Else To Go: Inadequate Housing and Risk of Homelessness Among Families in Toronto's Aging Rental Buildings*, (Toronto: University of Toronto Cities Centre, 2014);
- Purdy, Sean, "'It Was Tough on Everybody': Low-Income Families and Housing Hardship in Post-World War II Toronto" (2003) 37:2 *Journal of Social History* 457.
- Robertson, Stephen, "What's law got to do with it? Legal records and sexual histories" (2005) 14 *Journal of the History of Sexuality* 161.
- Sherrell, Kathy, "Legal Status, Place, or Something Else? The Housing Experiences of Refugees in Winnipeg and Vancouver" (Fall 2010) *Canadian Issues* 52.
- Silbaugh, Katharine, "Distinguishing Households from Families" (2016) 43:4 *Fordham Urb U* 1071.
- Sunega, Petr & Martin Lux, "Subjective perception versus objective indicators of crowding and housing affordability" (2016) 31 *J Hous and the Built Enviro* 695.
- Sunega, Petr, "Subjective or Objective? What Matters?" (2014) 1:1 *Critical Housing Analysis* 35.
- Suttor, Greg, *Rental Housing Dynamics and Lower-Income Neighbourhoods in Canada* (Toronto: University of Toronto Neighbourhood Change Research Partnership, 2015).
- Wake Carroll, Barbara, "Post-War Trends in Canadian Housing Policy" (1989) 18:1 *Urban History Review* 64.
- Wayland, Sarah, "Addressing the Housing Needs of Immigrants and Refugees in Canada" (Autumn 2010) *Canadian Issues* 22.
- Williams, Joan, "The Rhetoric of Property" (1998) 83:2 *Iowa L Rev* 277.

OTHER MATERIALS

- Brend, Yvette, "Bedroom-sharing rules shut door on affordable housing for some families", *CBC News* (19 Sep 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/national-occupancy-standards-housing-canada-bc-co-op-vancouver-couple-denied-girl-baby-1.4295849>> [<https://perma.cc/PX84-ZQ8W>].
- Canada, *Census of Canada, 1951, Volume III, Housing and Families* (Ottawa: Queen's Printer, 1953), Table 1.
- Clauson-Kaas, Jes et al, *Crowding and Health in Low-Income Settlements* (Avebury, England: United Nations Centre for Human Settlements, 1997).

- CMHC, *13.6% of Urban Households Were in Core Housing Need in 2016* (22 June 2018), online: <<https://www.cmhc-schl.gc.ca/en/housing-observer-online/2018-housing-observer/13-point-6-percent-urban-households-were-core-housing-need-2016>> [<https://perma.cc/228F-6STU>].
- , *Administration of Social Housing* (31 March 2018), online: <<https://www.cmhc-schl.gc.ca/en/about-cmhc/social-housing-information/administration-of-social-housing>> [<https://perma.cc/87HR-YRF2>].
- , *Canadian Observer Data Table: Number of Renters Households (x1000) – Canada, Provinces and Selected Metropolitan Areas, 2006-2015*, online: <<https://www.cmhc-schl.gc.ca/en/data-and-research/data-tables/number-renter-households-renter-canada-provinces-cmas>> [<https://perma.cc/PCV8-675A>].
- , *Housing Affordability and Need: A Chapter from the Canadian Housing Observer* (Canadian Mortgage and Housing Corporation, 2014).
- , *Housing in Canada Online: Definition of Variables*, online: <http://cmhc.beyond2020.com/HiCODDefinitions_EN.html#_top> [<https://perma.cc/PR8G-RXJ9>].
- , *Identifying Core Housing Need* (14 August 2019), online: <<https://www.cmhc-schl.gc.ca/en/data-and-research/core-housing-need/identifying-core-housing-need>> [<https://perma.cc/X93R-Y2LW>].
- , *Housing Market Information Portal, Core Housing Need*, online: <<https://www03.cmhc-schl.gc.ca/hmip-pimh/en/TableMapChart/CoreHousingNeedMethodology>> [<https://perma.cc/MLN3-H7KC>].
- , *National Occupancy Standards*, (Internal Briefing Note, 1991), unpublished.
- , *Rental Market Report, Canada Highlights* (2018), online: <http://publications.gc.ca/collections/collection_2018/schl-cmhc/NH12-249-2018-eng.pdf> [<https://perma.cc/LAC2-XZVW>].
- , *Renting in Canada*, online: <<https://www.cmhc-schl.gc.ca/en/rental-housing>> [<https://perma.cc/QU3M-4PCE>].
- , *Social Housing Programs* (31 March 2018), online: <<https://www.cmhc-schl.gc.ca/en/about-cmhc/Social-Housing-Information/Social-Housing-Programs>> [<https://perma.cc/J6QE-BHMX>].
- , *Socio Economic Analysis: The Housing Conditions of Off-Reserve Aboriginal Households* (Ottawa: Canada Mortgage and Housing Corporation, 2019).
- Dubber, Markus D, “Legal History As Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law” in *Oxford Handbook of Historical Legal Research, 2016*, online: <<https://ssrn.com/abstract=3002587>> [<https://perma.cc/W73V-7A5Z>].

- Government of Canada, *National Building Code of Canada 2015* (Ottawa: National Research Council of Canada, 2015).
- , *National Fire Code 2015* (Ottawa: National Research Council of Canada, 2015).
- Manitoba Human Rights Commission, Policy #A-6: Rental of Premises – Limitation on the Number of Occupants for a Dwelling; Ontario Human Rights Commission (2005), online: <<http://www.manitobahumanrights.ca/v1/education-resources/resources/policies-pages/policies-a-6.html>> [<https://perma.cc/V7RN-E9PB>.]
- Ontario Human Rights Commission, *Policy on Human Rights and Rental Housing* (2009).
- Pavlik, Katherine, Manitoba Immigrant and Refugee Settlement Sector Association, *Renting a Home in Manitoba: A Literacy Partners of Manitoba Publication*, (Literacy Partners of Manitoba), online: <http://www.whrc.ca/documents/housing_booklet_final_002.pdf> [<https://perma.cc/B8DS-3RP4>].
- Statistics Canada, *Estimated population of Canada, 1605 to present, CANSIM, table 075-0001 (persons)*, online: <<https://www150.statcan.gc.ca/n1/pub/98-187-x/4151287-eng.htm>> [<https://perma.cc/2YRM-3X2Y>].
- , *Housing Highlight Tables, Number of persons per room by housing tenure, total - number of persons per room, 2016 counts, Canada, provinces and territories, 2016 Census – 100% Data*, online: <<http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/housing-logement/Table.cfm?Lang=E&T=31&Geo=00>> [<https://perma.cc/ZB28-4YQF>].
- , *One hundred years of families*, by Anne Milan, Catalogue No 11-008 (Ottawa: Statistics Canada, 2000).
- , *Population Growth in Canada: From 1851 to 2061*, online: <https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-310-x/98-310-x2011003_1-eng.cfm> [<https://perma.cc/Y4NL-S4JN>].
- , *Statistics in 1905*, online: <https://www65.statcan.gc.ca/acyb07/acyb07_0006-eng.htm> [<https://perma.cc/G7QA-A5BV>].
- , *The shift to smaller households over the past century*, Chart 1, online: <<https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015008-eng.htm>> [<https://perma.cc/Z2DE-HFJC>].
- World Health Organization, *Housing: shared interests in health and development, Social Determinants of Health Sectoral Briefing Series 1* (Geneva: World Health Organization, 2011) [WHO Report], online: <https://apps.who.int/iris/bitstream/handle/10665/44705/9789241502290_eng.pdf> [<https://perma.cc/HFL3-F3VW>].