

PROTECTING THE BUILT ENVIRONMENT OF MANITOBA

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Introduction

Context

For the large majority of Canadians, "environment" is their city or town; it is in a city or town that 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, with such matters as stress, cultural identity, and sense of historic continuity affected by it. 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.

Clearly, one way for such buildings to be saved is to be *purchased* by someone dedicated to their retention; but since it is impossible to thus acquire all valuable buildings, this article looks at alternate approaches. There are legal mechanisms at five levels: international, federal, provincial, municipal, and private. Furthermore, public participation is an important dimension to any discussion of land use controls. Finally, it is also possible to apply for financial assistance to a number of sources. Though canvassed briefly later in this article, the relevant agencies 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.

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. Canada voted for these Recommendations which outline the

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1. *Protecting the Built Environment*, Pt. 1, Heritage Canada, Ottawa, 1978. The French version of this work was published in (1978), *La Revue du Barreau*.

2. For a description of the legal consequences of these treaties, see *Id.*, at 4-5.

contents of proper heritage legislation; however these Recommendations, unlike treaties, are not legally binding upon Canada.

In the Western world, heritage legislation of some description has existed since the fifth century A.D. In the modern period, it 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 sometimes decide, in cases of legal uncertainty, whether the *benefit of the doubt is to be* given to the owner or to the heritage authorities. Although this issue has yet to be firmly decided, most precedents suggest that 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

The federal government can presumably protect buildings if it actually buys them. However, the federal government, unlike some foreign governments, 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.⁶

The federal government has, however, established special non-statutory *administrative* procedures to minimize the effect of public works which damage heritage.⁷

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.⁸

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

3. For description of this historical evolution, see *Id.*, at 7.

4. For a review of most of the major jurisprudence affecting burden of proof in "heritage" cases, see *Id.*, at 7-11.

5. For a description of these limitations, particularly those found in the *British North America Act*, see *Id.*, at 11-17.

6. These various obligations result from the treaties mentioned, *Supra* n. 2.

7. For a description of the basic features of "environmental impact" procedures at the Canadian federal level as compared with the U.S. and Australia, see *Supra* n. 1, at 13-14.

8. *Id.*, at 14.

shared the same immunity from provincial laws (including heritage laws) as federal property, that assumption has been shaken by recent litigation: such property can probably be subject to provincial and municipal heritage controls.⁹

The federal government operates several subsidy schemes which can be useful for the renovation of buildings. However, the federal *Income Tax Act* treats a demolished investment property as "lost," and recognizes a substantial tax deduction on demolition accordingly. Furthermore, the *Income Tax Act* provides no incentives for renovation; this can leave renovation in a poorer position tax-wise than new construction.¹⁰ This question is currently the subject of substantial discussion and negotiation, and holds out the distinct possibility of change.¹¹

Other Aspects

This article discusses the other aspects of legislation to protect the built environment — namely, 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.¹² The following article will now consider those features of the question which arise directly out of the legislation of Manitoba.

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 Australia¹³ 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.¹⁴

Such legislation can have a significant impact upon undesignated historic resources threatened by public works. For example in Ontario *The Environmental Assessment Act, 1975*¹⁵ is typical of such legislation insofar as it orders the preparation and submission of reports containing an assessment of the environmental impact of proposed development.¹⁶ These

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9. *Id.*, at 16. *The Hamilton Harbour Case* (1976), 1 M.P.L.R. 133 (Ont. H.C.), on which this view was based, was appealed unsuccessfully to the Ontario Court of Appeal; appeal to the Supreme Court of Canada was abandoned.
 10. *Id.*, at 17-19. A more detailed description is found in M. Denhez, "Current Tax Proposals Affecting Renovation," in National Research Council, *Second Canadian Building Congress* (1980).
 11. For a description of current developments in this area, see *Heritage Canada Magazine*, May, 1979, at 3-4.
 12. *Supra* n. 1, at 20-23.
 13. See *National Historic Preservation Act*, 1966, 16 U.S.C. s. 470(f) particularly s. 106; *Environment Protection (Impact of Proposals) Act*, 1974, No. 164 (Aust.).
 14. *E.g.*, *Alberta Land Surface Conservation and Reclamation Act*, S.A. 1973, c. 34, s. 8; *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 22, as am. by S.A. 1978, c. 4; *The Environmental Assessment Act 1975* S.O. 1975, c. 69.
 15. S.O. 1975, c. 69.
 16. 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.

reports must be filed by most government departments and agencies. The Ontario *Act* 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 Act's definition of "environment" includes the built environment: "the social, economic and cultural conditions that influence the life of man or a community,"¹⁷ as well as "any building, structure, machine or other device or thing made by man."¹⁸ The report must also contain "an evaluation of the advantages and disadvantages to the environment of the undertaking and the alternatives to the undertaking."¹⁹

The report is reviewed by governmental authorities and made public.²⁰ If the report is incomplete, citizens can challenge it.²¹ This kind of legislation has 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.²²

Although its history has not been a happy one, as described later, provision for an environmental impact report has existed for some time in *The City of Winnipeg Act*. At the provincial level the system is only beginning: called the "Environmental Assessment and Review Process", it has not been incorporated in legislation. This non-statutory status of the system exposes it to the vagaries of the political process and limits the scope of public participation and supervision. Furthermore, the absence of legislation limits the system to government projects only — without the kind of statutory authority that exists elsewhere, it is impossible to compel the private sector to file environmental impact reports.²³

Provincial Protection of Property

General

In Manitoba there are two provincial mechanisms which can be used to protect a site or district. The two principal methods are administered by two separate ministries under two different statutes, *The Historic Sites and Objects Act*²⁴ and *The Planning Act*.²⁵

The Historic Sites and Objects Act

The Minister of Tourism and Cultural Affairs is empowered by *The Historic Sites and Objects Act* to recommend property for protection. He will normally be acting on the advice of a board called the Historic Sites Advisory Board of Manitoba.²⁶

17. *The Environmental Assessment Act 1975*, S.O. 1975, c. 69, s. 1(c)(iii).

18. S.O. 1975, c. 69, s. 1(c)(iv).

19. S.O. 1975, c. 69, s. 5(3)(d).

20. S.O. 1975, c. 69, s. 7(1).

21. S.O. 1975, c. 69, s. 7(2).

22. *But see*, S.O. 1975, c. 69, s. 18(19). In the United States there are usually 20 to 30 citizens' applications for injunctions pending before American courts at any given time to block projects threatening heritage. See the *National Historic Preservation Act*, 1966, 16 U.S.C. s. 470(f), particularly at s. 106; *National Environmental Policy Act of 1969*, 42 U.S.C. s. 4321. An updated list of U.S. litigation to protect historic sites is issued periodically by the National Trust for Historic Preservation, 740 Jackson Place, Washington, D.C.

23. The private sector is specifically included in the application of the Ontario and Alberta statutes, *Supra* n. 14.

24. R.S.M. 1970, c. H70, as am. by S.M. 1972, c. 81, s. 11; S.M. 1972, c. 42, s. 24.

25. S.M. 1975, c. 29 (p. 80), as am. by S.M. 1976, c. 51; S.M. 1977, c. 35 and c. 61, s. 11; S.M. 1978, c. 37; S.M. 1979, c. 16.

26. R.S.M. 1970, c. H70, as am. by S.M. 1972, c. 81, s. 11.

On the Minister's recommendation the Cabinet may designate any land or structure to be an historic site.²⁷ The consequences of such a designation are mentioned at Section 3 of the *Act*: "No person shall damage, destroy, remove, improve, or alter an historic site without a valid subsisting permit to do so under the regulations and except to the extent authorized by such a permit." The Minister is thus given discretion to accept or reject construction, alteration or demolition on protected property as he sees fit.

The Planning Act

The Cabinet is empowered by this statute to establish "special planning areas" for, "the preservation of historic and archaeological structures and sites, and areas adjacent thereto."²⁸ This can be done in any part of Manitoba except Winnipeg and lands designated as "provincial park lands" under the *Provincial Park Lands Act*.²⁹

A "special planning area" is subject to a system which is commonly called "development control." (This system is described more fully below in the context of municipal land use powers.) The designation suspends the application of all existing plans and zoning in the area;³⁰ and provides, "no development shall be undertaken within the area without the written permission of the Minister (of Municipal and Urban Affairs) following consultation with the municipalities or district."³¹ "Development" means any "operations on, over or under land, or the making of any change in the use or intensity of use of any land or building or premises."³²

Since demolition constitutes a radical change in the use of a building, demolition is presumably a form of "development" that would be subject to control. However, in interpreting the statute in this way one should keep in mind the following problem. Jurisprudence is still divided on the interpretation of land use controls,³³ with some courts holding that controls cannot be inferred. Thus, *The Planning Act* could not be used to control demolition unless the *Act* referred specifically to demolition control; inferences would be insufficient. Under such a narrow interpretation the *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

27. R.S.M. 1970, c. H70, s. 19(a).

28. S.M. 1975, c. 29, s. 12(1)(f).

29. S.M. 1975, c. 29, s. 93(1)(a), as am. by S.M. 1977, c. 35, s. 43.

30. S.M. 1975, c. 29, s. 12(4)(c).

31. S.M. 1975, c. 29, s. 12(4)(d).

32. S.M. 1975, c. 29, s. 1(k).

33. I. Rogers, *Canadian Law of Planning and Zoning*, (1973) 11. For a case in which the court equated the threat to heritage with a state of emergency, see *E.J. Murphy v. City of Victoria* (1976), 1 M.P.L.R. 166 (B.C.S.C.). In that case, the City was empowered to designate buildings for protection as heritage buildings, but nothing in the City's *ordinary* powers prevented the owner from demolishing the building between the time he received notice of the impending designation and the time the designation became effective (a period of several months). The City therefore declared a "state of emergency" and invoked the extraordinary powers which it may use in "emergencies." The by-law stated that because of the emergency no person shall demolish a building mentioned in the schedule to the by-law except in accordance with the by-law and no person shall construct a building or structure on the lands designated. Furthermore, all demolition permits then in force were revoked. The Court refused to overrule this "state of emergency". An Ontario court could conceivably reach the same decision. However, the case has been described as running "counter to traditional interpretations of municipal powers". See S.M. Makuch, "Annotation" (1976), 1 M.P. L.R. 167. The author, nevertheless, balances the statement with a number of cases both pro and con.

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.

Effect on Individual Sites

As mentioned above a site designated under *The Historic Sites and Objects Act* cannot be changed without governmental permission.

An area designated as a “special planning area” under *The Planning Act* may presumably be as large or as small as the Cabinet desires. It may conceivably be as small as an individual lot, or even smaller. It should be noted that the designation of a “special planning area” is intended as a first and interim measure pending preparation and adoption by the municipalities affected of more comprehensive protective legislation for the area.³⁴

What kinds of reasons are required to sustain a designation? If, for example, governmental authorities were to designate a property for reasons which were overtly extraneous to *The Historic Sites and Objects Act*, the designation would be open to challenge in the courts.³⁵ However, if the designation was made for the *bona fide* purpose of protecting heritage, then the “reasons” are not subject to attack even if the heritage value of the property is slight: “[I]f there was 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.”³⁶

Effect Upon the Surroundings of Sites

Unlike the legislation of certain other jurisdictions,³⁷ the Manitoba statutes do not give automatic protection to the surroundings of designated sites. Thus, neighbouring construction may block all view of the heritage site. To protect vistas to the heritage site it would be necessary to specifically include them in the designating order. *The Planning Act* recognizes the importance of preserving the areas adjacent to historic sites and provides for their inclusion in the “special planning area.”³⁸

Effect Upon Areas

The treatment of areas under *The Historic Sites and Objects Act* is not as clear as, for example, that of the statutes in Quebec and Ontario.³⁹ This does not mean, however, that the Manitoba statute is incapable of giving blanket protection to areas. There is nothing to prevent the Minister from designating an entire built-up area as a protected “historic site” under the *Act*: the word “site” is broad enough to include areas as well as individual structures.⁴⁰ This step has been taken under almost identical legislation by

34. S.M. 1975, c. 29, s. 12(4), as am. by S.M. 1977, c. 35, s. 5.

35. 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.

36. As stated by Mr. Justice Gould of the British Columbia Supreme Court in *Murray v. Richmond* (1978), 7 C.E.L.R. 145, at 146.

37. S.Q. 1972, c. 19, art. 31.

38. S.M. 1975, c. 29, s. 12(1)(f).

39. *Quebec Cultural Property Act*, S.Q. 1972, c. 19, s. 45 *et. seq.* *Ontario Heritage Act, 1974*, S.O. 1974, c. 122, s. 40 *et. seq.*

40. R.S.M. 1970, c. H70, s. 2(6).

British Columbia in Gastown and Chinatown in Vancouver, and by Alberta at Bitumont.

A "special planning area" under *The Planning Act*, as we have already seen, may presumably be any size the Cabinet wishes.

Interim Protection

Unlike the legislation of several other provinces,⁴¹ *The Historic Sites and Objects Act* does not specifically empower the responsible minister to halt work pending study of an interesting site. Consequently, immediate designation is the only way to protect an endangered building. It may even be necessary, on occasion, to designate structures without substantial documentation, and later to "undesignate" them. Revocation of a designation has not yet been attempted in Manitoba.

Other broad "protective measures" found in the legislation of other provinces are also missing. For example, the Minister cannot order the suspension of any license or permit, such as a construction or demolition permit) issued by a municipality.⁴²

The Planning Act is also of little help in this regard. It does make provision for an "interim development control order" by the Minister⁴³ — the effect of which is that no "development" can take place without a permit — but it is limited to areas without an adopted development plan or a basic planning statement (see section on municipal planning below).

It may nevertheless be possible to introduce some interim protection without statutory amendment. *The Historic Sites and Objects Act* empowers the Cabinet to enact regulations promoting the purposes of the statute;⁴⁴ such a regulation might introduce a system of interim protection pending designation. No such regulation has been made, however, and, naturally, whether it would be considered a proper object of regulation remains to be seen.

Applications

Requests for protection under *The Historic Sites and Objects Act* should be addressed to the Historic Sites Advisory Board of Manitoba.⁴⁵ Information concerning *The Planning Act* is available from the Administration Branch of the Department of Municipal and Urban Affairs.⁴⁶

Enforcement

Inspection

Unlike the statutes of several other provinces,⁴⁷ *The Historic Sites and Objects Act* does not confer on officials the right to inspect sites, with the

41. E.g., *Alberta Historical Resources Act*, S.A. 1973, 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. 42; *The Saskatchewan Heritage Act*, S.S. 1974-75, c. 45, s. 8.

42. See e.g., the *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 22(2), (3).

43. S.M. 1975, c. 29, s. 39(1.1) - (1.7) as introduced by S.M. 1977, c. 35, s. 25.

44. R.S.M. 1970, c. H70, s. 19.

45. Historic Resources Branch, Dept. of Tourism and Cultural Affairs, 200 Vaughan St., Winnipeg, Manitoba, R3C 1T5.

46. 1436-405 Broadway, Winnipeg, Manitoba R3C 3L6.

47. E.g., *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 22; B.C. *Heritage Conservation Act*, S.B.C. 1977, c. 37, s. 7(2); *Quebec Cultural Property Act*, S.Q. 1972, c. 19, s. 42; *Saskatchewan Heritage Act*, S.S. 1974-75, c. 45, s. 8.

exception of archaeological digs.⁴⁸ Although the Cabinet could conceivably enact a regulation specifying the right to inspect, the validity of such a measure is untested.

The right of inspection under *The Planning Act* can be exercised only in cases of "emergency."⁴⁹ It may, however, be possible to get a judge's order which effectively dispenses with the need for the owner's consent.⁵⁰

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 an altered or demolished designated structure. This is usually the most satisfactory means of dealing with the offences under heritage legislation, and is foreseen at Section 8(2) of *The Historic Sites and Objects Act*. Such a provision is also found in *The Planning Act*.⁵¹

The second form of penalty is a fine. Offences against *The Historic Sites and Objects Act* are punishable by a fine of up to \$100,⁵² a questionable deterrent (and far lower than, for example, Alberta's \$50,000).⁵³ Under *The Planning Act* the maximum fine is \$1,000 for individuals and \$5,000 for corporations.⁵⁴

The third form of penalty is a term of imprisonment. No such penalty can be imposed for offences against *The Historic Sites and Objects Act*. On the other hand, offenders against *The Planning Act* face a maximum term of six months as an alternative to a fine or in addition to a fine.⁵⁵

Binding Authority

It appears that *The Historic Sites and Objects Act* and *The Planning Act* are not binding upon all owners of heritage in Manitoba. As mentioned earlier,⁵⁶ they do not apply to federal lands and applicability to federally-regulated land (for example, railway property) is currently the subject of debate.

As far as the provincial government and its agencies are concerned, *The Historic Sites and Objects Act*, unlike the heritage statutes of some other provinces,⁵⁷ does not state that the Crown is subject to the statute; neither does *The Planning Act*. In the absence of such a provision the Crown is not bound by the statute.⁵⁸ The two *Acts* bind all other owners including municipalities.

48. S.M. 1975, c. 29, s. 13(4)(c).

49. S.M. 1975, c. 29, 84(3), 84(4), and s. 85.

50. S.M. 1975, c. 29, s. 84(1).

51. S.M. 1975, c. 29, s. 81(3).

52. R.S.M. 1970, c. H70, s. 20.

53. *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 38.

54. S.M. 1975, c. 29, s. 81(1).

55. S.M. 1975, c. 29, s. 81(1).

56. See text, *Supra* n. 5-11.

57. E.g., *Quebec Cultural Property Act*, S.Q. 1972, c. 19, s. 55; *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 39; *Saskatchewan Heritage Act*, S.S. 1974-75, c. 45, s. 13.

58. *Interpretation Act*, R.S.M. 1970, c. 180, s. 15. With respect to the *Planning Act*, Rogers, *Supra* n. 33, at 143, says that the Crown is bound by s. 87(1) of the Act. However, s. 87 (not s. 87(1)) appears to refer only to the Crown's exemption from the provisions relating to subdivision control in the case of land transfer agreements entered into before the Act came into force.

The Municipal Level

Introduction

There are two main purposes behind any action to conserve structures and streetscapes: first, to protect valuable buildings against demolition and unsympathetic alteration and, secondly, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas.

Manitoba municipalities wishing to act on their heritage concerns will be governed by the provisions of *The Planning Act*. According to *The Municipal Act*,⁵⁹ "where municipality desires to create, and regulate or control, special zones or districts within the municipality, and the uses to which land in those zones or districts, and the buildings or other structures therein, shall or shall not be put, it shall proceed as provided in the *Planning Act* and not otherwise."⁶⁰

Planning

General

It would undoubtedly be desirable for every community to consider heritage conservation in its planning process. There is no obligation on Manitoba communities to plan for conservation as there is in some other jurisdictions such as Great Britain.⁶¹ Indeed, municipalities in Manitoba are not obliged to draft plans of any description. The Minister of Municipal Affairs may, however, compel the municipality to draft a "development plan."⁶²

Normally the municipality or "planning district"⁶³ (representing more than one municipality) will undertake a development plan on its own initiative.⁶⁴ In that case, or where it has been ordered to draft a plan, the plan *may* take into account "the preservation, projection or enhancement of areas of land, buildings and structures by reason of their historical, archaeological, geological, architectural, environmental or scenic significance."⁶⁵

In one complicated case, *Re Tegon Developments Ltd. and City of Edmonton*,⁶⁶ the Court of another province said, among other things, that preservation of historic sites was not a "planning purpose."⁶⁷ That point was not, however, the deciding issue in the case;⁶⁸ furthermore, the above

59. S.M. 1970, c. 100 (M225).

60. S.M. 1970, c. 100, s. 310.

61. *Civic Amenities Act, 1967*, c. 69 (U.K.).

62. S.M. 1975, c. 29, s. 26(1).

63. S.M. 1975, c. 29, s. 13 *et seq.*

64. S.M. 1975, c. 29, s. 26(4).

65. S.M. 1975, c. 29, s. 27(4).

66. [1978] 5 Alta. L.R. (2d) 68; 81 D.L.R. (3d) 543 (C.A.); *aff'd.* [1979] 7 Alta. L.R. 292 (S.C.C.).

67. In the words of Mr. Justice Moir, speaking for the Alberta Court of Appeal, "[i]t is not a valid exercise of the [planning] power to use it to preserve historical cities and to induce others to advance money to preserve historical sites . . . It was not a planning purpose. *Id.*, at 69; 81 D.L.R. (3d), at 548.

68. The deciding issue was as follows: Alberta municipalities had been empowered (under old legislation which is now amended) to regulate "use of land" and "special aspects of specific kinds of development." Efforts to protect an historic district were invalid because they fell outside these municipal powers. According to the courts, these efforts did not regulate "use" because they tried to protect buildings regardless of use; and they did not regulate "specific kinds of development" because they regulated *all* development.

provision of *The Planning Act* would appear to preclude the possibility of a comparable conclusion being reached in Manitoba.

Effects of Planning

Once the development plan (or "basic planning statement")⁶⁹ has been drafted, it is discussed at a public hearing and forwarded to the Minister of Municipal and Urban Affairs.⁷⁰ Upon the approval of the Cabinet,⁷¹ the plan can receive final reading by the municipality, i.e., formal adoption. Thereafter, "no undertaking or development . . . shall be carried out that is inconsistent or at variance with the proposals or policies set out in the development plan."⁷²

Furthermore, the plan commits the municipality to a certain course of legislative action: "upon the adoption of a development plan the council of a municipality shall proceed forthwith to draft a zoning by-law to carry out the intent of the plan."⁷³ It follows that no by-law can be validly passed which would be contrary to the plan or its intent. Consequently, if the official plan contains provisions which are incompatible with heritage conservation (by, for instance, proposing the redevelopment of a picturesque area for highrises), an amendment would be desirable. The experience of other jurisdictions may be helpful in this regard; sample plan amendments may, for example, be obtained from the Ontario Heritage Foundation.⁷⁴

It also follows, at least in theory, that if the plan specifies heritage conservation in an area (an intent which, as has just been noted, must be implemented by an appropriate zoning by-law), it would be hazardous for the provincial or municipal government to undertake public works projects which detract from the purposes of heritage conservation.⁷⁵ This proposition is still untested in Manitoba but heritage-oriented amendments to the development plan nevertheless appear to be a prudent course to follow.

The Special Case of Winnipeg

The Municipal Act and *The Planning Act* do not apply to the City of Winnipeg; instead, the City has its own enabling legislation entitled *The City of Winnipeg Act*.⁷⁶

The City's overall plan is called the "Greater Winnipeg Development Plan" and represents "a statement of the City's policy and general pro-

69. Where a development plan has not been adopted, a municipality (or district) may still enact a "basic planning statement" setting out objectives for the future development of the area affected, which may be only a part of the municipality. The Act does not further stipulate the contents of the statement (as it does in the case of development plans), but its adoption has the same effect as the adoption of a development plan. See s. 36 *et seq.* as amended by S.M. 1976, c. 51, s. 9.

70. S.M. 1975, c. 29, s. 31.

71. S.M. 1975, c. 29, s. 33.

72. S.M. 1975, c. 29, s. 34(1). See also s. 39 (1).

73. S.M. 1975, c. 29, s. 34(2). See also s. 34 (3).

74. 77 Bloor Street West, Toronto, Ontario M7A 2R9.

75. John Swaigen of the Canadian Environmental Law Association has commented on the legal effect of Ontario plans on heritage conservation areas as follows: "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.) In Manitoba, of course, there would presumably be some form of protective zoning in effect as well, at least after six months from the time the plan was adopted, S.M. 1975, c. 29, s. 34(2)(b).

76. S.M. 1971, c. 105 as amended.

posals in respect of the development or use of land in the city."⁷⁷ The Plan must take into account heritage sites and areas.⁷⁸ Since it tends to be general in scope, further precision is found in the specific plans for particular districts of the City; these subsidiary plans (which are governed by the Greater Winnipeg Development Plan)⁷⁹ may be either "community plans"⁸⁰ or "action area plans."⁸¹ The legal effects of community plans and action area plans are similar in most respects.

There is no provision in the *Act* which states specifically that these plans, and the Greater Winnipeg Development Plan, are binding on *private* owners. The *Act* does say that the effect of these various plans, once adopted, is as if they were incorporated in *The City of Winnipeg Act*.⁸² This wording creates some ambiguity as to whether the plans are binding upon private development just as *The City of Winnipeg Act* is binding on private development.

There can be no doubt of the binding effect of these plans on public works: "[n]o public work shall be undertaken that does not conform to the provisions of the Greater Winnipeg development plan, the community plans and the action area plans."⁸³ It is not clear why this provision was necessary if these plans are tantamount to acts of the Legislature; if the provision was necessary, does that mean that they are *not* binding on *private* works in the absence of a comparable provision?

Certainly the binding character of plans and public works in Winnipeg makes the presence of heritage-oriented provisions all the more advisable, just as in the case of plans established under *The Planning Act*.

Controlling Governmental Demolition

The system of environmental impact assessment which was described earlier usually applies to municipalities: municipalities in jurisdictions employing the system are obliged to file appropriate reports before altering the environment, including heritage structures. Since the system does not exist in Manitoba, its municipalities are under no such obligation.

Until recently Winnipeg was an exception. Section 653 of *The City of Winnipeg Act* stated that the City's Executive Policy Committee should review every "proposal" for a public work which *may* significantly affect the quality of the human environment (nowhere defined in the Act) and submit to city council a report on: (a) the environmental impact of the proposed work; (b) any adverse environmental effects which cannot be avoided should the work be undertaken; and (c) alternatives to the proposed action. The section gave rise to a number of court cases in which citizens challenged the validity of city actions on the basis that no report was made or the report

77. S.M. 1971, c. 105, s. 569(f).

78. S.M. 1971, c. 105, s. 573(e.1), as introduced by S.M. 1977, c. 64, s. 65. See also S.M. 1971, c. 105, s. 573(d), as am. by S.M. 1977, c. 64, s. 63.

79. Under S.M. 1971, c. 105, s. 597.1, as introduced by S.M. 1977, c. 64, s. 82, "action area plans" would have to conform to "community plans" (a component of which the action area plan implements) and the latter would have to conform to the Greater Winnipeg Development Plan.

80. S.M. 1971, c. 105, ss. 579-83, as am. by S.M. 1977, c. 64, s. 71. Formerly "district plans" they were renamed "community plans."

81. S.M. 1971, c. 105, ss. 584-96, as am. by S.M. 1974, c. 73, s. 43; S.M. 1977, c. 64, ss. 72-80.

82. S.M. 1971, c. 105, s. 596.

83. S.M. 1971, c. 105, s. 597, as am. by S.M. 1977, c. 64, s. 81.

was insufficient.⁸⁴ In the face of such alleged oversights the courts generally took a "hands off" attitude.

A 1977 amendment repealed the Section and replaced it with a non-obligatory provision.⁸⁵ The section, which apparently has not been used, now reads as follows:

653 (1) The Council may require a report on the environmental impact of a proposed public work.

653 (2) Where the council requires [such] a report . . .

(a) it shall be the sole determining authority of the adequacy of the report . . . and

(b) it may establish such procedures as it may deem necessary.

Controlling Other Demolition

The clarity of municipal provisions controlling demolition depends on the location of the structure in question. If the structure is in Winnipeg, the municipal power to control alteration and demolition is clearly enunciated in *The City of Winnipeg Act*.⁸⁶

The Act also provides that the city council may designate heritage properties by placing them on the "Buildings Conservation List".⁸⁷ The effect of the designation of such properties is that they cannot be altered or destroyed without the city's consent.⁸⁸

Other municipalities in Manitoba do not share Winnipeg's power to control demolition of heritage sites; this distinguishes them not only from Winnipeg, but also from their counterparts in some other jurisdictions where demolition can be halted either permanently or temporarily.⁸⁹

Since *The Planning Act* does not refer specifically to demolition control, if a municipality were to attempt to control demolition it would have to invoke the general power to control "development" (assuming that demolition is "development" as discussed earlier). This general power is enunciated in Section 41 (1) of *The Planning Act*: "A zoning by-law shall prescribe . . . general development standards; and in prescribing those standards council shall have due regard to the character of the zone, the nature of the existing or proposed uses of land and buildings in the zone and the peculiar suitability of the zone for particular uses in relation to the most appropriate uses of land within the municipality." Such broad enabling provisions are found in most Canadian planning statutes, but have faced a problem referred to earlier, *i.e.*, the court's reluctance, at least until recently, to liberally interpret municipal authority to control land use. Disregarding direct statutory instructions not to limit the generality of such clauses,⁹⁰ the courts have often recognized only those municipal powers which are specifically enumerated.

84. See *Stein v. Winnipeg* (1974), 48 D.L.R. (3d) 223, [1974] 5 W.W.R. 484 (Man. C.A.) and *Easton v. City of Winnipeg* (1976), 69 D.L.R. (3d) 585 (Man. C.A.).

85. S.M. 1971, c. 105, s. 653, as am. by S.M. 1977, c. 64, s. 129.

86. S.M. 1971, c. 105, s. 483(b).

87. S.M. 1971, c. 105, s. 483(c), as introduced by S.M. 1975, c. 50, s. 11.

88. S.M. 1971, c. 105, s. 483(e) as introduced by S.M. 1975, c. 50, s. 11.

89. *E.g.*, *British Columbia Municipal Act*, R.S.B.C. 1960, c. 255, s. 715; *Quebec Cities and Towns Act*, S.R.Q. 1964, c. 193, s. 426(1)(d); *Ontario Heritage Act 1974*, c. 122, Pt. IV.

90. As in the opening words of s. 41(2) of *The Planning Act*, S.M. 1975, c. 29, s. 41(2), as am. by S.M. 1979, c. 16, s. 7.

However, *The Planning Act* expressly provides for development plans with heritage conservation objectives, and, indeed, requires the municipality to zone in such a way as to realize its planning objectives. Since it would be futile to empower municipalities without providing them with a mechanism to protect heritage buildings in accordance with the plan, perhaps the power to prevent demolition in recognized areas can be implied. Of course, in the absence of a test case it would be hazardous to infer the existence or scope of municipal power to control demolition of heritage structures.

Controlling Construction

General

In Manitoba, as elsewhere in Canada, the general philosophy of land use controls is that the owner of land can do virtually anything with his property except as specifically prohibited by regulations; these are usually found in zoning by-laws, which are described later. Under a *development control system* the situation is reversed: the owner can do virtually nothing unless specifically authorized. In a less stringent form the City of Winnipeg may make use of the latter mechanism,⁹¹ although it is not available to other Manitoba municipalities. The system is discussed below.

Development Control

Aside from the procedural prerequisites for development control it should be noted that the system cannot be instituted unless a community plan (*i.e.*, in addition to the Greater Winnipeg Development Plan) exists in the area to be affected.⁹² Development control is instituted by a by-law designating the area in which the system is to apply. The system supercedes existing zoning.⁹³ Thereafter, no development⁹⁴ can take place unless "development permission" is obtained from the City. This permission can be granted or refused on a discretionary basis, although in the case of conditional permission the conditions imposed must be confined to certain matters (which include design and landscaping).⁹⁵ Of course, official action must also conform to the plans in force.⁹⁶

It is also worth noting that *The City of Winnipeg Act* authorizes the city to enter into development agreements with owners as a condition of a zoning change or, where the property is within a development control area, of the granting of development permission.⁹⁷ Such agreements may deal with the same matters which can be the subject of conditions attached to the granting of development permission. In the case of zoning change applications, *The Planning Act* gives this same power to other Manitoba municipalities.⁹⁸

91. S.M. 1971, c. 105, ss. 623-37, as amended.

92. S.M. 1971, c. 105, s. 626(1), as am. by S.M. 1977, c. 64, s. 105.

93. S.M. 1971, c. 105, s. 628(1)(b).

94. As defined in S.M. 1971, c. 105, s. 624(1)(a). The definition is almost identical to *The Planning Act* definition previously mentioned.

95. S.M. 1971, c. 105, s. 632(1), (3), as am. by S.M. 1972, c. 93, s. 81.

96. S.M. 1971, c. 105, s. 633(1), as am. by S.M. 1977, c. 64, s. 107.

97. S.M. 1971, c. 105, s. 600(1), as am. by S.M. 1972, c. 93, ss. 76.1, 77; S.M. 1974, c. 73, s. 48 and c. 74, s. 34. See also S.M. 1971, c. 105, s. 632(4).

98. S.M. 1975, c. 29, s. 48, as am. by S.M. 1976, c. 51, s. 18.

Scope of Municipal Powers

Prior to an examination of the more traditional zoning powers an important feature of all land use controls should be noted. This has to do with the area over which controls apply. Municipal land use powers are usually exercised over a wide area, not, say, over a single lot. If a council tries to pass a by-law affecting a single lot (often called "spot zoning"), the result is not necessarily illegal; but it would be regarded by the courts with suspicion. If there is any hint of discriminatory treatment the courts may invalidate the by-law; this can occur even when the by-law ostensibly applies to a wider area.⁹⁹

The following is a list of powers which may be used in promoting heritage conservation. In purporting to exercise powers not specifically mentioned in the governing legislation, the municipality will have resort to the general power to control "development." This may be problematic as was discussed above.

As a legal prerequisite to the enacting of zoning by-laws a municipality must have adopted a development plan or basic planning statement.¹⁰⁰ Mention has already been made of the requirement that zoning by-laws conform to the plans in force.

Size and Height Controls

For two reasons, size and height controls are found in almost every attempt to preserve the character of neighbourhoods. First and foremost, the size of a building has a definite impact upon its environment, since an oversized building will appear incompatible with its context regardless of its architectural style. Secondly, a restrictive size and height by-law can indirectly discourage unwanted development. Manitoba municipalities are empowered to control the height and size of buildings.¹⁰¹

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. Whether such controls would be upheld in Manitoba remains to be seen.

Design Control Through Zoning

The clarity of enabling legislation to control design again depends on whether the structure or area is in Winnipeg or elsewhere. The City of Winnipeg is given express power to regulate design for non-residential buildings

99. See e.g., *Re H.G. Winton Ltd. and Borough of North York* (1979), 20 O.R. (2d) 737 (H.C.).

100. *The Planning Act*, S.M. 1975, c. 29, s. 40(1).

101. *The Planning Act*, S.M. 1975, c. 29, s. 41(2)(g) and (i); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 598(1)(g) and (i).

and apartment blocks.¹⁰² Unlike most other provinces,¹⁰³ however, Manitoba does not clearly confer the same power on other municipalities. Since *The Planning Act* does not specify design control, the question is whether the exercise of such power in, say, an architecturally interesting area which the development plan commits the town to preserve could be derived from its general power to prescribe "general development standards."¹⁰⁴

Even in Winnipeg where design control is clearly feasible, one should note that the provision does not confer discretion upon the municipality to accept or reject designs as it pleases. Rather, it foresees regulation by by-law — strictly speaking, acceptable designs must be spelled out in the by-law itself. If they are not, the by-law can be quashed for vagueness.¹⁰⁵ In practice, the Historic Winnipeg Advisory Committee has established guidelines for the approval of proposed designs in areas affected by HW (Historic Winnipeg) zoning.¹⁰⁶ These guidelines supplement the provisions of the by-law and provide greater particularity.

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

At the very least, facade materials should be specified. The ratio of facade openings to wall space and the distribution of facade openings can also be established. Other controls can be introduced if deemed advisable. For further information concerning the format of such by-laws, Heritage Canada should be contacted.¹⁰⁷ Finally, it is not clear whether the power to regulate design extends to the regulation of colour.

Use Zoning

Municipalities are empowered to regulate the uses to which property can be put.¹⁰⁸

The Planning Act also specifically provides for "conditional use" zoning,¹⁰⁹ a device which permits a greater degree of control in the areas to which it applies: applications for the approval of a conditional use are made to Council which is given considerable leeway in making its decision. The City of Winnipeg also makes use of this device although the precise statutory origins of its power to do so are less clear.

102. S.M. 1971, c. 105, s. 598(1)(o). In practice the City attempts to exercise some control over residential design as well by making residential use conditional in certain areas (see the following section on 'Use Zoning').

103. E.g., New Brunswick, *Community Planning Act*, R.S.N.B. 1973, c. C-12, s. 34(3)(a)(vi); Ontario, *The Planning Act*, R.S.O. 1970, c. 349, s. 35(4).

104. S.M. 1975, c. 29, s. 41(1), as am. by S.M. 1979, c. 16, s. 7.

105. See e.g., *Re Mississauga Golf and Country Club Ltd.*, [1963] 2 O.R. 625, 40 D.L.R. (2d) 673 (C.A.). Although the case was decided in Ontario, it is conceivable that a Manitoba court would reach the same decision.

106. See City of Winnipeg By-law 2048/78.

107. Box 1358, Station B, Ottawa K1P 5R4.

108. *The Planning Act*, S.M. 1975, c. 29 s. 41(2)(a) and (b); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 598(1)(a) and (b).

109. *The Planning Act*, S.M. 1975, c. 29, ss. 1(h), 41(1), 59. S. 41(1), as am. by S.M. 1979, c. 16, s. 7.

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 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 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 establishments at the number that existed at the time of the passing of the by-law.

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 attempt to use this "zoning" to freeze land, the practice has run into trouble in the courts.¹¹⁰

Setback Zoning

Setback rules are those which dictate the proper distance between a building and the street. They are important for the harmonious appearance of a streetscape. Location of buildings can be regulated by Manitoba municipalities.¹¹¹

Some North American cities are considering adapting the 80-120% formula to setbacks — that is, by stating that 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 is still untested in Manitoba.

Signs

Regulation of signs is essential to the maintenance of a building or heritage area, since outdoor advertising may have a significant impact on appearance. Municipalities in Manitoba can regulate all forms of signs.¹¹² Again, precision is desired — see, for example, the Gastown Sign Guidelines available from the Central Area Division of the Vancouver City Planning Department.

Fences and Walls

Fences and walls can also have an effect upon the appearance of a streetscape. Theoretically, fences and walls might fall within the definition

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

111. *The Planning Act*, S.M. 1975, c. 29, s. 41(2)(i), *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 598(1)(i).

112. *The Planning Act*, S.M. 1975, c. 29, s. 41(2)(m); *The City of Winnipeg Act*, S.M. 1971, c. 105, ss. 598(1)(m), and 513(1).

of "buildings," and be regulated in the same manner. However, certain special provisions are usually made for fences.

In some cases municipalities can compel an owner to fence his property. The City of Winnipeg can do so where a lot is vacant, and can regulate the description of the required fence.¹¹³ Other municipalities can compel an owner to fence his land only where it is used for "storage";¹¹⁴ query whether this provision could apply to parking lots. Furthermore, although these municipalities can regulate the "maintenance" of fences,¹¹⁵ it is not clear whether this can be interpreted to include the regulation of design of fences.

Maintenance

Maintenance is obviously essential if the quality of buildings and areas is to be retained. Municipalities in Manitoba are permitted to exercise limited regulatory powers to enforce maintenance standards.¹¹⁶ Both the exterior and interior of buildings can be regulated.¹¹⁷ Unlike the case in some other jurisdictions,¹¹⁸ however, these controls are not applicable to all buildings — they only apply to "dwellings."

It should be noted 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.¹¹⁹ Unlike certain other provinces,¹²⁰ Manitoba has no specific provision for the development of alternative standards specially for heritage buildings. Consequently, "provisions such as [typical maintenance and 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."¹²¹ It has been suggested elsewhere¹²² that where alterations which are a requirement under codes such as the National Building Code seriously reduce the architectural or historical significance of the building and affect the reasons for designation, it should be possible to obtain variances from the codes.

Trees and Landscaping

Trees and landscaping can enhance a heritage site or area. The planting and protection of trees and vegetation can be regulated by municipalities

113. S.M. 1971, c. 105, s. 431.

114. S.M. 1975, c. 29, s. 41(2)(p).

115. S.M. 1975, c. 29, s. 41(2)(o) and (t).

116. *The Municipal Act*, R.S.M. 1970, c. 100, s. 298 (M225); *The City of Winnipeg Act*, S.M. 1971, c. 105, ss. 640-51, as am. by S.M. 1972, c. 93, ss. 85-89; S.M. 1974, c. 73, ss. 96-99.

117. R.S.M. 1970, c. 100, s. 298(2)(b); S.M. 1971, c. 105, s. 641(b).

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

119. For example, in a recent Ontario case, *George Sebok Real Estate Ltd. and David E. Marton v. The Corporation of the City of Woodstock*, (1978), 21 O.R. (2d) 761, the Court of Appeal held that a by-law passed under s. 36 of *The Planning Act*, R.S.O. 1970, c. 349 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 high standards may prove to be an incentive for the owner to demolish the building concerned.

120. *E.g.*, *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 37.

121. Opinion of Connie Peterson Giller, Assistant Solicitor for the Regional Municipality of Waterloo, Ontario, Aug. 18, 1977 (unpublished).

under *The Planning Act*.¹²³ Curiously, *The City of Winnipeg Act* does not appear to give the City comparable powers to regulate landscaping (although it may prohibit the removal of trees and vegetation)¹²⁴ — unless this falls within its design control power with respect to the “architectural and other details of buildings.”¹²⁵ Examples of a model tree by-law are currently available from the Canadian Environmental Law Association.¹²⁶

Unlike some of their counterparts elsewhere,¹²⁷ Manitoba municipalities cannot pass ordinary by-laws to compel an owner to landscape his property. However, in conditional use situations or where the municipality extracts an agreement from the owner in return for a zoning change, landscaping requirements could be imposed. In the case of Winnipeg, landscaping may also be made a condition of the granting of development permission in a development control area.

Interim Control

Control of Demolition

A delay can occur 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 its intention from being defeated.

In the event of an immediate threat of demolition there is no express provision authorizing Manitoba municipalities to withhold demolition permits (as there is in the case of construction permits discussed below). Consequently, it is not clear what the City of Winnipeg could do if an owner applied for a demolition permit for a property which had not been designated under Section 483 of *The City of Winnipeg Act*, but which the City would like to designate. On the one hand, the proprietor might argue that he acquires a vested right to the permit at the time of application; on the other hand, the City could take the position that the designation procedure overrides such an alleged right, especially in cases where a notice of intention to list the property had been served on the owner.¹²⁸ Anticipating such a situation, some provincial statutes have made provision for the issuance of a “stop order,”¹²⁹ for a delay until an assessment of and report on the proposed alteration are done, or for the ordering of whatever “protective measures” are considered necessary.¹³⁰

As mentioned earlier other Manitoba municipalities are not authorized to designate specific heritage properties, and indeed their power to control demolition of any kind is still in doubt.

Control of Construction

All Manitoba municipalities can withhold a construction permit for 60

122. Ontario Historical Society, *The Ontario Heritage Act — Present Problems, Future Prospects* (1978) 18.

123. *The Planning Act*, S.M. 1975, c. 29, s. 41(2)(e), (o), and (t).

124. S.M. 1971, c. 105, s. 598(1)(e).

125. S.M. 1971, c. 105, s. 598(1)(o).

126. 8 York Street, Toronto.

127. E.g., *Quebec Cities and Towns Act*, R.S.Q. 1964, c. 193, art. 429(36).

128. City of Winnipeg By-law 2032/78 sets out listing procedures including notice provisions.

129. See *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 35(1).

130. See *Alberta Historical Resources Act*, S.A. 1973, c. 5, s. 22.

days.¹³¹ If the proposed project appears to be incompatible with the plan which has either been adopted or is in preparation, then the Council can withhold the permit for an additional period: Winnipeg can extend the delay by 90 days (and, when a plan has been forwarded to the Minister for approval, by a further 35 days),¹³² other municipalities by a period of 125 days¹³³ pending the adoption of the appropriate land use controls. If, however, the municipality fails to enact the relevant land use controls within the specified period, it becomes liable in damages to the owner of the property.¹³⁴

Provincial Intervention

"[I]n several provinces, the central planning authority or the responsible Minister is empowered to compel the council to adopt plans and by-laws or to conform to and enforce plans and by-laws that have already been adopted where there has been a failure to do so."¹³⁵ In Manitoba, such a power belongs to the Minister of Municipal and Urban Affairs. If he is satisfied that a municipality needs a plan or plan amendment he can compel it to draft one,¹³⁶ although it appears such power would be rarely exercised.

Variances

Even the most stringent land use controls will not necessarily cause hardship to owners of property for which the controls are inappropriate. In Winnipeg, a designated committee is empowered to vary the application of land use controls to a property where such control "injuriously or unnecessarily affects" the rights of the proprietor.¹³⁷ In other municipalities the same function is performed by a "variation board."¹³⁸

Compensation

More than one province has had to deal with the thorny question of whether or not an owner or occupier or other person having an interest in real property which is the subject of heritage designation can claim compensation from the municipality that made the designation, downzoned the property or took other measures.¹³⁹ The fear is, of course, that a municipality will not designate at all if it has to pay compensation for such designation.

In Manitoba, the only statute which could entitle an owner to compen-

131. *The Planning Act*, S.M. 1975, c. 29, s. 39(4); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 607(1), as am. by S.M. 1972, c. 93, s. 78.

132. S.M. 1971, c. 105, s. 607(2), as introduced by S.M. 1974, c. 73, s. 53.

133. *The Planning Act*, S.M. 1975, c. 29, s. 39(6) as introduced by S.M. 1977, c. 35, s. 26.

134. S.M. 1975, c. 29, s. 39(7) as am. by S.M. 1977, c. 35, s. 26; S.M. 1971, c. 105, s. 607(4).

135. *Supra* n. 33 at 252.

136. S.M. 1975, c. 29, s. 26(1) and (2); S.M. 1971, c. 105, s. 572.1(1) and (2), as introduced by S.M. 1977, c. 64, s. 60.

137. S.M. 1971, c. 105, s. 621, as am. by S.M. 1977, c. 64, ss. 94-101.

138. S.M. 1975, c. 29, ss. 56-58.

139. In Alberta the problem arises in connection with Section 19 of *The Historical Resources Amendment Act, 1978*, Section 19.5 (1) provides that:

"If a bylaw 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 bylaw, the council shall by bylaw provide the owner of that building, structure or land with compensation for the decrease in economic value."

In British Columbia the problem arises in connection with Section 478 (1) of the *Municipal Act*, R.S.B.C. 1960, c. 255, 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. . . ."

sation would be *The Expropriation Act*.¹⁴⁰ The owner would have to argue that the official listing or designation of his property as one of architectural or historical significance is tantamount to expropriation, or alternatively, that it has resulted in "injurious affection." "Injurious affection" is the expression for damage caused by lawful governmental acts to the value of private property. Both "expropriation" and "injurious affection" give an owner the right to demand compensation.¹⁴¹

As far as expropriation is concerned, the Act defines it as "the acquisition of title to land without the consent of the owner";¹⁴² since listing a property does not involve the taking of land, it would be virtually impossible for a court to equate listing with expropriation.

The question of what constitutes "injurious affection" is a little more complex. Where no land has been expropriated, the Act says that due compensation for injurious affection "shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute."¹⁴³ Since no "works"¹⁴⁴ are involved, it would appear that no claim for injurious affection can result from a heritage designation.

The same rules would apply in the case of heritage-oriented zoning by-laws. Unless the zoning is being used for improper purposes (such as a municipal attempt to reduce property value prior to an expropriation),¹⁴⁵ or is otherwise unlawful, no compensation claim is possible.

Nevertheless, a real problem of financial loss resulting from designation may sometimes exist. Since in such cases the individual property owner may feel called upon to subsidize conservation which benefits the community generally, a number of ways that the community could assume part of the burden may be suggested. Under Section 127(d) of *The City of Winnipeg Act*, for example, Winnipeg might make grants to the owners of listed property. Proposals made elsewhere¹⁴⁶ might also be considered in Manitoba: municipalities might eventually assume a percentage of the taxes payable on or the maintenance costs of listed property; the Heritage Manitoba might provide grants to municipalities to cover such costs; the province might reimburse municipalities for any grants made for developing or preserving heritage; and the province might provide low-interest loans for the preservation of listed buildings.^{146a}

Alternatively, 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*.¹⁴⁷ These recommendations would assist the renovation of *all* existing investment property (for example, rental

140. S.M. 1970, c. 78 (E190).

141. S.M. 1970, c. 78, s. 24.

142. S.M. 1970, c. 78, s. 1(1)(g).

143. S.M. 1970, c. 78, s. 31(1).

144. S.M. 1970, c. 78, s. 1(1)(p).

145. *Supra* n. 33, at 122-26, for an extensive discussion of such purposes.

146. *Supra* n. 122.

146a. An even more popular proposal appears to be a moratorium on tax increases following renovation. A useful inventory of such proposals is found in the report of Winnipeg's planning department entitled *Re Heritage Conservation: Report on Financial Incentives and Assistance*.

147. S.C. 1970-71-72, c. 63, as amended.

property, business property, etc.); they would also provide preferential tax treatment for the owners of designated historic property.¹⁴⁸ These proposals are currently under study.

Enforcement

Inspection

In almost all Canadian provinces it is customary to give municipalities a right of entry into premises in order to inspect whether by-laws are being observed. "It is well settled that without a statutory right of entry on property, it does not exist."¹⁴⁹

In *The City of Winnipeg Act* the right of the city to inspect premises is clearly enunciated.¹⁵⁰ Elsewhere, the wording is somewhat unusual. Unlike most planning statutes, the *Manitoba Planning Act* appears to restrict the right of entry to cases of "emergency";¹⁵¹ otherwise, officials cannot inspect for by-law violations in the absence of the owner's consent except by obtaining a judge's order.¹⁵² This curious situation may be remedied, however, by the clear right of entry conferred by *The Municipal Act* for the enforcement of any by-law;¹⁵³ this power is not contingent on the consent of the owner.

Penalties

As usual three types of penalties exist. The first is the obligation to restore a site to its appearance before the infraction occurred, or to require that the owner pay the cost where the municipality itself undertakes the restoration. This kind of penalty can be imposed for offences against *The Planning Act*.¹⁵⁴ It does not appear to be available to the City of Winnipeg under *The City of Winnipeg Act* except in the case of violation of maintenance and occupancy standards.¹⁵⁵

Fines may be ordered for offences against *The Planning Act* and *The City of Winnipeg Act* to a maximum amount of \$1,000 (\$5,000 for corporations).¹⁵⁶ A third form of penalty, imprisonment, may be imposed under the above statutes. Offenders face a prison term of up to six months as an alternative to a fine or in addition to one.¹⁵⁷

Binding Authority

As mentioned above,¹⁵⁸ the applicability of non-federal regulations (including municipal by-laws) to federal and federally-regulated works has been the subject of considerable jurisprudence; they may be applicable in certain limited circumstances. Furthermore, unlike their counterparts in

148. See *Heritage Canada Magazine*, April, 1979. A detailed description of the proposals currently being debated is found in "Current Tax Proposals Affecting Renovation". *Supra* n. 10.

149. *Supra* n. 33, at p. 253.

150. S.M. 1971, c. 105, ss. 485(1)(e), 494.

151. S.M. 1975, c. 29, s. 84(3).

152. S.M. 1975, c. 29, s. 84(1).

153. S.M. 1970, c. 100, s. 302.

154. S.M. 1975, c. 29, s. 81(3).

155. S.M. 1971, c. 105, s. 646(1), as am. by S.M. 1972, c. 93, s. 89; S.M. 1974, c. 73, s. 99.

156. *The Planning Act*, S.M. 1975, c. 29, s. 81(1); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 138(1).

157. *The Planning Act*, S.M. 1975, c. 29, s. 81(1); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 138(1), as am. by S.M. 1974, c. 73, s. 6.

158. See text *Supra* n. 5-11.

some other jurisdictions,¹⁵⁹ Manitoba 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.¹⁶⁰

In Winnipeg such express authority used to exist. Section 654 of *The City of Winnipeg Act* stated that "all plans, by-laws, orders or decisions established, enacted or made under [Part XX of the Act] are binding on the city and all persons including Her Majesty."

The 1977 amendments to the *Act* repealed that provision insofar as it bound the Province.¹⁶¹ Consequently, the provincial government and its agencies are under no obligation to obey the by-laws of the City. Furthermore, the 1977 amendments gave the Cabinet the right to exempt any agency or person involved in a government program or project from the by-laws of Winnipeg.¹⁶²

Are municipalities bound by their own plans and by-laws? As far as plans are concerned, municipal public works must respect official plans.¹⁶³ Similarly, by-laws must conform to the plans in force.¹⁶⁴ As far as by-laws are concerned, it appears that municipalities are bound by their own by-laws; however, they can also formally exempt themselves from them.¹⁶⁵

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 situation unsuitable in the majority of situations. Fortunately, a special form of agreement is possible to deal with that problem; called an "easement of covenant", it binds future owners as well as the present owner.

Easements and Restrictive Covenants

Contents

Easements and restrictive covenants are contractual agreements which

159. E.g., Saskatchewan, *Planning and Development Act*, R.S.S. 1978, c. P-3, s. 196; Manitoba, *The Planning Act*, S.M. 1975, c. 29, s. 87.

160. *Supra* n. 33, at 143. If, however, *The Planning Act* is binding on the Crown, as Rogers asserts (*but see* n. 58 above), it may become possible to treat municipal by-laws as binding also. This hypothesis is still untested.

161. S.M. 1977, c. 64, s. 130.

162. S.M. 1977, c. 64, s. 130.

163. *The Planning Act*, S.M. 1975, c. 29, s. 34(1); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 597, as am. by S.M. 1977, c. 64, ss. 81-82.

164. *The Planning Act*, S.M. 1975, c. 29, s. 34(2); *The City of Winnipeg Act*, S.M. 1971, c. 105, s. 599, as am. by S.M. 1977, c. 64, s. 83-84.

165. "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." *Supra* n. 33, at 144. Rogers bases his opinion on *Dopp v. City of Kitchener* (1927), 32 O.W.N. 275 (H.C.).

prohibit the owner of land from doing something on his land (called the "servient tenement").¹⁶⁶

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.

As mentioned above, 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, as described below.

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.¹⁶⁷

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 benefitted 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 the law in this area).

The question also arises: can an easement or covenant not only oblige an owner to tolerate something (a right of way, a building, etc.) but also 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."¹⁶⁸ Consequently, a covenant to repair would not be binding upon future owners. The same principle applies to easements.¹⁶⁹

Statutory Reform

Other jurisdictions¹⁷⁰ have eliminated the above mentioned problems by means of special legislation validating heritage easements and covenants and providing for their registration against the title to property. No such

166. 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 are treated together in this article.

167. See Sir Robert Megarry, *A Manual of the Law of Real Property* (5th ed. 1975) 374.

For example, an easement or restrictive covenant for a right of passage is for the occupants of the neighbouring land. Similarly, an easement or covenant not to demolish will not be binding on future owners unless it specifies a property (a "dominant" land) which will benefit from the agreement *aside* from the property being protected. On occasion, courts have even insisted that the "dominant" property must not only be specified, but must be shown to *really benefit* from the agreement (that is, not just nominally): for example, a restrictive covenant allegedly for the benefit of land in another community is not binding upon future purchasers because the other land is not really benefitted. See *Kelly v. Barrett*, [1924] 2 Ch. 379, at 404.

168. Megarry, *Id.*, at 375.

169. Megarry, *Id.*, at 394.

170. See e.g., *Ontario Heritage Act, 1974*, S.O. 1974, c. 122, ss. 22 and 37; Prince Edward Island, *Heritage Foundation Act*, R.S. P.E.I. 1974, c. H-4, s. 8.1.

legislation yet exists in Manitoba.¹⁷¹ Consequently, if one wants to sign a contract which not only binds the current owner but also binds future owners, one must adopt a second best solution (unless, of course, one happens to own property close by and the contract is drafted without maintenance provisions).

Agreements Under the Status Quo

It is possible under current law to draft a contract which, without being an easement or restrictive covenant, would include many protective provisions and still have some effect upon future owners. The contract can state that the owner will secure the signature of future buyers to the protective agreement. If future buyers refuse to sign, then the owner will be liable for damages. This technique succeeds in protecting a good number of properties for the foreseeable future. Examples of such agreements can be obtained from Heritage Canada.

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.

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.¹⁷² To date, no one has challenged the Canadian Department of National Revenue to give the same tax treatment; however, the subject is currently under study.

Public Participation

"Public participation" is a term which has been discussed at length in a multiplicity of publications. This article will therefore discuss only a few aspects which are 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 principal 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 provincial¹⁷³ or federal;¹⁷⁴ local groups usually choose to incorporate provincially. Heritage Canada can provide examples of the constitutions of similar groups.

171. Although both *The Planning Act* S.M. 1975, c. 29, s. 48(2) and *The City of Winnipeg Act*, S.M. 1971, c. 105, ss. 600(2) and 632(5) provide that development agreements extracted in return for zoning changes (or, in Winnipeg, the granting of development permission) may run with the land.

172. See the opinion of attorney Russell L. Brennehan, 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. Pub. L. 94-455, 90 Stat. 1525 *The Tax Reform Act of 1976*.

173. Contact Companies and Business Names Registration Branch, Department of Consumer, Corporate, and Internal Services, 10th Floor, 405 Broadway Ave., Winnipeg, R3C 3L6.

174. Contact Department of Consumer & Corporate Affairs Corporations Branch, 15th Floor, Place du Portage, Hull, Quebec.

Charitable Status

Charitable status is another valuable asset of a heritage group: it means that the group can issue tax-deductible receipts 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.¹⁷⁵

Financial Support

Fundraising is an inevitable necessity for conservation organizations.¹⁷⁶ Funding for various enterprises related to conservation can be found at the federal¹⁷⁷ and provincial¹⁷⁸ levels, as well as in the private sector.¹⁷⁹

Powers of Citizens' Groups

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 mechanisms 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 Manitoba, such decision-making power regarding designation as exists is in the hands of municipal officials. Similarly, there is no formalized

175. These rules are outlined in Revenue Canada's Information Circular No. 77-1. Contact Revenue Canada, 400 Cumberland Street, Ottawa, Ontario, K1A 0X5. 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. To obtain such advantages, a Canadian charity should complete "Package 1024" and form "SS-4," a series of forms available from the United States Embassy, 60 Queen Street, Ottawa, Ontario, K1P 5Y7.
176. A useful introduction to the subject is *Shortcuts to Survival*, (Toronto, 1978) by Joyce Young.
177. At the time of preparing this article, new programs were being announced by C.M.H.C. Contact Neighbourhood and Residential Rehabilitation, Canada Mortgage and Housing Corp., Montreal Road, Ottawa, Ontario, K1A 0P7. The Department of Indian Affairs and Northern Development administers a program which subsidizes historic sites designated under the federal *Historic Sites and Monuments Act*. Contact Historic Sites and Monuments Board of Canada, Department of Indian Affairs and Northern Development, Ottawa, Ontario, K1A 0H4. By agreement with provincial governments, the federal Department of Regional Economic Expansion shares in a number of projects. Contact D.R.E.E., P.O. Box 981, Winnipeg, R3C 2V2. The Department of Manpower and Immigration has a "Canada Works" and a "Young Canada Works" program which has a relatively strong heritage orientation. Contact the local Canada Employment Office. The Canadian Home Insulation Program (CHIP) can provide some assistance for insulating buildings. For further details, contact CHIP at P.O. Box 700, St. Laurent Postal Station, Montreal, Quebec, H4L 5A8. The Katimavik program can occasionally make free, young, unskilled labour available for community projects. Contact Katimavik, 323 Chapel St., Ottawa, Ontario, K1N 7Z2.
178. The Historic Resources Branch and Heritage Manitoba both have limited budgets to support certain special heritage projects. They can be contacted at 200 Vaughan St., Winnipeg. Manitoba also makes loans for urgent repairs undertaken by families earning less than \$10,000.00 per year. Contact the Manitoba Housing and Renewal Corporation's Critical Home Repair Program, 165 Garry St., Winnipeg, R3C 1G8.
179. 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. See Heritage Canada's *Directory of Funding Sources*. 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.

system of continuous citizen input into the planning process, such as the right of compulsory referendum in Quebec municipalities.¹⁸⁰ In short, there is no way for the citizenry to compel the municipality to protect anything, regardless of its value.

Conservationists, however, must also face other legal problems.

Access to Information

Information from various government levels can be important for conservationists, particularly in matters pertaining to public works. In 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*¹⁸¹ to compel the government to disclose this information.

In Canada, the situation is different. Under the *Official Secrets Act*,¹⁸² and related civil service oaths, 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 Manitoba. The federal situation, however, is likely to be changed by legislation recently presented before Parliament.

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.¹⁸⁴ 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*.¹⁸⁵ Although "political action" is very difficult to define,¹⁸⁶ 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 interest.

180. Quebec *Cities and Towns Act*, R.S.Q. 1964, c. 193, art. 426(lc). This right can be invoked (assuming a sufficient number of citizens demanded it) on any zoning amendment.

181. Pub. L. 89-554, 80 Stat. 383, as am. by Pub. L. 90-23, 81 Stat. 54; Pub. L. 93-502, 88 Stat. 1561; Pub. L. 94-409, 90 Stat. 1247; Pub. L. 95-454, 92 Stat. 1225. In Canada, The "Freedom of Information Act" Bill C-15 was introduced in the 1st session of the 31st Parliament. At the time of dissolution of Parliament in December 1979, it had been referred to the Committee on Justice and Legal Affairs. At the time of writing, the Secretary of State was presenting a new bill before Parliament.

182. R.S.C. 1970, c. 0-3.

183. S.C. 1970-71-72, c. 63, as amended.

184. S.C. 1970-71-72, c. 63, s. 20(1)(cc).

185. *Revenue Canada Information Circular 77-14*, June 20, 1977, s. 6(c). At the time of writing, litigation was pending between the Manitoba Foundation for Canadian Studies and the Minister of National Revenue over deregistration for alleged "political" content of its publication *Canadian Dimension*.

186. 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.¹⁸⁷

In some exceptional cases, it is possible for the public to use "private prosecutions".¹⁸⁸ There are also cases where citizens may take legal action in their capacity of *municipal ratepayers*.¹⁸⁹ 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 imagination in their application.

187. See *Rosenberg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496 (C.A.); leave to appeal to the Supreme Court of Ontario was refused in October, 1976.

188. See P. S. Elder (ed.), *Environmental Management and Public Participation* (1975).

189. See *Re Davies and Village of Forest Hill*, [1965] 1 O.R. 240, at 246 (H.C.) and *L'Association des Propriétaires des Jardins Taché Inc. v. Entreprises Dasken Inc.*, [1974] S.C.R. 2.

