Legislative Protection of the Built Environment in Prince Edward Island and New Brunswick

INTRODUCTION

Context

For the large majority of Canadians, environment is their city or town, for it is there they reside, work, and spend most of their leisure hours. Inevitably, the quality of this urban or semi-urban environment will have a significant impact upon their everyday life; affecting such matters as stress, cultural identity, and sense of historic continuity. The conservation of the built environment is, therefore, of great importance not only to the conservation movement but also to municipal planners, officials, and experts on land use controls. The cultural and aesthetic values represented by the buildings which constitute the environment of most of our population deserve our close attention.

One way for such buildings to be saved is through purchase by persons dedicated to their retention; however since it is impossible to thus acquire all valuable buildings, this article will look at alternate approaches. There are legal mechanisms at five levels: international, federal, provincial, municipal, and private. In addition, public participation is an important dimension to any discussion of land use controls. It is also possible to apply for financial assistance to a number of sources. Though canvassed briefly later in this article these sources should be contacted directly.

The international and federal aspects of protecting the built environment were already described by this writer in a previous publication.[1] The salient features of that detailed description can be summarized as follows:

International Aspects

Heritage legislation is defined by international consensus as the body of law which deals with the identification and protection of sites and areas of historic and/or architectural interest. Financial aid to such sites and areas is often considered a further component of such legislation, although it is not usually described in the statutes themselves.

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[1]M. C. Denhez, *Protecting the Built Environment* Pt. 1 (Ottawa: Heritage Canada, 1978). The French version will be found in (1978) 38 *La Revue du Barreau.*

The international treaties such as The Hague Convention of 1954 and the UNESCO World Heritage Convention of 1972 were drafted to promote the protection of architecture and historic sites. When Canada adhered to the latter treaty, it formally committed itself to a number of objectives concerning heritage conservation, including the integration of conservation principles into national policy.[2] These obligations have not been translated into statute.

International treaties have been supplemented by international recommendations which outline the contents of proper heritage legislation. Canada voted for these recommendations but, unlike treaties, they are not legally binding.

In the Western world, heritage legislation of some description existed as early as the fifth century A.D. In the modern period such legislation began to re-emerge in the seventeenth century. Most European countries have had laws comparable to Canada's current legislation for approximately a century.[3]

Interpretation

Heritage legislation now exists in Canada. In order to protect heritage property, it is sometimes necessary to restrict the owner's right to alter or destroy that property. Although there is nothing intrinsically unconstitutional or illegal about such controls, courts must decide in cases of legal uncertainty whether the benefit of the doubt is to be given to the owner or to the heritage authorities. This issue has yet to be firmly decided, however, most precedents suggest that the heritage authorities should enjoy the benefit of the doubt.[4]

Federal Aspects

Most authority for the protection of heritage belongs to the provinces. Although the federal government has entrusted a large heritage program to the Department of Indian Affairs and Northern Development, the extent to which it can actually protect buildings against demolition is severely limited by constitutional factors. For example, the federal *Historic Sites and Monuments Act* does not protect buildings against demolition.[5]

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[2]*Ibid.*, at 4-5.

[3]Historical evolution of legislation; *ibid.*, at 7.

[4]For jurisprudence affecting burden of proof in heritage cases see *ibid.*, at 7-11.

[5]For description of limitations see *ibid.*, at 11-17.

The federal government can presumably protect buildings if it actually buys them; yet it is under no legal obligation to protect the heritage which is in its hands. This distinguishes the federal government's legal obligations from those of other countries, which are by treaty obliged to respect Canada's heritage sites. It also distinguishes Ottawa's domestic obligations from its foreign ones, where by treaty it is obliged to respect the heritage sites of other countries. The federal government has, however, established special non-statutory administrative procedures to minimize the effect of public works which damage heritage.[6]

In the absence of statutory controls on federal heritage property, the question has arisen whether such property could be subjected to provincial heritage laws; but most authorities contend that federal property is exempt from such provincial legislation.[7]

There is some property which, without being federally owned, is under direct federal control: railway property and harbours are examples. Federal agencies supervise this property, but it is not clear whether these agencies can protect heritage. Although it was often assumed that such property shared the same immunity from provincial laws (including heritage laws) as federal property, that assumption has been shaken by recent litigation. This litigation suggests such property can probably be subject to provincial and municipal heritage controls.[8]

The federal government operates several subsidy schemes which can be useful for the renovation of buildings. The benefits of these subsidy schemes are diminished by the federal *Income Tax Act* which treats a demolished investment property as lost and gives a substantial tax deduction on such demolition. Furthermore, the *Income Tax Act* provides no incentives for renovation; this can leave renovation in a poorer position tax-wise than new construction.[9] This question is currently the subject of substantial discussion and negotiation therefore there is the distinct possibility of change.[10]

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[6]For description of the basic features of environmental impact procedures at the Canadian federal level as compared with the U.S. and Australia, see *ibid.*, at 13-14.

[7]*Ibid.*, at 14.

[8]*Ibid.*, at 16. The *Hamilton Harbour* case, on which this view was based, was appealed unsuccessfully to the Ontario Court of Appeal; appeal to the Supreme Court of Canada was abandoned.

[9]*Ibid.*, at 17-19. A more detailed description is found in *Tax Proposals Affecting Renovation*, by this writer in *Proceedings of the Second Canadian Building Congress*, National Research Council, Ottawa 1980.

[10]For a description of current developments in this area, see *Heritage Canada Magazine*, May 1979, at 3-4.

Other Aspects

This article discusses the other aspectsof legislation to protect the built environment, these being: the provincial, municipal and private contractual aspects, including the feature of citizen participation. In many respects, these are the most important aspects of the subject.

An overview of provincial and municipal powers in this area has already been published in order to compare the legislative provisions in any one province with those of any other province or territory in Canada.[11] The author will now consider those features of the question which arise directly out of the legislation of Prince Edward Island and New Brunswick.

THE PROVINCIAL LEVEL

Early Warning System and Governmental Demolition

Before a government can take action to protect historical resources, it must know that these valuable resources exist. Accordingly, the United States and Australia[12] have developed an Environmental Impact Assessment procedure, which requires that careful inventory and investigation precede major works which are likely to affect the environment (including the built environment) and which are financed, at least in part, by government. Several Canadian jurisdictions are gradually introducing this system.[13]

Such legislation can have a significant impact upon undesignated historic resources threatened by public works. In Ontario, *The Environmental Assessment Act, 1975*, S.O. c. 69 requires the preparation and submission of reports containing an assessment of the environmental impact of proposed development.[14] These reports must be filed by most government departments and agencies. The Ontario statute also specifies factors to be included in the reports, including the description of the proposed undertaking and its effect upon the environment. This requirement is important for heritage conservationists because the definition of environment given in s. 1(*c*) includes the built environment, *i.e.* "the social, economic and cultural conditions that influence the life of

[11]*Supra*, footnote 1, at 20-23.

[12]See *National Historic Preservation Act* (USA) 1966, 16 U.S.C. c. 470 (*f*) particularly s. 106; *Environment Protection (Impact of Proposals) Act*, Australia, 1974, c. 164.

[13]*E.g.*, *Alberta Land Surface Conservation and Reclamation Act*, 1973 S.A. c. 34, s. 8; *Alberta Historical Resources* S.A. 1973, c. 5, s. 37 as am. by S.A. 1975, c. 41, ss. 2, 26, s. 22; *Ontario Environmental Assessment Act*, S.O. 1975, c. 69.

[14]These are called *environmental assessments*. Some experts in environmental law refer to this as a grammatical curiosity: strictly speaking, it should not be the environment whose value is being assessed, but rather, the project which is affecting it.

man or a community", as well as "any building, structure, machine or other device or thing made by man." The report must also describe "an evaluation of the advantages and disadvantages . . . to the undertaking and the alternativesof the undertaking".[15]

The report is reviewed by governmental authorities and made public; if the report is incomplete, citizens can challenge it.[16] This kind of legislation had led to considerable litigation in the United States, where injunctions based upon the inadequacy of governmental procedures have been obtained against the demolition of heritage sites.[17] There is no statute which provides for such a procedure in either Prince Edward Island or New Brunswick; consequently, heritage sites do not enjoy the same degree of protection in these two provinces.

PROVINCIAL PROTECTION OF PROPERTY

General

In Prince Edward Island there are two ways to protect a site or district: one can proceed under the *Recreation Development Act*[18] or the *Planning Act.*[19] In New Brunswick there is one clear mechanism which can be used by the provincial government to protect a site or district; there is another mechanism which is not as clear. They are operated by two separate ministries under two different statutes, the *Historic Sites Protection Act*[20] and the *Community Planning Act.*[21]

The Recreation Development Act (P.E.I.)

The P.E.I. Executive Council is empowered by the *Recreation Development Act,* on the recommendation of the Minister of Tourism, Parks and Conservation, to designate protected areas.[22] The consequences of such a designation are mentioned at s. 10 of the Act: "No person shall use an area designated as a protected area in a manner

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[15]S. 5(3)(*d*).

[16]S. 7(2).

[17]S. 18(19). In the United States there are usually twenty to thirty citizens' applications for injunctions pending before American courts at any given time to block projects threatening heritage. See the *National Historic Preservation Act* (USA) 1966, 16 U.S.C. s. 470(*f*), particularly at s. 106; *National Environmental Policy Act,* 42 U.S.C. s. 4321, P.L. 91 190(1970).

[18]R.S.P.E.I. 1974, c. R-9.

[19]R.S.P.E.I. 1974, c. P-6 (as amended).

[20]R.S.N.B. 1973, c. H-6 (as amended).

[21]R.S.N.B. 1973, c. C-12 (as amended).

destructive of the item designated for protection. This appears to confer a clear power to designate areas which will be protected from unauthorized alteration and demolition.

The Planning Act (P.E.I.)

The P.E.I. Minister of Municipal Affairs is empowered by Part II, s. 46 of the *Planning Act* to designate areas for special regulation, as long as these areas are outside the boundaries of incorporated cities and towns. One of these areas is called a conservation zone and would be established for the purpose of preserving "objects of beauty, fossil remains, other objects, animate or inanimate, of aesthetic, educational or scientific interest . . ."[23] The section closely parallels the *Recreation Development Act,* which creates protected areas.

There are, however, some differences. First, the scope of the *Planning Act* is more limited; it contemplates designation in "any area except the City of Charlottetown or towns"[24] whereas the *Recreation Development Act* foresees designation in any area of the province. A second difference can be found in their approach to compensation for designation; this will be discussed *infra* under the heading "Compensation".

Under Part II of the *Planning Act,* the province can also control construction on heritage sites, since it is empowered to govern "development of land" and "building standards".[25]

Is it also possible for regulations to control demolition? The Minister is given general powers to enact regulations "implementing an official plan" and promoting "general welfare".[26] In practice, official plans developed by anyone except the municipality are extremely rare. If an official plan foresees the conservation of an area, and if it is declared that this purpose promotes the public welfae, can the Minister enact a regulation controlling demolition?

Any attempt to use those powers as a basis for regulations controlling demolition would have to take account of the problem.

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[22]S. 6(1)(*b*).

[23]S. 46(1)(*r*).

[24]S. 46(1).

[25]S. 46(1).

[26]*Ibid.*

Jurisprudence is still divided on the interpretation of land use controls,[27] with some decisions holding that such controls cannot be inferred unless the enabling legislation specifically empowers the government. By this reasoning, the *Planning Act* could not be used to control demolition unless the Act referred specifically to demolition control; inferences would be insufficient. Under such an interpretation, the *Planning Act* could control only infill construction and not demolition.

On the other hand, an increasing volume of jurisprudence now indicates that land use controls deserve liberal interpretation and should be supported unless they are clearly beyond the power of the authorities. Such an interpretation would favour the use of the *Planning Act* mechanisms for heritage conservation purposes; that is, to control both demolition and infill construction. However, it will take a court to determine which interpretation will prevail and in the meantime the *Planning Act* should be used relatively cautiously for purposes of controlling demolition. It appears preferable to resort to the *Recreation Development Act,* which is clearer in this respect.

The Historic Sites Protection Act (N.B.)

The New Brunswick Minister of Education is empowered by the *Historic Sites Protection Act* to go through a two-fold designation procedure for heritage sites. Under s. 2(1) "the Minister may designate any site, parcel of land, building, or structure of any kind to be an historic or anthropological site". The property thereupon becomes eligible for protection: the Minister may by s. 2(2) "designate any historic or anthropological site to be a protected site". The consequences of this designation are mentioned at s. 3 of the Act; "no person shall excavate or alter in any way a protected site or remove or cause to be removed therefrom any protected object unless he is the holder of a permit." The Minister of Education is thereby given discretion to accept or reject construction, alteration or demolition on protected property as he sees fit. The Act does not specify any special recourse for a person whose property has been designated a protected site.

The Community Planning Act (N.B.)

It is fairly clear from the legislative intent of the *Historic Sites Protection Act* that it was meant to be used for the purpose of protecting historic and anthropological sites. There is disagreement, however, as to whether the *Community Planning Act*[28] can be used by the province for

[27] I. F. Rogers, *Canadian Law of Planning and Zoning,* (Toronto: Carswell Co. Ltd., 1973) at 11. For a case in which the court equated the threat to heritage with a state of emergency, see *Murphy* v. *City of Victoria* (1976), 1 M.P.L.R. 166 (B.C.Q.B.).

[28] *Supra,* footnote 21.

those same purposes. If indeed, the *Community Planning Act* could be so used, the scenario would be as follows. The Act permits the Minister to prepare "regional development plans",[29] which are formally adopted by the Executive Council.[30] Once adopted, the plan "shall prevent the undertaking of any development in any manner inconsistent or at variance with [it] . . . [by] a municipality or other person".[31] Section 1 of the *Community Planning Act,* clearly states that "demolishing, altering, repairing or replacing" a building are forms of "development"; the inference is unavoidable that a plan can control alteration and demolition in the same manner as it controls other forms of development.

This line of reasoning is, however, predicated upon a contentious point: that plans, are by themselves, binding on owners. If plans are not binding, they cannot be used to control demolition or any other development, this hypothesis gives rise to debate among the authorities. On one hand, Rogers asserts the following:

> Both regional and municipal plans in New Brunswick prevent the undertaking of any development inconsistent or at variance with any policy or proposal therein. This prohibition applies not only to individuals and the municipality but also the province.[32]

On the other hand, this assertion is disputed by other authorities who argue that, at least as far as municipal plans are concerned, the plan cannot control development unless implemented by by-laws or similar further land use controls.[33]

Since most New Brunswick authorities appear to believe that municipal plans to become effective, must be supplemented by further measures, and since the legislation relating to regional plans is highly similar to that for municipal plans, there is a possible inference that regional plans must also be supplemented by further measures to become effective. If that hypothesis holds true, then a regional plan by itself would be insufficient to control demolition.

The weak point in that hypothesis is that, whereas municipal plans can be supplemented by by-laws, the *Community Planning Act* does not mention any further mechanism to supplement regional plans. If the

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[29]S. 17(1).

[30]S. 18(5).

[31]S. 18(7).

[32]*Supra,* footnote 27, at 62.

[33]This assertion is based upon: *Regina* v. *City of Barrie et al., Ex parte Bernick* (1970), 8 D.L.R. (3d) 52 (Ont. C.A.) and *Re Howard Investments* (1972), 30 D.L.R. (3d) 148 (Ont. H.C.). These cases were decided in Ontario and there is disagreement whether the N.B. legislation would give rise to similar decisions. However, an *obiter* in *Re R.K.A. Associates Limited* (1973), 8 N.B.R. (2d) 38 at 44 (N.B.Q.B.) appears to support this view.

Act had intended regional plans to be supplemented by further controls, it would probably have at least mentioned what those controls were. In the absence of any such statement, it appears more logical to assume that the plan itself is binding. This interpretation would also coincide more closely with the wording of s. 18(7) of the Act. Consequently, it is plausible that a regional plan prepared by the Minister and adopted by the Executive Council could probably control alteration and demolition of buildings. Such an approach has not, however, been attempted in New Brunswick and its validity is obviously untested in the courts. In the meantime, the *Historic Sites Protection Act* appears to be a far more reliable recourse than the *Community Planning Act.*

Even if the *Community Planning Act* were incapable of controlling demolition, it would still have some interest for provincial officials. Its planning procedures are expected to enjoy greater attention in direct proportion to the increased attention being paid to the possibility of heritage areas in New Brunswick and the need for planning such areas. Furthermore, the possibility of controlling demolition under the *Community Planning Act* may have some relevance for municipal heritage efforts.

Effect on Individual Sites

In Prince Edward Island, an area designated as a protected area under the *Recreation Development Act* (or a conservation zone under the *Planning Act)* may, presumably, be as large as or as small as the Executive Council desires. The same principle would also apply to protected sites under the New Brunswick *Historic Sites Protection Act.*

The P.E.I. *Recreation Development Act* does not outline the method whereby an owner could apply for permission to alter or demolish property within a designated protected area. This method can, presumably, be detailed in the regulations which the Executive Council can make under s. 15 of the Act. Authorities appear to have wide discretion in deciding whether or not to grant such permission.

Similarly, designation of an area under Part II of the P.E.I. *Planning Act* may mean that, if the regulations so dictate, ministerial consent can be prescribed for construction. For the reasons outlined earlier, it is not clear whether ministerial consent can be prescribed for demolition.

In New Brunswick, the protection of an individual site can be largely accomplished by having it designated as a historic site and then as a protected site by the Minister of Education under the *Historic Sites Protection Act.* Future changes would thereupon require governmental permission.

If one were to accept the hypothesis that plans can control development, then it would also be possible to protest an individual site under the New Brunswick *Community Planning Act.* To do so, the site would need to be located in a planning area, the plan for which contemplated the protection of sites such as the one in question. It is not immediately clear how specific the plan would need to be, that is, whether it would need to mention the site by name or whether it could generally foresee protection of any historic site of a definable class. As noted earlier, the use of the *Community Planning Act* to avert demolition of heritage is still untested in New Brunswick.

Finally, what kinds of reasons are required to sustain a designation? If governmental authorities were to designate a property for reasons which were overtly extraneous to the *Historic Sites Protection Act* and the comparable legislation, the designation would be open to challenge in court.[34] If, however, the designation was enacted for the bona fide purpose of protecting heritage, then the reasons are not open to attack even if the heritage value of the property is slight: "[it]f there is some evidence [of heritage value] . . . this court cannot substitute its own opinion for that of the [authorities] . . . as to whether that evidence was sufficient or good enough, or both, to make the declaration under the Act".[35]

Effect on the Surroundings of Sites

Unlike the legislation of certain other jurisdictions,[36] the Prince Edward Island and New Brunswick statutes do not give automatic protection to the surroundings of designated sites; consequently neighbouring construction may block all view of the heritage site. To protect vistas of the heritage site, it would be specifically necessary to include them in the designating order.

Similarly, if one were to assume that in New Brunswick a plan can control development, then it would be necessary to include vistas in the planning area and include a statement foreseeing their protection in the plan. This hypothesis has not been tested in New Brunswick.

Effect on Areas and Districts

Nothing in the P.E.I. *Recreation Development Act* prevents an entire district from being designated a protected area. Other jurisdictions have

[34]It is settled that even ministerial discretion is subject to the purposes for which it was granted to the minister: *Roncarelli* v. *Duplessis,* [1959] S.C.R. 121.

[35]As stated by Mr. Justice Gould of the British Columbia Supreme Court in *Murray* v. *Richmond* (1978), 7 C.E.L.R. 145.

[36]S.Q. 1972, c. 19 art. 31.

used far more ambiguous legislation to protect districts as historic sites, Gastown and Chinatown in Vancouver and Bitumount in Alberta are notable examples. The P.E.I. *Planning Act* s. 46(1)(*r*) gives the province the right to prescribe the geographical boundaries of any conservation zone.

In New Brunswick, the Minister of Education is empowered under the *Historic Sites Protection Act* s. 2(3) to designate historic districts. The designation carries no legal consequences; it has moral or persuasive value only.

In other respects, the treatment of areas under the *Historic Sites Protection Act* is not as clear as, for example, that of comparable statutes in Quebec and Ontario.[37] This does not mean, however, that the New Brunswick statute is incapable of giving blanket protection to areas. There is nothing to prevent the Minister from designating an entire area as a protected site under the *Historic Sites Protection Act;* the word site is broad enough to include districts as well as individual buildings. This step has been taken by British Columbia, with almost identical legislation, in Gastown and Chinatown in Vancouver,[38] and by Alberta at Bitumount.

The *Community Planning Act* also deserves attention when considering heritage areas. At the very least, that statute provides a useful procedure the drafting of plans which can direct the evolution of heritage areas; as mentioned earlier, there may also be a possibility for more direct control. Since the Minister of Municipal Affairs is specifically empowered by s. 5(2) the *Community Planning Act* to establish "planning districts", there appears to be no problem in applying planning controls on a district-wide basis. One should note that the Act contains no limits as to how small or large a district can be; the size is presumably at the Minister's discretion. A district could conceivably be as small as a short row of houses; this hypothesis is, however, still untested in New Brunswick.

Interim Protection

Unlike the legislation of several other provinces,[39] the P.E.I. *Recreation Development Act* does not specifically empower the Minister to halt work pending study of an interesting site. Consequently, immediate designation is the only way to protect an endangered building. It may

[37]The *Quebec Cultural Property Act* (at art. 45 *et seq.*) and the *Ontario Heritage Act,* 1974 (at s. 40 *et seq.*) both define detailed procedures for the protection of heritage areas.

[38]British Columbia *Gazette,* Feb. 18, 1971.

[39]*E.g., Alberta Historical Resources Act,* S.A. 1974, c. 5, s. 35; *B.C. Heritage Conservation Act,* S.B.C. 1977, c. 37, s. 14 (note that the municipal council, and not the Minister, is given this right); *Quebec Cultural Property Act,* S.Q. 1972, c. 19, s. 29; *Saskatchewan Heritage Act,* S.S. 1974-75, c. 45, s. 8.

even be necessary, on occasion, to designate structures without substantial documentation, and later to "undesignate" them. "Undesignation" has not yet been attempted in P.E.I.

Similarly, the statute does not provide for other forms of interim protection such as delay of alteration of a site until the site has been assessed and reported upon. The broad protective measures of other statutes are also lacking and the Minister cannot order the suspension of any licence or permit (for example, a construction or demolition permit) issued by the municipality.[40]

The P.E.I. *Planning Act* is equally silent on the subject. It may, nevertheless, be possible to introduce interim protection without statutory amendment as both the *Recreation Development Act* and the *Planning Act* empower the Cabinet to enact regulations promoting the purposes of the statute.[41] Section 24 of the *Planning Act* already comes close to this objective, insofar as it provides for an interim planning policy. Such a regulation could introduce a system of interim protection pending designation. None has been passed to date, however, and, naturally, whether it would be considered a proper object of regulation remains to be seen.

Protection under New Brunswick's *Historic Sites Protection Act* takes effect upon registration of a description of the land designated as a protected site. However, as with P.E.I.'s *Recreation Development Act*, immediate designation (subject to the possibility of later "undesignation") is the only way to protect a threatened site.[42]

It may again, be possible, to introduce interim protection without statutory amendment, by the enactment of regulations under s. 8 of the *Historic Sites Protection Act*. No such regulation has been passed to date; naturally, its validity is untested.

On the other hand, certain interim controls may be possible under the *Community Planning Act*. Controls on development, such as they may be, can take effect even before the plan has been adopted; they can take effect once notice of the plan has been published.[43] It appears, however, that by that time a plan must already have been completed. Consequently, unlike several other jurisdictions, New Brunswick's provincial authorities appear unable to provide interim protection pending completion of the plan. Again, this situation could be changed by regulation, as allowed by s. 77, but no such regulation has been passed and its validity is obviously untested.

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[40]*Alberta Historical Resources Act*, S.A. 1974, c. 5 s. 22(2),(3).

[41]*Recreation Development Act*, s. 15(*o*); *Planning Act*, s. 59.

[42]*Historical Sites Protection Act*, s. 2(2.1).

[43]S. 19(1).

Other New Brunswick Plans

Aside from regional plans, the Minister of Municipal Affairs can by s. 28 of the *Community Planning Act* use area plans in areas which are outside municipal boundaries. In general, since area plans possess the same characteristics as regional plans, they too might be able to control development.

Applications

Requests for protection under the *Recreation Development Act* are handled by the Prince Edward Island Heritage Foundation[44] or the Department of the Environment.[45] The Department of Municipal Affairs provides information concerning the P.E.I. *Planning Act.*[46]

Requests for protection under the New Brunswick *Historic Sites Protection Act* are processed by the Minister of Education[47] or the Historical Resources Administration.[48] Information concerning the *Community Planning Act* is available from the Department of Municipal Affairs in Fredericton.[49]

Enforcement

Inspection

Unlike the statutes of several other provinces,[50] Prince Edward Island's *Recreation Development Act* does not confer on officials the right to inspect sites. Although the Cabinet may in the future attempt a *regulation* specifying the right to inspect, the validity of such a regulation is untested.

The P.E.I. *Planning Act* s. 55, foresees a very limited right of inspection; namely, only verification that a person building or demolishing something has the appropriate permit.

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[44]P.O. Box 2,000, Charlottetown.

[45]*Ibid.*

[46]*Ibid.*

[47]P.O. Box 6,000, Fredericton E3B 5H1.

[48]*Ibid.*

[49]The Community Planning Branch, Dept. of Muncipal Affairs, Centennial Bldg., Fredericton.

[50]*E.g., The Alberta Historical Resources Act, supra,* footnote 39, s. 22; B.C. *Heritage Conservation Act, supra,* footnote 39, s. 7(2); *Quebec Cultural Property Act, supra,* footnote 39, s. 29; *Saskatchewan Heritage Act, supra,* footnote 39, s. 8.

Like the *Recreation Development Act*, New Brunswick's *Historic Sites Protection Act* does not specifically confer the right to inspect sites. Again, the Cabinet could conceivably enact a regulation specifying such a right. Inspection can, however, be carried out under s. 92(1) of the *Community Planning Act* for areas under its jurisdiction.

Penalties

Three kinds of penalties are possible. The first restores the situation to the *status quo ante* by requiring, at the owner's expense, reconstruction of a designated structure which has been altered or demolished. This is usually the most satisfactory means of dealing with offences under heritage legislation, but although it is foreseen in other provinces,[51] it is not provided for in either Prince Edward Island's *Recreation Development Act* or *Planning Act*, or in New Brunswick's *Historic Sites Protection Act*. This penalty is, however, available for violations of New Brunswick's *Community Planning Act*.[52] Furthermore, unlike virtually every other province (including New Brunswick),[53] Prince Edward Island has not included in its *Planning Act* the power to remove illegally-constructed buildings.

The second form of penalty is a fine. Offences against the *Recreation Development Act* are punishable by a fine which can be established by Cabinet regulation.[54] In the absence of such a regulation, the maximum fine is $1,000,[55] (which is lower than, for example, Alberta's $50,000.[56]). Offences against the P.E.I. *Planning Act* can result in a fine of $500, which can double in the case of a second offence and can be increased by $50 per day in the case of a continuing offence.[57] Offences against the New Brunswick *Community Planning Act* are punishable by a fine of up to $100,[58] which is a questionable deterrent. *Under the Historic Sites Protection Act* s. 9 the maximum fine is now $500 for individuals and $5,000 for corporations.

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[51]*E.g., Alberta Historical Resources Act, supra,* footnote 39, s. 38; *Ontario Heritage Act,* s. 69; *Quebec Cultural Property Act, supra,* footnote 39, s. 57.

[52]S. 93(1)(*c*).

[53]S. 93(1)(*b*).

[54]S. 15(*p*).

[55]S. 14.

[56]*Alberta Historical Resources Act, supra,* footnote 39, s. 38.

[57]S. 52.

[58]S. 95(1).

The third form of penalty is a term of imprisonment. P.E.I. foresees imprisonment for offences against its *Recreation Development Act*[59] only upon default of payment of a fine. The P.E.I. *Planning Act's* provisions are similar.[60] In New Brunswick the *Summary Convictions Act,* s. 31(3) imposes a maximum term of six months for offences under both acts in casesof default of payment of a fine. Corporations, however, are usually fined, unless it is possible to identify and convict the officials who were personally responsible. Such identification and conviction is relatively difficult.

Binding Authority

It appears that the *Recreation Development Act,* the P.E.I. *Planning Act,* the New Brunswick *Historic Sites Protection Act* and the New Brunswick *Community Planning Act* are not binding upon all owners of heritage in P.E.I. and New Brunswick. As mentioned earlier,[61] they do not apply to federal lands and applicability to federally-regulated land (for example, railway property) is currently the object of some debate. As far as the provincial government and its agencies are concerned, the *Recreation Development Act,* unlike the heritage statutes of some other provinces,[62] does not state that the Crown is bound. The *Interpretation Act* indicates that without such a provision, the province is not bound.[63] The P.E.I. *Planning Act* s. 60.1 does, however, bind the Crown. The New Brunswick *Historic Sites Protection Act* s. 5.11 does bind the provincial government and its agencies. The Crown is also bound by plans under the New Brunswick *Community Planning Act.*[64] All four acts bind all other owners, including municipalities.

THE MUNICIPAL LEVEL

Introduction

There are two main purposes behind any action to conserve structure and streetscapes; first, to protect valuable buildings against demolition and unsympathetic alteration, and second, to maintain the integrity of the scene by discouraging unsympathetic infill construction.

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[59]S. 15.

[60]S. 52.

[61]*A.G. for Alberta* v. *A.G. for Canada,* [1915] A.C. 363 (P.C.); *King* v. *Lee* (1918), 16 R.C. Ex. 427; *Burrard Power Co.* v. *Rex,* [1911] A.C. 87 (P.C.).

[62]*E.g., Quebec Cultural Property Act, supra,* footnote 39, s. 55; *Alberta Historical Resources Act, supra,* footnote 39, s. 39; *Saskatchewan Heritage Act, supra,* footnote 39, s. 13.

[63]*Interpretation Act,* R.S.P.E.I. 1974, c. I-6, s. 10.

[64]SS. 18(7), 27.

The latter purpose is particularly important in the preservation of streetscapes and areas.

P.E.I. municipalities may use the *Planning Act* and N.B. municipalities the *Municipal Heritage Preservation Act*[65] and the *Community Planning Act.* In principle, heritage concerns can be expressed through planning; but, the *Municipal Heritage Preservation Act* may suit a municipality's purposes more exactly.

The New Brunswick Municipal Heritage Preservation Act

This statute provides for the establishment, by by-law, of a preservation area, which may consist of "the municipality or a potion of the municipality or a building or a structure that is of historical or architectural significance".[66] It may also include any area surrounding such portion of the municipality, building or structure. Such an area can be established only upon the recommendation of the Preservation Review Board[67] provided for in the Act,[68] which has the function of investigating and preparing reports on the establishment of preservation areas and the making of by-laws.[69] Moreover, the by-law establishing the area must be approved by the Executive Council.[70] Provision is also made for the giving of public notice and the consideration of objections to the proposed by-law.[71]

Under s. 10 of the Act the municipal council may make by-laws relating to the preservation areas on a number of subjects; including demolition and the prohibition of demolition, alteration of facades and exterior design, height and bulk of buildings, location of buildings, fences, walls, trees, signs, poles and wires. Section 11 requires such by-laws and the establishment of the preservation area itself must comply with any plans (regional plans, municipal plans, area plans, planning statements or development schemes) in effect in the municipality.

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[65]S.N.B. 1978, c. M-21.1.

[66]S. 5(1).

[67]*Ibid.*

[68]S. 8(1).

[69]S. 9.

[70]*Supra*, footnote 66.

[71]S. 6.

Planning

General

It would undoubtedly be desirable for every community to consider heritage conservation in its planning process. Although Prince Edward Island municipalities may do so,[72] such planning is not compulsory, as it is in jurisdictions such as Great Britain.

There is no obligation on New Brunswick municipalities to plan for heritage preservation; indeed, New Brunswick municipalities are not obliged to draught plans of any description. The Minister of Municipal Affairs, by the *Community Planning Act,* ss. 23(1) and 91(3), may, however, compel the municipality to draught a plan and/or put it into effect. Once a municipality has been ordered to draught a plan, or if it undertakes a plan on its own initiative, the plan must take into account "preservation of buildings and sites of historical interest".[73]

Effects of Plans

There is no provision in the P.E.I. *Planning Act* compelling a municipality to exercise its planning functions. However, once the Land Use Commission has approved the official plan, "the by-laws of the municipality affected shall conform therewith".[74] Since April, 1976, there has not been any provision requiring that by-laws be enacted to put the plan into effect.

It follows that the plan would not necessarily commit the municipality to a certain course of legislative action. In other words, the municipality is not compelled to enact by-laws putting all the provisions of the plan into effect, but when it does enact by-laws, they must conform with the plan. Thus, the plan does impede municipal courses of action which are contrary to the plan. Consequently, if the official plan contains provisions which are incompatible with heritage conservation (for example, by proposing the redevelopment of a picturesque area for high-rises), an amendment would be desirable. Such amendments have already been draughted in other jurisdictions.[75]

In New Brunswick, when a plan has been enacted, the familiar question arises whether the plan is immediately binding on owners. As mentioned earlier,[76] there is some disagreement on that issue. Although

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[72]*Planning Act,* s. 24(4)(ix).

[73]S. 23(5)(vi)(*j*).

[74]*Planning Act,* s. 35.

[75]Contact the Ontario Heritage Foundation, 77 Bloor St. West, Toronto, Ontario.

[76]See "The Community Planning Act" under "Provincial Protection of Property" in this article.

the *Community Planning Act* states that it is binding, some authorities believe that the plan becomes effective for private owners only when it is supplemented by zoning by-laws. The outcome of this debate remains to be seen. Nevertheless, it remains fairly clear that if the official plan contains provisions which are incompatible with heritage conservation, an amendment would again be desirable.

It also follows, at least in theory, that if the plan specifies heritage conservation in an area, it would be hazardous for the provincial or municipal government to undertake public works projects which detract from the purposes of heritage conservation.[77] That proposition is still untested in Prince Edward Island and New Brunswick,[78] but a heritage-oriented amendment to the official plan nevertheless appears to be a prudent course to follow.

Controlling Governmental Demolition

The system of environmental impact assessments which was described earlier usually applies to municipalities: municipalities in those jurisdictions are obliged to file appropriate reports before altering the environment, including heritage. Since this system does not exist in New Brunswick or Prince Edwrd Island, municipalities in these provinces are under no such obligation.

New Brunswick's *Municipal Heritage Preservation Act,* s. 2(2) does provide, however, that the provincial government is bound by the Act. Since all by-laws made under the Act (including those establishing preservation areas) are subject to the approval of the Executive Council before they are valid,[79] it is clear that the province can, if it wishes, veto any preservation area which might interfere with a provincial project. It can also veto by-laws prohibiting demolition in such an area. Section 11 of the Act further provides that the establishment of a preservation area or the making of any by-law under the Act has to comply with any official plan, such as a regional plan, municipal (or area) plan, basic planning statement, development scheme or urban renewal scheme. If the provincial government has already approved such a plan which has anti-heritage consequences, it would be difficult for a municipal by-law creating a preservation area to overturn that effect.

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[77]See P.E.I. *Planning Act,* s. 34.

[78]The legal effect of plans on conservation areas is perhaps analogous to that of Ontario, where John Swaigen of the Canadian Environmental Law Association comments: "if a municipality made an official plan and it was approved by the Minister, and this official plan provided for an area to be designated as a heritage conservation area, the municipal council would be acting illegally if it tried to construct public works, and the construction required the demolition of designated heritage properties. Whether the municipality would be acting illegally if it built public works which simply detracted aesthetically from the area would probably depend on the exact wording of the official plan, the testimony of experts and many other factors". Opinion rendered to Heritage Canada, July 25, 1977 (unpublished).

[79]S. 5.

Controlling Other Demolition

In Prince Edward Island

In Prince Edward Island, the clarity of municipal provisions controlling demolition depends on the location of the structure in question. If that location is the City of Charlottetown, then the municipal power to control alteration and demolition is clearly enunciated in the *City of Charlottetown Act.*[80] The City Council is empowered to "regulate and restrict the demolishing of any building, buildings, neighbourhoods, sites on streetscapes which may effect the preservation of the historic character of our city".[81] The circumstances surrounding the 1976 enactment of this provision suggest that it was intended to empower the city to designate sites and areas where all demolition would need council approval.

Demolition may perhaps also be controlled in areas covered by an official plan. Under the *Planning Act,* official plans can be draughted by a municipality[82] or by several municipalities together.[83]

The scope of municipal plans is not entirely clear and is not defined by statute. Section 24(6) indicates it is not the plan itself which is binding upon private owners; rather 47(1) requires the municipality to enact regulations "in the case of cities and towns" or by-laws "in the case of smaller municipalities".[84]

Does that include control of demolition? This inference is still untested in P.E.I. It is clear, however, that municipal regulations can have the same content as provincial regulations.[85] This fact suggests that if the province were empowered to control demolition, then the municipalities would be likewise empowered. The question whether the province is so empowered was discussed earlier; the status of that power is presently unclear.

If the courts were to decide that the *Planning Act* does not sustain municipal demolition control, Prince Edward Island municipalities other than Charlottetown would be left with less power than some of their

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[80]S.P.E.I. 1948, c. 43 as amended, particularly in 1976.

[81]*City of Charlottetown Act,* s. 36(49).

[82]Ss. 11, 27 *et seq.*

[83]Ss. 21(1), 27 *et seq.*

[84]S. 49(1).

[85]S. 47(1).

counterparts elsewhere.[86] They would enjoy no statutory power to halt demolition either permanently or temporarily.

New Brunswick municipalities are able to control demolition and alteration of specified property under two statutes, the *Municipal Heritage Preservation Act* and *The Community Planning Act.* It can be argued that the latter statute provides municipalities with two mechanisms whereby they can control development and hence demolition.

Under the New Brunswick Municipal Heritage Preservation Act

Section 10(1) of the Act sets out the matters upon which a municipal council may make by-laws related to preservation areas established under s. 5 of the Act. The demolition and alteration of buildings is considered twice to be a proper subject of such by-laws. First, s. 1 provides that by-laws may "provide for the . . . development and redevelopment of lands, buildings and structures". Development is defined as "the demolishing, altering . . . of a building or structure, in whole or in part". Second, 10(*d*) says that by-laws may be made "respecting the prohibiting of demolishing buildings and structures".

Section 12 goes on to provide that no development can be carried out in a preservation area unless a certificate of appropriateness is obtained from the Preservation Review Board. In addition, no development can be carried out in accordance with such a certificate until every right of appeal established under the Act has been exercised or until the time prescribed for the exercise of that appeal right has expired.[87]

Plans Controlling Demolition in New Brunswick

The familiar question arises again whether a plan, by itself, can control development. If it is possible, then it can also control demolition, since demolition is a form of development.[88] The two mechanisms detailed below are predicated upon this admittedly debatable assumption.

The first mechanism is a municipal plan by the *Community Planning Act,* a municipality can adopt a municipal plan[89] which, according to the

[86]*E.g., Municipal Act* R.S.B.C. 1960, c. 255, s. 715.

[87]S. 12(2).

[88]*Community Planning Act, supra,* footnote 21, s. 1.

[89]S. 23(1).

above reasoning, would control development[90] including demolition.[91] As in the case of regional plans, it is not clear how specific the municipal plan must be in order to bind a given property. This matter has not been resolved in the context of heritage conservation.

The second mechanism is a basic planning statement. A basic planning statement can be adopted, with ministerial consent,[92] by a municipality which has no municipal plan. For conservation purposes, it has the same characteristics as a municipal plan,[93] and hence could control demolition in the same way that such a plan might.

Both of these mechanisms rest upon the familiar assumption that plans (or basic planning statements) are legally binding on owners. As noted earlier, this assumption is the subject of some debate. If plans prove unable to control development and hence demolition, the municipality would need to implement the plan through a zoning by-law.

Zoning By-laws to Control Demolition in New Brunswick

Do zoning by-laws exist to implement a plan controlling demolition? That question has never been raised in New Brunswick courts, and no clear answer emerges. There are, however, some indications to suggest that a New Brunswick municipality could enact a zoning by-law to control demolition. Municipalities are given a general power by s. 3 of the *Community Planning Act* to enact by-laws "to carry out the intent of the plan". Since plans must foresee the "preservation of buildings and sies of historical interest"[94] and can foresee the prohibition of demolition, it would inescapably follow that a by-law implementing the plan could prohibit demolition of buildings and sites of historical interest if the by-laws were sufficiently precise.

This conclusion, for all its apparent clarity, nevertheless rests upon the assumption that municipalities enjoy the general power to pass by-laws implementing plans which the Act says they enjoy. A court may choose, however, to disregard the clear wording of the *Community Planning Act* and say that municipalities enjoy no such power.

Section 34(*b*) of the *Community Planning Act* gives specific examples of a municipality's zoning powers without limiting the general powers to

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[90]S. 27.

[91]S. 1.

[92]S. 29(1).

[93]S. 31.

[94]S. 23(5)(vi)(*j*).

implement a plan. In some jurisdictions courts have used such a statement to disregard the general power. If a by-law did not fall among the specific examples then it was invalidated regardless of the general power conferred by statute. As incongruous as it may seem, it is not inconceivable for a court to recognize that a municipality can draught a plan, and yet to deny the municipality the means to implement legitimate provisions of that same plan.

This is the case because jurisprudence has been divided over the interpretation of any land use controls.[95] Some courts will go to considerable lengths to give a narrow interpretation of municipal powers over private property. If their interpretation is accepted, the only powers which could be exercised by a municipality under the *Community Planning Act* would be the specific examples defined in the Act (at s. 34 *et seq.*). Under that interpretation the control of demolition would not be available to municipalities (along with other relevant powers mentioned later) despite the wording of the Act.

On the other hand, an increasing volume of jurisprudence now holds that land use controls deserve liberal interpretation and should be upheld unless they are clearly beyond the power of the authorities.[96] Such an interpretation would permit municipalities to enact by-laws implementing the plan, even if those matters were not specifically mentioned in the specific powers of s. 34. Only a court decision will tell whether this approach is possible and any step in this direction must be taken extremely cautiously.

Controlling Construction

General

In P.E.I., any development including alterations on property which has been designated under s. 36(49) of the *City of Charlottetown Act* would require the approval of the City of Charlottetown. Such controls are outlined in a draught by-law of that City; but at the time of writing this article, that by-law had not been passed.

Land in municipal planning areas and joint municipal planning areas in P.E.I. would also be subject to controls on construction, although the plans in those areas would apparently need to be accompanied by a more specific set of regulations and by-laws outlining the controls applicable.

As noted earlier, the P.E.I. *Planning Act* does not state specifically what the limits of those regulations are. They can cover development

[95] *Supra*, footnote 27, at 11.

[96] *Ibid.*

and building standards. The question arises whether regulations can permit a municipality to control land use on a discretionary basis, or whether precise guidelines would have to be spelled out; the general tenor of Canadian jurisprudence suggests the latter. A second question arises as to whether such regulations can cover all the subjects which are important for a heritage area; that is, even those which are not foreseen in the enabling legislation for zoning (such as trees and landscaping, for example). The answer here is probably in the affirmative, but both issues await resolution.

In New Brunswick it is clear that under the *Municipal Heritage Preservation Act* a municipality may make by-laws to cover construction in preservation areas, since s. 10(1)(*b*) provides for the "development and redevelopment of lands, buildings and structures" and development is said to include the "erecting . . . of a building or structure".[97] The section goes on to list powers specifically given to the municipality and related to controlling construction.

One important feature to consider whenever discussing material powers is that they are usually exercised over a wide area, not over a single lot. If a municipality tries to pass a by-law affecting a single lot (often called spot zoning), then this effort, while not necessarily illegal, is nevertheless regarded by the courts with suspicion. If there is any hint of discriminatory treatment, then the courts may invalidate the by-law; this can occur even when the by-law ostensibly applies to a wider area.[98]

The following is a list of powers which are useful in promoting heritage conservation. In the case of those powers which are not specifically mentioned in the New Brunswick *Municipal Heritage Preservation Act* or the *Community Planning Act,* it may still be remotely possible to exercise such powers insofar as the municipality is given general planning authority, if that general power is upheld by the courts. Except where otherwise indicated, the adoption of a municipal plan or basic planning statement is a prerequisite for the enactment of controls under the *Community Planning Act.*[99]

Bulk and Height Controls in Zoning

For two reasons, bulk and height controls are found in almost every attempt to preserve the character of neighbourhoods. First and foremost, the bulk of a building has a definite impact upon its environment, since an oversized building will appear incompatible with

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[97]S. 1.

[98]*Re H. G. Winton Ltd. and Borough of North York* (1978), 20 O.R. (2d) 737 (Ont. D.C.).

[99]Ss. 34(1), 34(2).

its environment regardless of its architectural style. Secondly, a restrictive bulk and height by-law can indirectly discourage unwanted redevelopment.

Unlike most provinces, Prince Edward Island does not refer specifically to bulk and height in its enabling legislation. Instead, it empowers municipalities to regulate construction in all ways necessary "to improve the general appearance" of the municipality, including the appearance of buildings.[100] This power is probably sufficient to sustain controls on bulk and height.

New Brunswick municipalities are empowered to control bulk and height in preservation areas by virtue of s. 10(1)(*f*) of the *Municipal Heritage Preservation Act* and by s. 34(3)(*a*)(iii) of the *Community Planning Act.*

In several American jurisdictions, a new kind of height control, which is both precise and flexible, has been developed. The permitted height of a building is expressed as a percentage (for example, not less than 80% and not more than 120%) of the average height of buildings on the block or of buildings fronting upon the street and built before 1950. Although a different permissible height on each block may be the result, this kind of control is not, strictly speaking, spot zoning because it is of general application throughout the area. It could be useful in communities which already have a slightly irregular roof line. However, whether it will be upheld in Prince Edward Island and New Brunswick still remains to be seen.

Design Control through Zoning

P.E.I. municipalities are empowered to regulate "appearance". Similarly, under New Brunswick's *Municipal Heritage Preservation Act,* by-laws may prescribe "the facade and exterior design, character and appearance of buildings". By-laws may also prescribe "the manner in which existing buildings and structures may be altered or repaired with respect to the facades of such buildings or structures or altered with respect to the exterior design of such buildings or structures".[101] New Brunswick municipalities are also empowered to regulate "design, character and appearance" under the *Community Planning Act* by virtue of s. 34(3)(*a*)(vi).

These latter provisions do not, however, confer discretion upon a municipality to accept or reject designs as it pleases. Rather, they foresee

[100]*Town Act,* R.S.P.E.I. 1974, c. T-4, s. 83 (i.2) and (w.2); *Village Service Act,* R.S.P.E.I. 1974, c. V-5, s. 40(*o*) and (*p*); *Town of Summerside Act* as am. by S.P.E.I. 1959, c. 46, s. 70 (44) and (62); *City of Charlottetown Act* s. 36(37)(*a*) and (48), as am. by S.P.E.I. 1967, c. 64, s. 1, and S.P.E.I. 1974, c. 57, ss. 12 and 13.

[101]S. 10(1)(*h*) and (*e*).

regulation by by-law; acceptable designs must be spelled out in the by-law itself. If they are not, the by-law can be quashed for vagueness.[102]

This requirement of precision can lead to problems, since it necessarily inhibits flexibility. Consequently, architectural control usually generates some opposition from builders and architects, who resent limitations on their creativity. The importance of such controls to the character of streetscapes and areas, however, remains undiminished.

At the very least, facade materials can be specified. The ratio of facade openings to wall space and the distribution of facade openings can be established. Other controls can be introduced if deemed advisable.

Finally, it is unlikely that the power to control design would extend to the regulation of colour. One exception to this proposition would be in areas designated under New Brunswick's *Municipal Heritage Preservation Act,* under which the definition of "design" given in s. 1 is broad and definitely does include colour.

Use Zoning

Municipalities in both provinces are empowered to regulate the uses to which property can be put.[103] The decision to preserve an area does not usually imply a change of use. It is customary to retain the existing zoning designation and simply add extra conditions to protect the special features of the area.

Some care must be exercised, however, to ensure that the zoning is not so loose as to encourage displacement of the population. For example, residential heritage areas are sometimes vulnerable to an invasion of bars, restaurants and discotheques, which can have an unsettling effect upon the neighbourhood. If the neighbourhood character is to be maintained, use zoning is important and must take account of this effect.

In other jurisdictions it is customary to make only minor modifications in the use zoning by-law applicable to valuable areas. For example, one may see a prohibition on service stations, wholesale outlets or the like. It should be remembered, however, that no such by-law can have retroactive effect. Consequently, any regulation to exclude such uses from the area would have the effect of "freezing" such installations at the number that existed at the time of the passing of the by-law.

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[102]*Re Mississauga Golf & Country Club Ltd.* (1963), 40 D.L.R. (2d) 673 (Ont.C.A.).

[103]*Town Act,* R.S.P.E.I. 1974, c. T-4, s. 83(w.2); *Village Service Act,* R.S.P.E.I. 1974, c. V-5, s. 40(*p*); *City of Charlottetown Act,* s. 36(37)(*a*); *Town of Summerside Act,* s. 70(62); *Planning Act,* R.S.P.E.I. 1974, c. P-6, s. 49(2)(*b*); *Community Planning Act,* R.S.N.B. 1973, c. C-12, ss. 35 and 34(3).

It is unlikely that the regulation of use can be extended to the point of freezing certain lands altogether. For example, the zoning of land as "recreational" or "historical" probably cannot impede other kinds of construction. Despite the fact that several communities are attempting to use this "zoning" to freeze land, the practice has run into trouble in the courts.[104] Furthermore, laws such as the P.E.I. *Planning Act* state specifically that no by-law can have the effect of confiscating private lands for parks, schools, etc.[105]

Setback Zoning

Setback rules are those which dictate the proper distance between a building and the street and are important for the harmonious appearance of a streetscape. Location of buildings can be regulated by municipalities in Prince Edward Island and New Brunswick.[106]

Some cities are currently considering adapting the 80 to 120% formula to setbacks. By that formula, the setback cannot be less than 80% nor more than 120% of the average setback of other buildings on certain streets. This approach is suitable for streets where setback is already irregular. The formula, however, is still untested in Prince Edward Island and New Brunswick.

Signs

Regulation of signs is essential to the maintenance of a building or heritage area, since any outdoor advertising has a significant impact upon appearance. Towns in Prince Edward Island can regulate all forms of signs.[107] Elsewhere, the regulatory power is less clearly enunciated. In Charlottetown and Summerside, the sign provisions refer only to signs overhanging the sidewalk.[108] The *Village Service Act* makes no reference to the regulation of signs in villages. Since signs are usually regarded as an appurtenance of buildings, one may infer that the power to regulate signs of all kinds is necessarily included in the power to regulate the appearance of buildings, but such an inference is still untested.

Signs in New Brunswick can be regulated by municipalities under both the *Municipal Heritage Preservation Act*[109] and *The Community*

[104]*Regina Auto Court* v. *Regina (City)* (1958), 25 W.W.R. 167 (Sask. Q.B.); *Sula* v. *Duvernay*, [1970] Que. A.C. 234; *Re Corporation of District of North Vancouver Zoning By-law 4277*, [1973] 2. W.W.R. 260 (B.C.S.C.).

[105]S. 49(2)(*c*).

[106]*Supra*, footnote 103; *Municipal Heritage Preservation Act*, S.N.B. 1978, c. M-21.1, s. 10(1)(*g*).

[107]*Town Act*, s. 83(c.2).

[108]*City of Charlottetown Act*, s. 36(28); *Town of Summerside Act*, s. 70(52).

[109]S. 10(1)(*j*).

Planning Act.[110] Furthermore, they can also be regulated under s. 11(1)(*i*) of the *Municipalities Act.*[111] This is another of the few instances where a municipal plan is not a prerequisite. Whenever signs are regulated, precision is advisable, as in the *Gastown Sign Guidelines,* available from the Central Area Division of the Vancouver City Planning Department.

Fences and Walls

Fences and walls also affect the appearance of a streetscape. Theoretically, fences and walls could be included in the definition of "buildings" and regulated in the same manner; however, special provisions are usually made for fences.

In Prince Edward Island, such a specific provision applies only to towns,[112] including Summerside.[113] Charlottetown and Prince Edward Island villages are not included and consequently the power to regulate fences is less clear in the latter jurisdictions. Some provinces empower their municipalities to compel owners to fence property abutting a roadway;[114] this power is granted to P.E.I. municipalities which are not villages.[115] Where no specific authority is mentioned by statute, it may still be possible to enact by-laws under the general power to regulate appearance. Alternatively, unsightly lots can be required to be fenced by an order issued under the *Unsightly Property Act.*[116]

In New Brunswick both the *Municipal Heritage Preservation Act* by s. 10(1)(*i*). and *The Community Planning Act,* s. 34(3)(*a*)(vii) empower municipalities to regulate fences and walls. Under the *Municipal Heritage Preservation Act* a municipality is also empowered to compel owners to fence in parts of a property since the statute speaks of "prescribing . . . the placement . . . of fences and walls". The Act may therefore be used to compel the actual construction of a fence within a preservation area.

Maintenance

Towns in Prince Edward Island are given powers "providing for and regulating the cleansing" of buildings, and Charlottetown is also

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[110]S. 34(3)(*a*)(xiii) and (*b*)(ii).

[111]*Municipalities Act,* R.S.N.B. 1973, c. M-22.

[112]*Town Act,* s. 83 (t.3).

[113]*Town of Summerside Act,* s. 70(40).

[114]*E.g., Municipal Act,* R.S.B.C. 1960, c. 255, s. 514(2)(*d*); *Local Government Act,* R.S.N. 1970, c. 216, s. 98(1)(*q*).

given limited powers concerning maintenance.[117] Elsewhere, the power is less clearly enunciated. However, the P.E.I. *Planning Act* appears to refer, in part, to maintenance when it states that all municipalities can enact building standards in the implementation of an official plan and by-laws promoting "the general welfare, health, safety and convenience".[118] The latter clause has not been tested in the courts. Alternatively, it is possible to order the repair or cleaning of "unsightly property" under the *Unsightly Property Act.*[119]

Municipalities in New Brunswick can enact by-laws to enforce maintenance of dwellings. These powers are exercised by virtue of Regulation 73-71 passed under ss. 93 and 94 of the *Municipalities Act.* This is therefore one of the few cases in which a plan is not a prerequisite for action. The regulation clearly covers both the interior and exterior of buildings. This power, however, only extends to residential property. Unlike their counterparts elsewhere,[120] New Brunswick municipalities are given no general power to enforce maintenance on other kinds of buildings unless they become a nuisance. A small exception is to be found in s. 10(1)(*e*) of the *Municipal Heritage Preservation Act,* which allows for the making of by-laws relating to preservation areas and "prescribing the manner in which existing buildings and structures may be altered . . . with respect to the exterior design of such buildings or structures". Since "design" as defined in s. 1 includes "maintenance", it is possible for a municipality to have some control over the maintenance of the exteriors of buildings in a preservation area. Examples of draught by-laws for maintenance standards are available in New Brunswick from the ministry of Municipal Affairs.

It should be noted, finally, that maintenance and occupancy standards must be approached with caution. Frequently, standards have been so strict that owners of older buildings could not meet them without costly renovations. Unlike certain other provinces,[121] Prince Edward Island and New Brunswick have no specific provisions for the development of alternative standards to deal specifically with such buildings. Consequently, "provisions such as (typical maintenance and

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[115]*Town Act,* s. 83(n.1); *City of Charlottetown Act,* s. 36(10); *Town of Summerside Act,* s. 70(18).

[116]*Unsightly Property Act,* S.P.E.I. 1975, c. 32, s. 4(*c*).

[117]*Town Act,* s. 83(g.3); *City of Charlottetown Act,* s. 36(47) as am. by S.P.E.I. 1963, c. 40, s. 1 (rental property).

[118]S. 46(1)(*i*).

[119]As am. by S.P.E.I. 1975, c. 32.

[120]*E.g., Planning Act,* R.S.O. 1970, c. 349, ss. 36,37; *The Municipal Government Act,* R.S.A. 1970, c. 246, s. 239(1); *Municipal Code,* art. 404(2), 392a par. 1.

[121]*E.g., Alberta Historical Resources Act,* s. 37.

occupancy standards) often refer to modern building code standards which often do not recognize the special construction problems involved in restoration work . . . accordingly, some of these provisions may even prove counterproductive".[122]

Trees and Landscape

Trees and landscaping also enhance the appearance of a heritage area. Unlike the statutes of most other provinces,[123] the P.E.I. acts appear to refer only to the protection of trees on public property.[124] Summerside's statute, on the other hand, makes no mention of the protection of trees at all. It is not clear whether some other ground, such as the power to enact by-laws "to improve the general appearance"[125] of the municipality, would sustain a tree-protection by-law.

Other forms of greenery (shrubs, hedges, and so on) also go unmentioned in P.E.I.'s enabling legislation. In that respect the province differs from other jurisdictions.[126] In the absence of direct authority, the power to regulate landscaping is usually difficult to infer[127] unless the appearance comes to resemble an unpleasant growth, which can be regulated.[128]

The planting and protection of trees, hedges and shrubs can be regulated by New Brunswick municipalities.[129] Like municipalities

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[122]Opinion of Connie Peterson Giller, Asst. Solicitor for the Regional Municipality of Waterloo, Ontario; Aug. 18, 1977 (unpublished).

For example, in a recent Ontario case, *Re George Sebok Real Estate Ltd. et al.* v. *City of Woodstock* (1979), 21 O.R. (2d) 761, the Court of Appeal held that a by-law passed under s. 36 of the *Planning Act* and "prescribing standards for the maintenance of physical conditions and for the occupancy of property" could call for thicker walls; new walls in the attic, more exits, and an improved basement floor; that is, for extensive alterations entailing substantial expenditure of money. The court held that such provisions fell within the ambit of standards for the "occupancy" of property because such standards are higher than those for the maintenance of property. From the point of view of heritage conservation, however, such a high standard may prove to be an incentive for the owner to demolish the building concerned.

[123]*E.g., Local Government Act,* R.S.N. 1970, c. 216, s. 98(1)(*r*); *The Planning Act,* as amended S.A. 1977, c. 89 s. 67(3) .4; *The Planning Act,* S.M. 1975, c. P-80, s. 41(2)(*e*) & (*o*); *Community Planning Act,* R.S.N.B. 1973, s. 34(3)(*a*)(vii) & (ix).

[124]*Town Act,* R.S.P.E.I. 1974, s. 83(*e*); *Village Service Act,* R.S.P.E.I. 1974, s. 40(*g*); *City of Charlottetown Act,* s. 36(10).

[125]*Supra,* footnote 100.

[126]*Supra,* footnote 123; also *Cities and Towns Act,* R.S.Q. 1964, c. 193, s. 429 (36).

[127]*Re Mississauga Golf and Country Club Ltd.* (1963) 40 D.L.R. (2d) 673 (Ont. C.A.).

[128]See *Town Act,* R.S.P.E.I. 1974, s. 83(c.3), *City of Charlottetown Act,* s. 36(10), or the *Unsightly Property Act,* R.S.P.E.I. 1974, c. U-5.1).

[129]*Community Planning Act,* R.S.N.B. 1973, s. 34(3)(*a*)(vii) and (xiv); *Municipal Heritage Preservation Act,* N.B. Acts 1978, s. 10(1)(*i*) and (*k*).

elsewhere, they can now compel an owner to plant trees or landscape his property, but only in a preservation area. The *Municipal Heritage Preservation Act* allows for by-laws "prescribing . . . the placement . . . of hedges, shrubs and trees" and "prescribing . . . the planting of trees".

Interim Control of Demolition and Construction

General

A delay can arise between the time that a municipality decides to take action on a heritage issue, and the time that such action takes effect. During that delay, the municipality needs to maintain the *status quo* in order to prevent the defeat of its intention.

In Prince Edward Island

Unlike some of its counterparts in other provinces,[130] the City of Charlottetown does not have the explicit right to delay issue of a demolition permit pending study of an undesignated site. Nevertheless, since Charlottetown's powers are worded in fairly general terms, it may be remotely possible to enact a by-law to that effect. The validity of such a by-law is still undetermined.

It was mentioned above[131] that demolition controls might also be attempted in regulations under the *Planning Act.* That statute, however, does not currently mention interim controls of any description, except to say in s. 24(1)(*b*) that municipalities can adopt "an interim planning policy". It is unlikely that such a power would sustain interim controls on demolition or construction unless new Cabinet regulations were passed to that effect. Again, however, the validity of such Executive Council regulations might have to be determined in court.

A by-law to maintain the *status quo* pending enactment of zoning controls on construction is customarily called a "holding by-law". As mentioned above, it is questionable whether such a by-law would be upheld on the basis of a municipal "interim planning policy". It is also a moot point whether a holding by-law could be based on an unusual provision of the *Town Act,*[132] which applies to P.E.I. towns with the exception of Summerside.

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[130]*E.g., Cities and Towns Act,* s. 426(1)(*d*), as am. by S.Q. 1974, c. 46, s.1; *The Ontario Heritage Act, 1974,* s. 30.

[131]See "Interim Protection".

[132]Section 83(u.2) of the *Town Act* confers on towns the power of "regulating and preventing the erection and construction of any building hereafter to be erected in the town or the alteration of any building now existing therein". The general wording of this provision makes its precise scope unclear.

Unlike some municipalities elsewhere,[133] municipalities in P.E.I. are not usually empowered, in the absence of any existing by-law, to refuse issue of a building permit pending adoption of a by-law.[134] It is difficult to say whether they can pass a holding by-law and thereafter refuse any permits until a further zoning by-law is passed. In earlier cases such a by-law appeared invalid,[135] but more recent cases suggest a carefully-worded holding by-law might be possible.[136]

In New Brunswick

If a New Brunswick municipality is caught by surprise by an application to demolish a structure or to build in an unsuitable area, then it does not have the delaying powers enjoyed by municipalities elsewhere. It cannot postpone demolition or construction pending adoption of corrective measures. The *Municipal Heritage Preservation Act* makes no provision for interim control. It does not, for instance, make provision for the following; issuance of a "stop order", delay until an assessment of and report on the proposed alteration are done, or ordering whatever "protective measures" are considered necessary.[137]

However, demolition and construction can be postponed if the municipality was not caught completely off guard; that is, if it had already authorized public notice of its intent to draught a relevant plan, basic planning statement or by-law. In the latter case, it can postpone all applications for "development" (and hence both demolition and construction) for up to six months pending adoption of the relevant land use control.[138] There may, however, be some communities which fail to recognize that the *Community Planning Act* equates demolition with "development" and hence may not even ask that owners apply for a permit to demolish.

Provincial Intervention

"In several provinces, the central planning authority or the responsible Minister is empowered to compel the council to adopt by-laws and plans or to conform to and enforce plans and by-laws that

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[133]*E.g., Municipal Act*, R.S.B.C. 1960, c. 255, s. 707(1); *Vancouver Charter*, s. 570(1).

[134]See Rogers, *supra*, footnote 27, at 128 *et seq.*

[135]*Outremont* v. *Protestant School Trustees*, [1952] 2 S.C.R. 506; *Ste.Agathe* v. *Reid* (1904), 26 R.C.S. 379.

[136]*Re Kerr and Township of Brock* (1968), 69 D.L.R. (2d) 644 (Ont. H.C.); *Soo Mill & Lumber Co.* v. *Sault Ste. Marie* (1974), 47 D.L.R. (3d) 1 (S.C.C.). Although these cases were decided in Ontario it would be open to a P.E.I. court to reach the same decision.

[137]See the *Alberta Historical Resources Act*, s. 35(1) and s. 22. For a contrasting situation in which municipalities can postpone demolition even in the absence of any preceding by-law of notice, see: *The Ontario Heritage Act, 1974*, s. 30; *Cities and Towns Act*, s. 426(1)(*d*) as am. by S.Q., 1974; *Heritage Conservation Act*, S.B.C. 1977, c. 37, S. 14(1)(*a*).

[138]*Community Planning Act*, R.S.N.B. 1973, s. 81(1) and (2).

have already been adopted where there has been a failure to do so."[139] No such power of intervention is given in Prince Edward Island. In New Brunswick, however, the Minister of Municipal Affairs can compel a municipality to conform to or enforce its official plans; if it still fails to do so, the Minister can take action.[140]

Variances

Even the most stringent land use controls will not necessarily cause hardship to owners of property for which the controls are inappropriate.

In Prince Edward Island, parties who are dissatisfied with the application of any land use control mentioned in the *Planning Act* may apply under s. 50 for a variance; that is, for a change in the control as it applies to their property. Furthermore, the Minister's decision itself may be appealed to the Land Use Commission. The New Brunswick *Community Planning Act* also establishes a procedure permitting owners to obtain variances.[141]

Additionally, in New Brunswick, the *Municipal Heritage Preservation Act* provides any aggrieved person with a broad right of appeal to the Provincial Planning Approval Board under s. 15(2). A further right of appeal granted by s. 17, lies from the Board to the Supreme Court. Section 20(1) of the Act further provides that any person "directly affected by the operation . . . of a by-law" may apply to the Supreme Court for an order quashing that by-law.

Compensation

General

More than one province[142] has had to deal with the thorny question whether or not an owner or occupier or other person having an interest

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[139]Rogers, *supra*, footnote 27, at 252.

[140]*Community Planning Act*, R.S.N.B. 1973, s. 91(3) and (4).

[141]Ss. 35(*b*), 86(2).

[142]In Alberta the problem arose in connection with s. 19 of *The Alberta Historical Resources Amendment Act, 1978*, a section not yet proclaimed. S. 19.5(1) provides that:

If a by-law under Section 19.3 or 19.4 [allowing for designations] decreases the economic value of a building, structure or land that is within the area designated by the by-law, the council shall by by-law provide the owner of that building, structure or land with compensation for the decrease in economic value.

In British Columbia the problem arose in connection with s. 478(1) of the *Municipal Act*, which provides that:

The council shall make to owners, occupiers or other persons interested in real property . . . injuriously affected by the exercise of any of its powers, due compensation for any damages . . . necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work. . . .

in real property which is the object of heritage designation can claim compensation from the municipality that made the designation, downzoned the property, or took other such measures. The fear is, of course, that a municipality won't designate at all if it has to pay compensation for such designation.

In Prince Edward Island

Section 8(1) of the *Recreation Development Act* makes it clear that where a particular use of land in a protected area has been prohibited, the Minister must compensate the person who has the right to make that particular use of the lands. This same section goes on to state that compensation ends with this Act:

> Except as provided in this section, no compensation is payable for any interest in land injuriously affected by a designation of an areas as a . . . protected area . . . .

Consequently, any claim for compensation for injurious affection (damage to the value of land when part only of the land is taken or when no land is taken) under other statutes such as the *Expropriation Act*[143] would seem to be precluded.

On the other hand, the *Planning Act* does not provide for compensation in the case of the creation of a conservation zone or special planning area. Usually, the rule here is that downzoning is not compensable, although the P.E.I. statute (unlike, for instance, the Alberta *Planning Act*[144]) does not specifically reiterate this principle.

The only statute which could entitle an owner to compensation in this circumstance would be the *Expropriation Act.* The owner would have to argue that designation is tantamount to expropriation, or alternatively, that designation has resulted in injurious affection. Injurious affection is the expression for damage caused by governmental acts to the value of private property. Both expropriation and injurious affection give an owner the right to demand compensation.

The question of injurious affection is slightly more complex. Although the *Expropriation Act* does provide for compensation for injurious affection under s. 11, it does not define the term. The common law would then have to be relied on for a definition and certain problems would arise. The requirements of injurious affection have been said to be:

(1) Damage must be the result of an act authorized by statute;

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[143]*Expropriation Act,* R.S.P.E.I. 1974 c. E-11.

[144]*Planning Act,* S.A. 1977, c. 89, s. 4.

(2) Damage must be such as, in the absence of statutory authorization, would give rise to a cause of action;
(3) Damage must be to the land itself; there is no compensation for personal or business loss;
(4) Damage must flow from the construction rather than the operation of a public work.[145]

A number of problems may be highlighted. For instance, would designation give rise to a cause of action? Are we dealing here with a "public work"?[146] Thirdly, neither s. 98 of the *Town Act* nor s. 39 of the *Village Service Act* provides for compensation for injurious affection, although both do provide for compensation in the case where land is taken or where damage is caused by the entering onto of land or the removal of a building, wall, fence, etc., from land. The rule here is that the right to compensation for injurious affection has to be given in the statute.

In New Brunswick

The only statute which could entitle an owner to compensation would be the *Expropriation Act.*[147] Again, the owner would have to argue that designation is tantamount to expropriation, or alternatively, that designation has resulted in injurious affection.[148]

As far as expropriation is concerned, s. 1 of the Act gives the following definition: ". . . to take land without the consent of the owner". Since designation does not involve any taking of land, it would be virtually impossible for a court to equate designation with expropriation.

Injurious affection, on the other hand, is defined as resulting "from the construction and not the use of the works by the statutory authority". Two questions again arise: in the first place, are we dealing here with a public work? In the second place, can it be said that the damage flows from the construction of such a work? As in the case of P.E.I., it would appear that no claim can result from a heritage designation.

As far as downzoning under the *Community Planning Act* is concerned, again there is no compensation unless the zoning is being

[145]G. S. Challies, *The Law of Expropriation* (2nd ed.), (Montreal: Wilson & LaFleur Ltd., 1963) at 133 & *ff.*

[146]The definition of "public work" is in section 1(*f*): "public work" includes highways, roads, and bridges, public buildings and all other works and property for the acquisition, construction, repair, extending, enlarging or improving of which any public money is or has been appropriated by the legislature. "Designation" therefore appears not to be a public work.

[147]*Expropriation Act,* R.S.N.B. 1973, c. E-14.

[148]Ss. 25 and 46.

used for improper purposes, such as a municipal attempt to reduce property value prior to an expropriation.[149]

An Alternative to Compensation

Instead of providing for elaborate compensation at the provincial and municipal levels, proposals have been made to provide incentives through the federal *Income Tax Act.* These recommendations, currently under study, would assist the renovation of all existing investment property (for example, rental property, business property, etc.) and would also provide preferential tax treatment for the owners of designated historic property.[150]

Enforcement

Inspection

In almost all Canadian provinces, it is customary to give municipalities a right of entry into structures in order to inspect whether by-laws are being observed. But "it is well settled that without a statutory right of entry on property, it does not exist".[151] Prince Edward Island, unlike other provinces, has not granted the right to investigate any breach of by-laws. Inspection can be directed apparently to only those breaches which may be dangerous to public health or safety.[152] In Summerside's by-laws not even this power is mentioned.

If, however, a permit is required for a given activity (for example, construction), then a peace officer may enter the premises to verify that the occupant has the permit.[153] From this right, it may be possible to argue that the peace officer can simultaneously inspect to confirm that the permit does indeed cover the work being done. Furthermore, most municipalities are empowered to appoint Building Inspectors[154] who are usually responsible for all aspects of construction; one may infer that an Inspector is empowered to inspect. But this inference is still untested for heritage purposes in Prince Edward Island.

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[149]An extensive discussion of such purposes is found in Rogers, *supra,* footnote 27, at 122-6.

[150]See *Heritage Canada Magazine,* April, 1979 and "Tax Proposals Affecting Renovation" by this author, in *Proceedings of the Second Canadian Building Congress,* (Ottawa: National Research Council, 1980).

[151]See Rogers, *supra,* footnote 27, at 253.

[152]*Town Act,* R.S.P.E.I. 1974, s. 83(g.2); *Village Service Act,* R.S.P.E.I. 1974, s. 40(i); *City of Charlottetown Act,* s. 36(14), 36(29).

[153]*Planning Act,* R.S.P.E.I. 1974, s. 55.

[154]*Town Act,* R.S.P.E.I. 1974, s. 83(i.1); *Village Service Act,* R.S.P.E.I. 1974, s. 40(j); *City of Charlottetown Act,* s. 36(48); *Town of Summerside Act,* s. 70(44). In practice, few municipalities appoint a building inspector.

In New Brunswick, no right of inspection is given under the *Municipal Heritage Preservation Act.* However, under the *Community Planning Act,* the right is conferred upon the Provincial Planning Director, the Municipal Planning Officer, and representatives of the Minister by s. 92(1).

Penalties

As is usual, three kinds of penalties are possible for offences. The first penalty is the obligation to restore a site to what it was before the infraction occurred. No such power is enunciated in P.E.I. In this sense, P.E.I. municipalities enjoy fewer powers of enforcement than their counterparts in New Brunswick. Municipalities can, however, order that a structure which was illegally erected be torn down.[155] Poor maintenance can similarly be corrected by the municipality's requiring that the premises be cleaned up at the owner's expense.

In New Brunswick restoration of a property to its original condition can be ordered under both ss. 18 and 19 of the *Municipal Heritage Preservation Act* and s. 93 of the *Community Planning Act.* Structures which were illegally erected can be torn down at the owner's expense. Poor maintenance can similarly be corrected by having the premises cleaned up at the owner's expense.[156]

A second form of penalty is a fine. In Prince Edward Island offences against the *Planning Act* and the *Town Act* carry a maximum fine of $500, with the *Planning Act* making provision for a $1,000 fine for subsequent offences.[157] Elsewhere, offences which are not covered by the *Planning Act* also carry fines: $500 in Charlottetown and Summerside, and $50 in villages.[158] In New Brunswick offences under both the *Municipal Heritage Preservation Act,* s. 21(1), and the *Community Planning Act,* s. 95(1), carry a maximum fine of $100 per day for each day of the offence.

Imprisonment is the third form of penalty. Generally, imprisonment for 90 days can be ordered for offences against P.E.I. statutes.[159] It would appear that it can be ordered in addition to a fine, except when the charges are being laid under the *Village Service Act* or the *Planning*

[155]*Town Act,* R.S.P.E.I.1974, s. 83(i.2); *City of Charlottetown Act,* s. 36(48); *Town of Summerside Act,* s. 70(44).

[156]See *Community Planning Act,* R.S.N.B. 1973, s. 34(3)(*e*) and *Municipalities Act,* R.S.N.B. 1973, s. 190(3).

[157]*Planning Act,* R.S.P.E.I. 1974, s. 52; *Town Act,* R.S.P.E.I. 1974, s. 83.

[158]*City of Charlottetown Act,* as am. by S.P.E.I. 1977, s. 36; *Town of Summerside Act,* s. 70; *Village Service Act,* s. 45(1).

[159]*Town Act,* R.S.P.E.I. 1974, s. 83; *City of Charlottetown Act,* s. 36; *Town of Summerside Act,* s. 70; the penalty can be for "three months".

Act. In these two cases, imprisonment can be ordered only upon default of payment of the fine.[160] In New Brunswick, offences under both the *Municipal Heritage Preservation Act* and the *Community Planning Act* do not result in imprisonment, except on default of payment of a fine.

Binding Authority

As noted earlier, the applicability of non-federal regulations (including municipal by-laws) to federal and federally-regulated works has been the object of considerable jurisprudence; they may be applicable in certain limited circumstances.[161]

Unlike counterparts elsewhere,[162] P.E.I. municipalities are given no authority to subject provincial works to municipal by-laws. In the absence of any statutory authority to the contrary, "municipal by-laws do not apply to the Crown".[163] Since the P.E.I. *Planning Act* is binding on the Crown, however, it is a moot point whether municipal by-laws are also binding; that hypothesis, however, is still untested.[164]

In New Brunswick, the province is exempted under s. 22 of the *Municipal Heritage Preservation Act.* As far as the *Community Planning Act* is concerned, "in New Brunswick the province is expressly prohibited from undertaking any development at variance with a plan [ss. 18(7) and 27] but is otherwise exempted from complying with the Act and any by-law (s. 96)".[165]

Are municipalities bound by their own plans and by-laws? As far as plans are concerned municipal public works must respect official plans in both Prince Edward Island under s. 35 of the *Planning Act* and in New Brunswick under ss. 18(7) and 27 of the *Community Planning Act.* Similarly, the establishment of any preservation area and the making of any by-law under the *Municipal Heritage Preservation Act* must comply with any regional plan, area plan, planning statement, etc. in effect according to s. 11.

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[160]*Village Service Act,* R.S.P.E.I. 1974, s. 45(1); *Planning Act,* R.S.P.E.I. 1974, s. 52.

[161]See *Part 1,* p. xx, *Supra, et seq.*

[162]*E.g., The Planning and Development Act,* R.S.S. 1978, c. P-13, s. 195; *Planning Act,* S.M. 1975, c. P-80, s. 87(1).

[163]Rogers, *supra,* footnote 27, at 143.

[164]*Planning Act,* R.S.P.E.I. 1974, s. 60.1.

[165]Rogers, *supra,* footnote 27, at 143.

As far as by-laws are concerned, it appears that municipalities are bound by them; however, they can also formally exempt themselves from them.[166]

THE PRIVATE LEVEL

General

If a proprietor is willing to subject his property to control on alteration and demolition, it is possible to sign a private agreement with him to that effect. Most agreements are simple contracts: they bind the signatories, but they do not bind anyone else. Consequently, if an owner agrees to protect his property against demolition and later sells the property, the agreement would usually not be binding upon the future owner. Conservationists would find this result unsuitable in the majority of situations. Fortunately, a special form of agreement called an easement or covenant can be used to deal with that problem; it binds future owners as well as the present owners.

Easements and Restrictive Covenants

Contents

Easements and restrictive covenants are contractual agreements which prohibit the owner of land from doing something on his land (called the "servient tenement").[167] An easement or covenant can cover a variety of subjects. The best-known example is a right of way, where the owner of land (the servient land) agrees not to interfere with the passage of someone else over his land. Similarly an owner of land can enter into an agreement not to alter or demolish a building on his land. This is the kind of agreement which interests conservationists. Most agreements do not bind future owners. If an agreement is to be classed as an easement or covenant binding on future owners, it must (at common law) meet certain standards.

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[166]"Comprehensive zoning by-laws often exempt local authorities from their provisions and permit by way of exception municipal buildings and structures to be erected on lands otherwise confined to residential uses. It would appear that such exceptions are legal." Rogers, *supra*, footnote 27, at 144. Rogers bases his opinion on *Dopp* v. *Kitchener* (1927), 32 O.W.N. 275 (Ont. H.C.).

[167]The technical difference between an "easement" and a "covenant" is sometimes confusing. For example, some organizations (such as the Ontario Heritage Foundation) working with these agreements refer to an "easement" as the interest in the "servient" land which the agreement gives rise to, whereas a "covenant" is the contract which outlines the mutual obligations of the parties. On the other hand, most texts prefer to define an easement as a proprietor's commitment not to interfere with someone else's activity on the proprietor's land (for example, a right of way), whereas a restrictive covenant is a commitment that the proprietor himself will not do something on his own land. In any event, since both easements and restrictive covenants share the same characteristics for conservation purposes, they shall be treated together in this article.

Common Law Standards for Easements and Restrictive Covenants

In order for an easement or covenant to be binding upon future owners, it must spell out that the agreement is for the benefit of other land.[168] Consequently, conservationists cannot obtain covenants upon property unless they own something in the area. Even then there would have to be some indication that their own property benefited from the covenant (for example, that it retained its value as part of a heritage district, although even this "benefit" may not be concrete enough to satisfy the demands of a law in this area).

Another question arises: can an easement or covenant not only oblige an owner to tolerate something (a right of way, a building, etc.) but also oblige the owner to do something positive (for example, landscaping, maintenance)? At common law, the answer is "no" because a covenant must be negative in nature: "The test is whether the covenant required expenditure of money for its proper performance".[169] Consequently, a covenant to repair would not be binding upon future owners. The same principle applies to easements.[170]

Statutory Reform

In order to circumvent the above-mentioned problems, a new section was added to the Prince Edward Island *Heritage Foundation Act.*[171] Section 8.1(5) empowers the Foundation to enter into covenants which will run with the land even if no land is benefitted and even if the covenant is positive. Although the Foundation can assign these covenants to other incorporated groups, by subs. (6), an owner cannot initially enter into a binding heritage covenant with any person or group except the Foundation. Unlike similar foundations in other jurisdictions the P.E.I. foundation cannot be replaced by a municipality, as under *The Ontario Heritage Act 1974,* s. 37, or by individual, as under Quebec Civil Law "personal servitudes."

The New Brunswick *Historic Sites Protection Act* empowers several parties in New Brunswick to enter into covenants which will bind future owners even if no other land is benefitted and even if the covenant is positive.[172] The parties who can enter into these agreements with the

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[168]See Megarry, *A Manual of the Law of Real Property* (5th ed.) (London: Stevens, 1975) at 374.

[169]*Ibid.*, at 375.

[170]*Ibid.*, at 394.

[171]R.S.P.E.I. 1974, c. H-4 as am. by 1976 S.P.E.I., c. 12.

[172]*Historic Sites Protection Act,* s. 2.1(2), as am. by S.N.B. 1977, c. 27, s. 1.

owner are the Minister of Education or anyone else whose easement or covenant has been approved by the Minister. In New Brunswick, the first prerequisite in order for such an agreement to be registered as an easement or covenant binding on future owners is that the property in question be an historic site. This presumably means that the property must have been designated by the Minister as an historic site under s. 2(1) of the *Historic Sites Protection Act.* However, the site does not necessarily need to have been additionally designated as a "protected site" under s. 2(2) of the same statute. Of the various provinces which have introduced special heritage easements and covenants,[173] New Brunswick is the only one to require such a formality.

If the agreement is signed by the owner and the Minister, then it can be registered at the local land registry office and becomes binding not only on present owners but also on future owners. It is enforced by the Minister and his successors in that office. If the agreement is signed by the owner and someone other than the Minister, then it must first be approved by the Minister, as required by s. 2.1(1), before it can be registered and become binding on future owners. It would be enforceable by the person contracting with the owner along with that person's successors. Section 2.1(3) permits these agreements to be assigned to other parties; for example, if an owner entered into an approved easement or covenant agreement with X, X could assign his rights (that is, enforcement) to Y, who could then enforce the agreement in X's place.

Registration and Information

In order to bind future owners, any easement or covenant should be registered at the local land registry office.[174] Such agreements have been draughted in other jurisdictions and examples are available from them. The Ontario Heritage Foundation has available such examples.

Fiscal Aspects

An easement is an interest in land; proprietorship is a "bundle" of interests and to part with an interest means to part with a segment of one's proprietorship. This disposition has market value, namely the difference in the value of the property before and after the contract.

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[173]See *Ontario Heritage Act,* ss. 22 and 37; *Heritage Conservation Act,* S.B.C. 1977, c. 37, s. 27; *Historic Objects, Sites and Records Act,* s. 20(*a*) as am. by S.N. 1977, c. 80, s. 6; *Heritage Foundation Act,* s. 8.1, as am. by S.P.E.I. 1976, c. 12, s. 1. In Quebec "personal servitudes" were already available to anyone for the same purposes on any kind of property: see J. G. Cardinal, 57 *Revue du Notariat* at 485.

[174]*Historic Sites Protection Act,* s. 2(2.1), as am. by S.N.B. 1978, c. 28, s. 2; *Heritage Foundation Act,* s. 8.1(4), as am. by S.P.E.I. 1976.

In the United States, such a contractual agreement is considered a donation to the public of a part of one's proprietorship, and charitable tax receipts are recognized accordingly.[175] To date, no one has challenged the Canadian Department of National Revenue to give the same tax treatment, but the subject is currently under study.

PUBLIC PARTICIPATION

General

Public participation is a term which has been discussed at length in a multiplicity of publications. This article will discuss only a few aspects particularly germane to the protection of the built environment.

Organization of Conservation Groups

Incorporation

There are certain advantages for heritage organizations which are officially incorporated. The principle advantages are the capacity to own property, the capacity to enter into contracts, limited liability, and usually a greater facility in obtaining charitable status.

Incorporation can be either provincial or federal; local groups usually choose to incorporate provincially. Heritage Canada provides examples of the constitutions of similar groups.

Charitable Status

Charitable status is another valuable asset of a heritage group; it means that the group can issue tax-deductible receipt for all donations. This feature obviously constitutes an advantage in fund-raising. The rules concerning charitable status, along with application forms are available from the Charitable and Non-Profit Organizations Section of Revenue Canada and are contained in Information Circular No. 77-19.[176]

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[175]See the opinion of attorney Russell L. Brenneman, published in *Preservation News*, May, 1976, at 3. This view was accepted by the Internal Revenue Service (U.S.) in a 1975 ruling (Rev. Rul. 75-358, 1975 -34 I.R.B. Aug. 25, 1975) and U.S. Public Law 94-455, The *Tax Reform Act* of 1976.

[176]Charities registered in Canada can also be recognized in the United States. This would permit Americans donating to the charity to deduct the donation from their income in Canada; it would also permit American charities to transfer funds to the Canadian charity.

Financial Support

Fund-raising is an inevitable necessity for conservation organizations.[177] Funding for various enterprises related to conservation can be found at the federal and provincial levels, as well as in the private sector.[178]

Powers of Citizens' Groups

General

Heritage legislation is useless unless it is enforced. Obviously, the most expeditious way to have the law enforced is for the government to enforce it. It is conceivable, however, that government might fail to act because of oversight or conflict of interest. In such cases, public action may have a very positive impact upon the implementation of the objectives of heritage legislation.

There is, however, no formal legal mechanism to integrate public participation in the decision-making process for the designation and protection of heritage property. Federal laws are silent in this regard. Under the statutes of Prince Edward Island and New Brunswick the decision-making power regarding designation is in the hands of provincial and municipal officials. Similarly, there is no formalized system of continuous citizen input into the planning process, as there is, for example, in the *City of Winnipeg Act* or in the right of compulsory referendum in Quebec municipalities.[179] In short, there is no way for the citizenry to compel officials to protect anything, regardless of its value.

Access to Information

Information from various government levels can be important for conservationists, particularly in matters pertaining to public works. In

[177]See J. Young, *Shortcuts to Survival* (Toronto: Shortcuts, 1978).

[178]There are some 35,000 registered charitable organizations in Canada; some can be persuaded to donate to the conservation of the built environment. The corporate sector is another possible source of funds.

Some civic beautification projects can be carried out on a purely voluntary co-operative basis. Such projects, often called a "Norwich Plan", require good organization and promotion. Frequently, such organization comes from merchants' associations or chambers of commerce. Interesting examples of this approach, though not for heritage purposes, are found in the civic beautification projects of Kimberley and Osoyoos, British Columbia. Special arrangements may also be made to cover the cost of local improvements — for instance a beautification scheme may be paid for by the proprietors who are benefitted. Further information on such projects is usually available from the local representative of the Norwich Union Insurance Company.

[179]*Cities and Towns Act*, art. 426(1*c*), as am. by S.Q. 1968, c. 55, s. 120 and S.Q. 1969, c.55, s. 21. This right can be invoked (assuming a sufficient number of citizens demand it) on any zoning amendment.

certain jurisdictions, such as the United States, all governmental information is deemed public until declared confidential; it cannot be so classified without valid reasons. Otherwise, the courts can invoke the *Freedom of Information Act*[180] to compel the government to disclose this information.

In Canada, the situation is different. Under the *Official Secrets Act*[181] all governmental information is secret until its publication is authorized. This authorization is at the exclusive discretion of the government. Citizens have no way to compel the government to provide information on the protection of heritage or any other subject. The same situation prevails in P.E.I. In New Brunswick, on the other hand, a *Right to Information Act*[182] was recently passed but not proclaimed; it is not clear yet what impact it will have on conservation efforts.

Access to Political Action

Lobbying on behalf of private interests for entrepreneurs and speculators is not only legal in Canada; a special provision of the *Income Tax Act*[183] states that all such measures of political action are tax deductible. On the other hand, the very same measures used on behalf of the public interest are not tax deductible; furthermore, a charitable organization which undertakes such political action on behalf of the public interest commits an offense punishable by the loss of its charitable status.[184] Although "political action" is very difficult to define,[185] any charitable organization which undertakes to promote heritage conservation must do so with caution.

Access to the Courts

If an individual is harmed by an illegal act, he may sue. If the entire community is harmed by an illegal act, such as the illegal destruction of heritage, can the community sue? Alternatively, can a citizens' group do so on behalf of the community? This question underlines the principle of *locus standi.* This legal principle concerning the right to appear before the courts denies such access to the majority of conservationists and other citizens' groups who are working on behalf of the public interests.

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[180]1966 P.L. 89-554, 80 Stat. 383 as amended.

[181]R.S.C. 1970, c. 0-3.

[182]*Right to Information Act,* S.N.B. 1978, c.R-10.3.

[183]*Income Tax Act* as am. by S.C. 1970-71-72, c. 63, s. 1 [20(1)(*cc*)].

[184]*Revenue Canada Information Circular 77-14,* June 20th, 1977, s. 6(*c*).

[185]In the spring of 1978, Revenue Canada issued an information circular which so restricted the rights of charitable organizations that it had to be withdrawn.

If all the members of a community have been equally harmed by an illegal act (*e.g.* by the government), no one has access to the courts except a representative of the government (the Attorney-General). In other words, it is usually necessary for the plaintiff to demonstrate that the alleged illegality will cause him more harm (physically or financially) than other members of the community. Otherwise, if only the public interest is at stake, he will usually be denied access to the courts.[186]

In some exceptional cases, it is possible for the public to use private prosecutions.[187] There are also cases where citizens may take legal action in their capacity of municipal ratepayers.[188] Jurisprudence on this point, however, remains somewhat unsettled.

CONCLUSION

Canada's built environment is difficult to protect. This environment, which determines the quality of life of a large part of our population, is also our habitat with all the complications which that entails. Planning for our structural heritage is as complex as dealing with the subject of habitat itself.

There are no simple solutions. By the same token, there is no single legal mechanism which is sufficient to deal effectively with the problems facing our built environment. The proper protection of our structural heritage demands a variety of legal techniques, as well as initiative and imaginative in their application.

The entire analysis of the protection of the built environment presupposes, of course, that the people of New Brunswick and Prince Edward Island have the collective will to put conservation and renovation programs into effect. That is a policy decision which depends largely on the degree of commitment which the people of these provinces feel toward the architectural and historic legacy of previous generations.

Until recently, that sense of commitment appeared thinly-spread and (as elsewhere in Canada) confined to a handful of military structures, or to communities made famous by the likes of Franklin Delano Roosevelt and Lucy Maud Montgomery. That attitude is changing, as witnessed by the rapid growth of local amenity societies

[186]See the recent case of *Rosenberg and Makarchuk* v. *Grand River Conservation Authority* (1976), 12 O.R. (2d) 496 (Ont. C.A.); leave to appeal to the Supreme Court of Ontario was refused in October, 1976.

[187]P. S. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Association, 1976).

[188]See: *Re David and Village of Forest Hill*, [1965] 1 O.R. 240 at 246 (Ont. H.C.); citizens in P.E.I., and even the National Farmers Union, have scored some notable successes in this area before the P.E.I. Land Use Commission; *Taché Gardens et al* v. *Dasken Enterprises*, [1974] S.C.R. 2.

across both provinces, with the support of some key business groups and elected officials; and even further impetus is likely to be provided by the preparations for New Brunswick's Bicentennial in 1983-84.

More citizens in both provinces now realize that it is indeed possible to plan almost every community in a way which reflects special local identity.[189] That manifestation of local pride in the community's historical and architectural roots is likely to lead to increasing demands for the entrenchment of conservation and renovation techniques at the very core of the planning process.

MARC C. DENHEZ*

[189]A distinction should, however, be made between the situation in the two provinces. Although a substantial amount of legislation exists in each province, and although there are still some doubts expressed by some New Brunswickers concerning the clarity of their own legislation, there are far more doubts expressed about the clarity of the P.E.I. "heritage" legislation. The latter relies upon so many inferences that, according to one Charlottetown official, the major benefits of the legislation will go to the Island's litigation lawyers. According to this view, energetic conservation efforts, while possible, should be accompanied by a reformulation of the province's legislation in far more precise language.

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