

# USING CIVIL LAW TRUSTS FOR AFFORDABLE HOUSING: A COMMUNITY LAND TRUST MODEL

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[See table of contents](#)

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# **USING CIVIL LAW TRUSTS FOR AFFORDABLE HOUSING : A COMMUNITY LAND TRUST MODEL**

**Ernest VAUDRY and Susan ALTSCHUL\***

Introduction. . . . .	77
1. Trust in Quebec civil law . . . . .	78
2. Using Quebec civil law constructs to achieve the aims of a community land trust . . . . .	80
3. Use of land trusts in the United States and Canada . . . .	84
4. Trust in common law . . . . .	87
Conclusion . . . . .	88

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\* Members of the Barreau du Québec.

## INTRODUCTION

Community groups in Quebec have expressed interest in using the new civil law Trust to develop a method of providing affordable housing to people with low or moderate incomes.

“Community land trusts” (CLT) are used in a number of different jurisdictions for a number of different purposes. *They are usually set up for socially desirable objectives such as the preservation of historically significant property, wildlife, green spaces or community vocations such as childcare facilities, libraries, art or recreation. The label implies that land will be set aside in perpetuity or for a fixed period of time in order to be used for collective social purposes. When a community land trust is created for housing purposes, its specific mission is the provision of housing. A dimension of affordability can also be added. Inherent in this feature is the notion that speculation should be avoided and inflation should be controlled as efficient ways to ensure affordability over a long period of time.*

While many organizations across Canada and the USA have as a mission the provision of affordable housing and call themselves community land trusts, *very few are actually trusts in the juridical sense.* The confusion is somewhat compounded by the fact that trusts as legal vehicles are different from one jurisdiction to the next.

This article explores how the **concept** of Community land trusts and the objective of using land for socially useful purposes might be met by using the new civil law Trust mechanism. It also examines how this objective has been accomplished in the past, both in Quebec – where it was necessary to use completely different types of legal vehicle – and in some other jurisdictions, where the vehicle used is called CLT but has very little to do with trusts.

## 1. Trust in Quebec civil law

Although Quebec civil law has had a notion of Trust since 1888, it was not until the reform of 1994 that attempts were made to streamline it and make it a functioning vehicle.<sup>1</sup>

Il en résulte une fiducie entièrement et indiscutablement renouvelée dans le *Code civil du Québec*, une fiducie qui ne partage pratiquement rien avec son aïeule – si ce n'est le nom – et qui s'analyse comme une institution à la fois originale et avant-gardiste. [...] [Le législateur] s'est ... astreint à recréer une fiducie dont le fondement est inspiré de la notion "civiliste" du patrimoine, évitant ainsi de recourir au dédoublement de la propriété du *trust* de *common law* tout en se dispensant de la nécessité d'ériger la fiducie en personne morale. Ce faisant, il a offert à l'institution une base juridique plus solide et un meilleur encadrement qui permettront à ses utilisateurs d'y recourir en sachant qu'ils ont entre les mains un outil de planification et de gestion du patrimoine hors pair, conçu à la fine pointe de la science du droit.<sup>2</sup>

In Quebec the trustee has no title to the property forming the trust. In effect, the distinct patrimony that constitutes the Quebec trust does not confer title on the trustee, on the settlor or the beneficiary. In the uniquely Quebec form of trust the beneficiary enjoys rights in relation to both the trust *and* the trustee, but does not hold any title in the trust property.<sup>3</sup>

The old Civil Code of Lower Canada had permitted trust for strictly personal purposes since 1888.<sup>4</sup> But only recently has Quebec civil law expressly permitted trusts for both private and social utility,<sup>5</sup> thus giving them a wider field of applicability. The social trust in Quebec must be constituted for the accomplishment of "a purpose of general interest," such as a cultural, educational, philanthropic, religious or scientific purpose, and does not have the making of profit or the operation of an enterprise as its main object.<sup>6</sup>

1. See : Jacques BEAULNE, *Droit des fiducies*, Montréal, Wilson & Lafleur, 1998; André MORRISSETTE, "Fiducie" in "Chronique Réforme du Code civil," (1993) 15 R.P.F.S.; John E.C. BRIERLEY, "Titre sixième – De certains patrimoines d'affectation – Les articles 1256-1298," in *La réforme du Code civil*, t. I, Ste-Foy, P.U.L., 1993.

2. J. BEAULNE, *id.*, p. 5.

3. Art. 1262 C.C.Q.

4. See art. 981(a) and following of the Civil Code of Lower Canada.

5. Art. 1266 C.C.Q.

6. Art. 1270 C.C.Q.

It may be perpetual.<sup>7</sup> At first view, this would correspond roughly to what may be considered a charity for the purposes of the *Income Tax Act*.<sup>8</sup>

The trust is not a juridical person<sup>9</sup> but rather a juridical institution or device that exists solely for the purpose of pursuing its mission.<sup>10</sup> Although social trusts as well as private trusts may be perpetual, they cease to exist once their objects have been achieved. The concept of a patrimony by appropriation is unique to Quebec, as it seems to exist in no other jurisdiction.<sup>11</sup> The property appropriated to the distinct patrimony no longer belongs to the settlor of the trust nor does it belong to the trustee or the beneficiary. Article 1278 C.C.Q. tells us that the titles to the property administered by the trustee are drawn up in his name. They could be drawn up in the

7. Art. 1273 C.C.Q.

8. According to Canada Customs and Revenue Agency, there are four general categories of charitable purposes.

For an organization to be registered, its purposes have to fall within one or more of the following categories :

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- certain other purposes that benefit the community in a way the courts have said are charitable.

#### **Registering a Charity for Income Tax Purposes**

T4063(E) Rev. 01

Art. 1525 *in fine* C.C.Q. states : "*The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the carrying on of an enterprise.*" When one considers the definition of an enterprise as established in the code, article 1525 certainly includes the activities of an ordinary not-for-profit corporation. If a social utility trust excludes the operation of an enterprise, it can be argued that a charitable entity as may be recognised by the CCRA is closer to what would constitute a social utility trust.

See : *Congrégation des témoins de Jéhovah d'Issoudun-Sud c. Mailly*, J.E. 2000-1776 (C.Q.) where Justice Gérald Locas suggests that an entity whose primary purpose is the pursuit of a charitable purpose is not considered to be the operation of an enterprise within the meaning of article 1525 C.C.Q.

9. See art. 298 and following C.C.Q.

10. The trust ends when it has attained its objectives (art. 1296 C.C.Q.).

11. André MORRISSETTE, "Étude de la fiducie du Code civil du Québec et comparaison avec le *trust* du droit anglais", in *Colloque sur les fiducies dans le Code civil du Québec*, Montréal, Wilson & Lafleur, 1995. It would be difficult as a result to find pertinent jurisprudence on this concept from common law as well as other civil law jurisdictions. For the origins of the concept : see BEAULNE, *op. cit.*, note 1, pp. 20-21 and 26-27.

name of the trust itself, since the article is not imperative. The trustee acts as an administrator with the powers of full administration.

Once constituted, the patrimony may increase by property transfers from any person.<sup>12</sup> The court can always intervene at the request of an interested party to modify the constituting act to better fulfil the intent of the settlor.<sup>13</sup>

The acceptance of the trust by the trustee (or any one trustee in the case of a plurality of trustees) is necessary to constitute the trust, if all other legal requirements are met.<sup>14</sup>

## **2. Using Quebec civil law constructs to achieve the aims of a community land trust**

A community land trust would not be a recognized charity for much the same reasons that housing co-operatives and other non-profit housing corporations would not be recognised as charities.<sup>15</sup> The community land trust would not therefore be a social trust as defined by the Civil Code.<sup>16</sup> It would more likely take the form of a private trust that would provide housing on a non-profit basis to a defined class of beneficiaries. Such a trust may have in addition to other features the appropriation of property to other specific uses such as community or green spaces.<sup>17</sup>

*In order to work most effectively for the purposes of social housing, such a trust should encompass only the land, not the buildings that either exist already or will be put up. In this way the buildings can have actual owners and can therefore be alienated and/or hypothecated. If the buildings already exist on the Trust land, the Trustee can transfer superficial ownership of the buildings as well*

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12. Art. 1293 C.C.Q.

13. Art. 1294 C.C.Q. second paragraph.

14. Art. 1264 C.C.Q.

15. In some cases the Canada Customs and Revenue Agency will recognize the provision of housing as a charitable activity when the organization is established "exclusively to provide housing for the poor, the handicapped or the aged, where it is apparent that the intention of the organization is to provide some measure of relief associated with these conditions, can qualify for registration as a charity" CCRA policy reference number CSP - H01.

16. Social trusts do exist in Quebec. See for example "La Fiducie du domaine Saint-Bernard" which created a park for environmental protection in 2000.

17. Arts. 1268-1269 C.C.Q.

as enjoyment of the land<sup>18</sup> to various non-profit organizations or housing cooperatives, which in turn will grant leases to their members. The non-profit organizations and housing cooperatives then become the beneficiaries of the trust on the land, as well as having ownership rights in the buildings. If new buildings are to be constructed, the air space will be subdivided from the land and transferred to the beneficiaries.

### **The Settlor**

Any natural or legal person may be a settlor. Nothing seems to prevent the settlor from being more than one person. It is therefore possible for a consortium of sorts to set up a trust. Once established, however, persons increasing the patrimony of the trust do not acquire the status of *de facto* settlors.<sup>19</sup> Persons wishing to set up a Community Land Trust must therefore either own land or have a means of acquiring it, so that they can give it the appropriation of a trust. Once appropriated, the owners cease to hold title but retain a general supervisory mission to ensure that the land is used properly.<sup>20</sup> The settlor appoints or establishes the way to appoint a trustee.<sup>21</sup> The settlor also establishes the way replacements are made. In this regard the settlor is free to innovate with any legitimate ways of appointing or replacing a trustee. Community or collective involvements in the process are available to the settlor.

The settlor could be a non-profit corporation whose purpose is the establishment of a community land trust. It would purchase or otherwise acquire property, which would subsequently be appropriated to the CLT. Once the CLT is established anyone can add property to the trust.<sup>22</sup>

### **The Trustee**

The trustee is a natural person but can also be a legal person if duly authorized by law.<sup>23</sup> However, the only legal persons authorized by law to act as Trustees are those constituted under the *Loi*

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18. Art. 1111 C.C.Q.

19. Art. 1293 C.C.Q.

20. Arts. 1287, 1290-1291 C.C.Q.

21. Art. 1276 C.C.Q.

22. Art. 1293 C.C.Q.

23. Art. 1274 C.C.Q.

*sur les sociétés de fiducie et les sociétés d'épargne.*<sup>24</sup> Non-profit organizations and housing cooperatives could not therefore be designated as trustees. The settlor may appoint himself Trustee, providing there is also a co-Trustee who is "neither the settlor nor a beneficiary," i.e. has no interest in the trust property.<sup>25</sup> The trustee may resign without giving a reason but must notify the person or organization charged with supervising his administration, which include the beneficiary.<sup>26</sup>

The trustees could include individuals chosen from the Board or the membership of the settlor, individuals chosen from amongst the membership of the beneficiaries if these are legal persons such as housing cooperatives or non-profit corporations, or individuals who directly benefit from the housing that is provided; possibly individuals chosen from a defined community or public.

If a specific, named individual is appointed as Trustee problems arise when that person dies or resigns. When providing for a perpetual trust, it may be sufficient to designate as Trustee a person fulfilling a specific function, such as "the president of XYZ Housing Corporation."

### **The beneficiary**

Any person having capacity to receive by gift or by will can be the beneficiary of a trust.<sup>27</sup> This includes both physical and legal persons.

In the case of a community land trust, who are the beneficiaries? Are they the occupants and members of their families? Are they the identifiable members of a disadvantaged socio-economic group? Are they legal persons such as co-operatives or non-profit corporations? Is it a larger community, geographically or otherwise defined? Considering the supervisory powers of the beneficiaries

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24. L.R.Q., c. S-29.01; see articles 170 and 174. There are presently at least two exceptions permitted by other statutes: *An Act respecting La Financière agricole du Québec*, L.Q. 2000, c. 53, art. 70 and *An Act to amend the Act respecting occupational health and safety and other legislative provisions*, L.Q. 2000, c. 76, arts. 1 and 2.

25. Art. 1275 C.C.Q.

26. Arts. 1355 and 1357 C.C.Q.

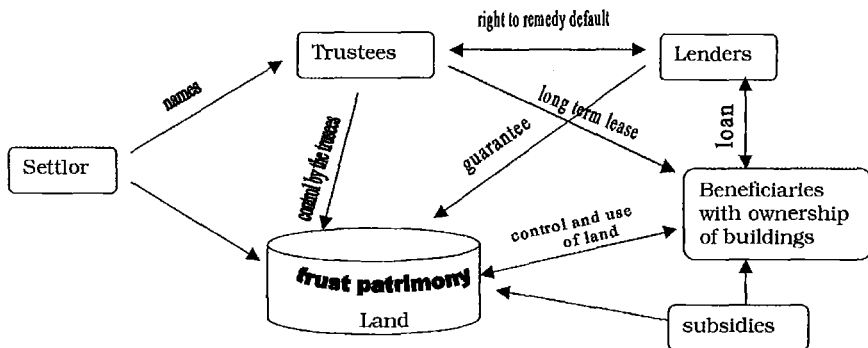
27. Art. 1279 C.C.Q.



and respective roles of the other parties to the trust, the answers to these questions are of prime importance in the setting up of a CLT.<sup>28</sup> Careful consideration must be given to the definition of the beneficiary group in the trust deed. A distinction should be made between the beneficiaries as a defined group and the target population. Whereas the overarching goal of the CLT may be housing of an entire class of people who could not easily afford what is on the market, the defined beneficiaries of this trust should only be the specific organizations that can own the buildings on the CLT property. Such caution in the definition of beneficiaries is warranted because beneficiaries would have legal standing with regard to the enforcement of the trust deed provisions.

Conceivably, if no suitable beneficiaries can be found the Trustee can dissolve the trust.

The chart that follows shows the connections between the various actors in this complicated relationship.



There are no compelling reasons why the model suggested could not also be employed to accommodate individual ownership of single family housing or apartments while effectively reducing wind-fall speculation on subsequent sales.

28. Art. 1287 C.C.Q.

### 3. Use of land trusts in the United States and Canada

Modern land trusts were initially formed as a means to protect natural habitats, green spaces and property of historical or cultural significance. Land trusts for affordable housing are a much more recent variant of the hybrid between public and private ownership models.

The oldest affordable housing Community land trust is the **Burlington Community land Trust** (BCLT) founded in Vermont in 1984. In 16 years its holdings have grown to nearly 500 units of housing, including single-family homes, housing cooperatives, condominiums and varied rental options.<sup>29</sup>

The BCLT adopted as its working model the American proposal by the Institute for Community Economics (I.C.E.), using a non-profit corporate structure where control of the vocation and the pursuit of the initial objectives are subject to the authority of a larger group.<sup>30</sup> The CLT retains ownership of the land and sells only the right to occupy and build thereon. The monitoring of compliance with the land lease agreement is also within the hands of a larger group that includes founding members, beneficiaries and anyone endorsing the objectives being pursued.

In the CLT model, real property ownership is split between title to the land on the one hand, and title to the housing and the improvements on the other. If the CLT model is applied to a simple example, the single-family house, title to the land under the house is held by the CLT. Title to the house is held by the individual(s) who we would otherwise think of as the homeowner(s). The relationship between the CLT as owner of the fee interest in the land and the homeowner is governed by a ground lease, with the CLT as ground-lessor and the homeowner as

29. H. McCULLOCH, *Sharing the Wealth : Resident Ownership Mechanisms, a PolicyLink Report*, U.S.A. 2001, p. 95.

30. In the ICE legal manual at page 4-1 the authors declare : "Community land trusts (CLTs) are not-for-profit corporations chartered specifically for those purposes that are essential to the CLT model as described in Chapter 1. It is also essential to the model that the CLT be a "membership organization" (as opposed to one controlled by a self-perpetuating board of directors), and that membership be open not only to people who use the CLT's land as lessees but to any other members of the community who support the CLT's purpose and have an interest in its operation." Institute for Community Economics. 1991 "The community land trust legal manual" Springfield, MA : Institute for Community Economics. Web site : <<http://www.iceclt.org>>.

ground lessee. ... At bottom, a ground lease is a long-term lease to a party willing to invest in the use of the land while the fee owner/lessor retains the ultimate reversionary interest at the end of the lease term. ... The CLT model adapts this lease format; in order to carry out its overriding purpose of preserving the long-term affordability of housing, a CLT ground lease also contains limitations on both the resale price and the use of the house located on the leased land.<sup>31</sup>

The model presumes that the CLT/lessor has been created with the intention of preserving the land from speculation and protecting long-term affordable housing. Abromowitz informs us that a CLT is typically a non-profit, tax-exempt corporation, with a board comprising representatives of the community at large, tenants and non-resident members with particular skills or interests that are useful.<sup>32</sup>

The model not only allows the trust to reduce the vendor's 'take' on subsequent sales, thereby making each sale somewhat more affordable than the previous one, but also allows the trust to make sure that the lower cost accommodations are available by priority to households that are below the median income for the area. The Burlington Community land trust uses a land lease to effectively control resale of property on trust land. However, the residents acquire sufficient title in the land to be considered as homeowners, and thus are able to develop pride in the community and a stake in its ongoing improvement.

There have been a number of experiences here in Canada, notably **Colandco** in Toronto and the **Community Housing Land Trust Foundation** in British Columbia. Colandco, a not-for-profit corporation held the land for more than 2,300 units in 14 projects,<sup>33</sup> making it arguably the biggest community land trust in North America. In British Columbia, the Community Housing Land Trust Foundation was set up by the provincial government as housing co-operatives approached the end of their initial mortgage periods and were no longer prevented by financing and subsidy conditions from speculating on the value of their property. The purpose of the

31. David ABROMOWITZ, *An Essay on Community Land Trusts in Property Values, alternatives to public and private ownership*, Geisler and Danecker eds, Island Press, Washington DC, p. 214. Our underlining.

32. *Id.*, p. 221.

33. M. HARSTONE, "The Co-operative Land Trust in Practice", November 18, 1993, "CMHC task force on Land Trusts and self help housing."

Foundation was to hold the land in perpetuity on behalf of the co-operative residents and prevent co-ops from dilapidating or otherwise disposing of their patrimony.

In Quebec the best example of what is referred to as a community land trust is the **Milton Parc community**. Although not a trust in the above described sense, the community through a private member's bill and a rather detailed co-ownership agreement have pursued objectives similar to those of the community land trusts in other Canadian provinces and in the United States.<sup>34</sup>

Under the rules of divided co-ownership in the Quebec Civil Code,<sup>35</sup> buildings and the land they sit on normally belong to the people who live in them, the building or apartment being held privately while the land and the common portions are held in undivided co-ownership. This combination of tenures is known as a "fraction". A Declaration of Co-ownership is registered against the entire immovable and it binds all present and future owners. Such a declaration can contain provisions to ensure affordability by restricting the advantages that any co-owner may obtain when alienating his fraction. The condominium model was used successfully in the Milton-Parc project to protect an "ensemble" of 135 buildings from speculation and preserve it for occupants with low or middle incomes.

It could be similarly adapted to fulfill the objectives of a community land trust. By creating a distinct universe it allows :

- land to be held collectively
- use of the land to be bound in perpetuity
- selection of who will be admissible to join
- control by a Trustee so that its objectives cannot be changed in future.

The Trust in this model would be a non-profit corporation like in the other parts of Canada, and not a Trust corporation as it exists in Quebec law; it would have a sufficient stake in the condominium

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34. For a detailed description, see Susan ALTSCHUL, "Condominium for Social Purposes", (1989-90) 92 R. du N. 219, 219-234.

35. Arts. 1038-1109 C.C.Q.

to ensure a veto over changes in the destination clause of the declaration of co-ownership.<sup>36</sup>

As in the I.C.E. model, individual owners could give a right of first refusal to the community land trust at a price that is determined according to the covenants placed on the property of the co-owner at the time of purchase.

In this model, the problem of defining an owner is eliminated, so mortgage and other financing is easier to obtain. However, any mortgage creditor who repossesses a fraction finds himself bound by all the restrictions of the Declaration of Co-ownership, which are not normally attractive to the speculative investor. (In the Milton-Parc model the problem was palliated by CMHC agreeing to ensure the mortgage loans).

#### **4. Trust in common law**

Professor Donovan Waters, the leading Canadian author on common-law trusts, provides the following definition :

All that can be said of a trust, therefore, is that it is the relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.<sup>37</sup>

According to Waters, trust is “an institution half-way between juristic personality and agency,” dating back to twelfth-century England.<sup>38</sup> Its essence is a duality of “estates” in the land – equitable (held by the beneficiary) and legal (held by the trustee) – each of which constitutes title.

Neither Colandco nor the British Columbia Community Land Trust Housing Foundation are trusts as defined above. They do not split the ownership of the land, but use long-term leases. Even the

36. Arts. 1092 and 1098 C.C.Q.

37. D.W.M. WATERS, *Law of Trusts in Canada*, second edition, Toronto, Carswell, 1984, p. 5, citing G.W. KEENAN and L.A. SHERIDAN, *The Law of Trusts*, 10th edition, 1974, p. 5

38. H. McCULLOCH, *op. cit.*, note 28, pp. 8 and 95.

I.C.E. model, in which the CLT owns the land and the tenant owns the home built upon that land, does not involve the trademark splitting of title that is the essence of a common law trust.

Nor is the form used in the United States, Ontario and British Columbia that of a trust as defined by Quebec law.<sup>39</sup> It is closer to our notion of emphyteutic lease,<sup>40</sup> (although in a community land trust the principal obligation of the homeowner/tenant is not to make improvements but rather to forgo any profit when he sells), superfiary ownership<sup>41</sup> or divided co-ownership.<sup>42</sup> Indeed, all those vehicles have been used in this province for such purposes. The City of Montreal has set up a 52-year emphyteutic lease program for co-ops and non-profit organizations, "equivalent to a form of long-term rental arrangement where the rent is pre-paid in advance and the use is guaranteed for the duration of the lease."<sup>43</sup> Another experiment involved the superfiary ownership granted to a cooperative, which paid 4 % of the municipal evaluation as a form of rent.<sup>44</sup>

## CONCLUSION

Quebec in many respects is still on the leading edge of the search for innovative solutions to housing problems of middle and lower income citizens. Its traditions in co-operative, non-profit and public housing as well as rental housing legislation together with bold initiatives such as the Milton-Parc community, place it squarely on a path leading to the eventual recognition of the right to decent affordable housing alongside others like adequate food, education and health.

With vacancies near all time lows and costs for building and operating housing higher than they have ever been, new models for private/public collaboration are needed. Governments at all levels have historically invested substantial funds to respond to the social

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39. Arts. 1260-1298 C.C.Q.

40. Arts. 1195-1211 C.C.Q.

41. Arts. 1110-1118 C.C.Q.

42. Arts. 1038-1109 C.C.Q.

43. Kayla SAMUELS, Kathryn DI CRISTINA, Leslie SAMUELS, *St. Henri / Petite Bourgogne, a Community Land Trust Study*, Studio III, December 17, 1990 (UQAM).

44. *Fiducie foncière de la Montérégie : Fiducie foncière : Applications et modèles théoriques* (UQAM).

needs of low and moderate-income citizens. The practice of governments in Canada since the Second World War has been to invest heavily in the creation of housing to alleviate the effects of cyclical housing crises. With few exceptions, once invested and the short-term impact achieved, the funds are usually forgotten.<sup>45</sup> These "forgotten contributions" are usually recovered by the owners in one form or another at the time of resale. It is also clear that public investment in community infrastructure enhances the value of such housing, thus creating additional development potential upon eventual resale. Ironically, the successful creation of quality housing integrated in a well serviced and well developed community increases the chances that the housing will be resold at prices that are less affordable than originally intended.

The CLT model suggests that private and public investments in affordable housing can be "captured" for future generations. Conservation and recycling of housing subsidies combined with re-investment of increased value as a result of market forces may make this type of housing more affordable with the passage of time rather than the opposite.<sup>46</sup>

In this article we have suggested that the new civil law of Trust could be successfully adapted to create a working model of a Community Land Trust, one that would achieve the stated objectives of removing land from speculation in perpetuity and delivering affordable housing to people in low-income brackets. Such an approach would not bring back the \$55 a month apartment, but may extend affordability over a longer period than has been so far observed.

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45. Public housing is a notable exception, but the creation of this type of housing had fallen out of favour in the 1970's. Another exception is the effort of the Government of Québec to ensure that housing co-operatives and non-profit housing corporations remain non-profit and refrain from dilapidating their property, acquired with public funds. See sections 68.1 and following of *An Act Respecting The Société d'habitation du Québec*, L.R.Q., chapter S-8.

46. Indeed, the Burlington Community Land Trust reports that re-sales typically serve an even lower-income family than the original sales (cited in McCULLOCH, *op. cit.*, pp. 8 and 95).