Protecting the Built Environment of Newfoundland and Nova Scotia

Marc C. Denhez
1. INTRODUCTION

(A) Context

For most Canadians, "environment" is their city or town, where they reside, work, and spend most of their leisure hours. The quality of this urban or semi-urban environment will have a significant impact upon their everyday life, including stress, cultural identity, and sense of historic continuity. Conserving the cultural and aesthetic values represented by the buildings which constitute this environment therefore deserves attention.

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.

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

(B) 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.

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International treaties were drafted to promote the protection of architecture and historic sites, and Canada has thereby formally committed itself to a number of objectives concerning heritage conservation, including the integration of conservation principles into national policy. These obligations have not been translated into statute.

Most European countries have had laws comparable to Canada's current legislation for approximately a century.

(C) 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.

(D) Federal Aspects

Most authority for the protection of heritage belongs to the provinces. Although the federal government has entrusted a large heritage program to Parks Canada, the extent to which it can actually protect buildings against demolition is severely limited by constitutional factors.

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. It has, however, established special

2. A description of the legal consequences of these treaties is found in the above publication, at 4-5.
3. A description of this historical evolution is found in the above publication at 7.
4. The above publication reviews most of the major jurisprudence affecting burden of proof in "heritage" cases. See at 7-11.
5. A description of these limitations, particularly those found in the British North America Act, is found in the above publication at 11-17.
6. 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. These various obligations result from the treaties mentioned earlier.
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 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.\(^11\)

(E) *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

\(\text{\textsuperscript{7}}\) The above publication describes the basic features of "environmental impact" procedures at the Canadian federal level as compared with the U.S. and Australia. See at 13-14.

\(\text{\textsuperscript{8}}\) *Op. cit.,* at 14

\(\text{\textsuperscript{9}}\) *Op. cit.,* 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.


\(\text{\textsuperscript{11}}\) For a description of current developments in this area, see *Heritage Canada Magazine,* May, 1979, at 3-4
already been published in order to compare the legislative provisions in any one province with those of any other province or territory in Canada.\textsuperscript{12} The following article will now consider those features of the question which arise directly out of the legislation of Newfoundland and Nova Scotia.

2. THE PROVINCIAL LEVEL

(A) Early Warning System

(i) General

Before a government can take action to protect historical resources, it must know that these valuable resources exist. The United States and Australia\textsuperscript{13} 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.

In Canada a number of jurisdictions have adopted variants of this system.\textsuperscript{14} Most recently, Newfoundland has enacted its Environmental Assessment Act\textsuperscript{15} which provides for the assessment of the environmental impact of both public and private "undertakings".

Nova Scotia has not introduced a statutory environmental impact assessment system.

(ii) The Environmental Assessment Act (Nfld.)

The Act, which will be supplemented by ministerial and Cabinet regulations, requires that persons (including the Crown\textsuperscript{16}) notify the Minister of Consumer Affairs and Environment before proceeding with a proposed "undertaking".\textsuperscript{17} On the basis of the information given, the Minister, using "prescribed criteria", determines whether or not the person proposing the undertaking will be required to prepare an "environmental impact statement."\textsuperscript{18}

\textsuperscript{12} Protecting the Built Environment, Part I. Op. cit., at 20-23
\textsuperscript{13} 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
\textsuperscript{14} See e.g., Ontario's Environmental Assessment Act, 1975, S.O. 1975, c. 69; Alberta Land Surface Conservation and Reclamation Act, S.A. 1973, c. 34, s. 8 and Alberta Historical Resources Act, S.A. 194, c. 5 as amended, s. 22
\textsuperscript{15} Bill 13 (1980)
\textsuperscript{16} S. 5
\textsuperscript{17} S. 6(1)
\textsuperscript{18} S. 7. Before making this decision the Minister may order that further
The environmental impact statement, if ordered, must describe and evaluate not only the undertaking but alternatives, the environment itself, and the likely effects of the project on that environment. It must also propose measures designed to minimize or remedy "any significant harmful impacts." "Environment" is broadly defined and includes "the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community," as well as "any building, structure, machine or other device or thing made by humans." It therefore appears that the built environment was fully contemplated by the legislation. However, as mentioned earlier, a full environmental assessment of a proposed project will occur only if the Minister decides it is necessary in the circumstances. The "prescribed criteria" on which he must base his decision will be established by Cabinet regulation. It would therefore be possible to include the protection of the built environment from the ambit of the legislation; if this happened, it would not be the first such information be provided in the form of an "environmental preview report": S. 10(1) If a statement is required, it must be prepared according to terms of reference set out in the Act. S. 13(3) The completed statement must be acceptable to the Minister who then delivers it to the Cabinet with his recommendations: Ss. 18, 20, 32. The Cabinet ultimately decides whether the proposed undertaking which has been the subject of the environmental assessment will be permitted to proceed, and its decision is final. Through an apparent oversight Bill 59 contains no specific provision authorizing the Cabinet either to give approval to proceed with the undertaking or to refuse such approval (although it clearly empowers the Minister to recommend either course of action). Furthermore, it does not prohibit the issuance of a permit or other authorization required by any law applicable to the undertaking beyond the point where the Minister has made his recommendations to the Cabinet: s. 33(1)(b).

19. S. 13(3) (b), (e)
20. S. 13(3)(c), (d)
21. S. 13(3)(f)
22. S. 2(e) (iii), (iv)
23. S. 37(d)
24. For example, such criteria could presumably exclude many types of activities from the assessment provisions of the legislation. The Act also allows the Minister, with Cabinet approval, to order that any specific undertaking or proponent of an undertaking be exempted from the application of the Act or the regulations where he is of the opinion that "it is in the public interest" to do so: s. 36(1) (a). In addition, the Cabinet may by regulation exampt any specific person or undertaking or any class of persons or undertakings from the provisions of the Act: s. 37(j). Yet another avenue for the exercise of ministerial discretion to exclude projects from the application of the Act is contained in the very definition of "undertaking": undertakings which do not in the opinion of the Minister have "significant environmental impact" are presumably excluded even from the initial notice
occurrence in Canada.\textsuperscript{25} Otherwise, however, the Act may have an extremely broad sweep, including a wide assortment of public and private projects.\textsuperscript{26} Even entire policies and programs which result in such demolition would also fall within the Act’s purview.\textsuperscript{27} Whether environmental assessments will in fact be required in cases where the demolition of heritage property is contemplated will depend on the precise wording of exempting regulations or orders.

Even if the built environment is subjected to the Act’s protective provisions, the role of the public in enforcing those provisions is expected to be relatively limited, in terms of initial participation,\textsuperscript{28} requirements. This last provision may potentially be a serious loophole in the Act. At best it is gratuitous, anticipating the exemption provision in section 36(1). There is no parallel stipulation in the Ontario Act: s. 1(o).

\textsuperscript{25} The pattern which has emerged in some jurisdictions (for example, Alberta and the United States, though not Australia) is that heritage-oriented environmental impact assessments have dealt initially with archaeological resources, not with historical resources. Consideration for threatened historic buildings has usually come later. Although Ontario has entered the field relatively recently, it appears that the same pattern is being followed by that province: the Ontario Ministry of the Environment currently regards the destruction of the structural environment by demolition as outside the ambit of the Act by virtue of section 4 of Ontario Regulation 836/76. The section states that, in the case of a building started prior to 1975 (the date of the coming into force of the Act), its “retirement” is exempt from the relevant provisions of the Act. The Ministry interprets the “retirement” of a building built before 1975 as including its demolition. For commentary, see \textit{Heritage Fights Back}, op. cit at 85-7

\textsuperscript{26} The definition of “undertaking”, which in the first instance determines the application of the Act to proposals and does not distinguish between public and private proponents, is as follows: “any enterprise, activity, project, structure, work, policy, proposal, plan or program that may, in the opinion of the Minister, have a significant environmental impact and includes a modification, an extension, an abandonment, a demolition and a rehabilitation thereof: “S. 2(n). Taken together with the definition of “environment” referred to above, the Act thus specifically contemplates the assessment of projects involving building demolition.

\textsuperscript{27} The following comments, made with reference to the Ontario legislation, apply equally to the Newfoundland statute: “It is important to note that under the Ontario Act, government policies and programs could also be subjected to an environmental impact assessment in addition to specific individual physical projects. For example, an urban renewal program could be subjected to an environmental assessment with regard to the question of whether such a program in benefiting the poor by providing them with better housing would also have certain serious costs attached by destroying heritage as a general government policy.” (John Swaigen, formerly of the Canadian Environmental Law Association, in an opinion rendered to Heritage Canada, July 25, 1977. Unpublished.)

\textsuperscript{28} On one hand, where an environmental assessment is required, the proponent must arrange for a public meeting for the purpose of providing information to the public concerning the proposed undertaking and recording the community’s
public disclosure, and participation in the ultimate decision. Finally, the statute does not provide many details concerning its own enforcement. It nevertheless does represent a potential first line of defense for the built environment.

Concerns with respect to the environmental impact of the undertaking: S. 17. The submitted environmental impact statement is to be made available to all interested persons: S. 18(1) (a); and the Minister may invite written comments from interested persons concerning the environmental effects of the project (and require the proponent to answer the questions posed): S. 23. On the other hand, unlike the statutes in some other jurisdictions (which give any person the right to require that a public hearing into the matter take place before a permanently constituted "environmental assessment board to examine a particular environment impact statement "where the Minister receives indication of strong public interest") in the proposed undertaking: S. 24.

As previously noted, the Act requires public disclosure of the submitted environmental impact statement (if any) and the report of the environmental assessment board (if any). However, there are no public disclosure requirements with respect to any of the following actions, among others: registration by the proponent (i.e., the original notice to the Minister of the proposed undertaking), the decision of the Minister not to require an environmental impact statement following receipt of an environmental preview report, the environmental preview, the recommendations of the Minister to the Cabinet as to whether an undertaking should be permitted to proceed, the final decision by the Cabinet and the reasons therefore (compare S. 32 of the Ontario statute). The apparent power of the Minister to decide that certain undertakings are without "significant environmental impact" and are therefore not "undertakings" within the meaning of the Act is also not open to public under the exempting provisions previously referred to. In addition, the Act specifically authorizes the Minister to decline to disclose certain documents or matters where in his opinion such disclosure is not in the public interest: S. 36(3).

While environmental review boards elsewhere are empowered to decide whether or not a proposal undertaking should be allowed to proceed (as in S. 12(2), (3) of the Ontario statute) a board appointed under the Newfoundland provision merely submits a report containing "any recommendations" to the Minister, who delivers it to the Cabinet and makes it public: SS. 30, 31. As already mentioned, the final decision is the Cabinet's. Since almost every decision required by the Act to be made by the Minister or the Cabinet is a matter of broad discretion, there will be little scope for intervention by the courts in the form of judicial review of such decisions.

For example, the Act does not refer specifically to the inspection of premises. Furthermore, there is no specific provision referring to the obtaining of injunctions or orders requiring the restoration of sites to their condition before violations occurred. On the other hand, contravention of the Act or the regulations is punishable, in the case of a first offence, by a fine of up to $5,000 and, in default of payment, to imprisonment not exceeding six months, or both fine and imprisonment; in the case of a subsequent offence, by a maximum penalty of $10,000 and, in default, twelve months imprisonment, or both: S. 38. The section also states that "each and every continuance for a day or part of a day of the contravention constitutes a separate offence."
(B) Statutes Pertaining to Provincial Protection

(i) General

In Newfoundland, there appears to be a surplus provincial mechanisms which might be used to protect heritage sites and districts. The two provincial methods are administered by separate ministries under the two governing statutes, The Historic Objects, Sites and Records Act and The Urban and Rural Planning Act. These give rise to no less than six different ways to designate property of cultural importance — the most offered by any jurisdiction in Canada.

The former statute provides one such mechanism; the latter provides five. Those five are found in the procedures for “Protected Areas”, “Protected Roads”, “Regional Plans”, “Local Area Plans” or “Development Control Areas”. However, the real effectiveness of these last five mechanisms in terms of protecting the built environment is subject to various degrees of conjecture.

Nova Scotia also has several relevant statutes. Its Historical Objects Protection Act cannot be used to restrict an owner’s rights with respect to his property; however, the recent Heritage Property Act is the basic statute for conservation purposes. The Nova Scotia Planning Act also has implications.

(ii) The Historic Objects, Sites and Records Act (Nfld.)

On the recommendation of the Minister of Tourism, the Cabinet is empowered by the Historic Objects, Sites and Records Act to “declare to be an historic site any site, area, parcel of land, building, monument or other structure . . . which is considered by the Minister to be of historical or architectural significance.” The consequences of this designation are mentioned at Section 20 of the Act: “no person shall move, destroy, damage, deface, obliterate, alter or interfere with the designated site without the Minister’s written consent.” The Minister is thereby given discretion to accept or reject construction, alteration or demolition as he sees fit.

32. S.N. 1973, c. 85 as amended
33. R.S.N. 1970, c. 387 as amended
34. S.N.S. 1970, c. 8
35. S.N.S. 1980, c. 8
36. S.N.S. 1969, c. 16 as amended. The Act is presently under review by the Planning Act Review Committee.
37. S. 17(1) (am. 1977, c. 80, s. 4). The declaration is made by regulation published in The Newfoundland Gazette.
38. S. 20
(iii) The Urban and Rural Planning Act (Nfld.)

As mentioned earlier, this statute offers five separate possibilities for the protection of the built environment.

First, the Cabinet "may declare any area of natural beauty or amenity to be a Protected Area," where in its opinion the preservation of the "natural amenities" of the area requires that development be controlled.33 It is not immediately clear whether or not buildings can constitute a "natural amenity" so as to make them eligible for Protected Area designation. However, the provision has been used in at least one instance to protect an area of natural beauty which includes heritage structures.40

The second mechanism provides less room for debate. The Cabinet is empowered to designate as a "Protected Road" any road or highway "for the purpose of controlling development" along it.41

There are three "planning" mechanisms which the province can set in motion under the Urban and Rural Planning Act and which provide, at least theoretically, even further alternatives for conservation activity.

One is the "Regional Plan" provided for in Part V of the Act. The Minister (of Municipal Affairs and Housing) can define any area and declare it a "Regional Planning Area".42 A Regional Plan is then prepared by the Provincial Planning Board,43 the members of which are representatives of government departments and Cabinet appointees. Once the Minister has approved the plan, the Cabinet can issue a "Regional Development Order", the effect of which is similar to that of the Protected Area Order mentioned above: all "development" must conform to the terms of the plan and the (zoning and other) regulations which implement it.44 Presumably the order would also require that any municipal plans or zoning conform to the Regional Plan.45

39. S. 66
40. Sandy Point on Flat Island in St. George's Bay (designating regulation not yet approved)
41. S. 69
42. S. 57
43. S. 58. S. 59 details what the Regional Plan may include; although heritage conservation proposals are not mentioned, the Plan may contain any proposals or matters which the Board considers necessary or desirable: s. 59 (c) (x).
44. S. 65
45. The Regional Development Order can prohibit "all public authorities" (includes municipalities from taking any action "that conflicts with or is inconsistent with the Regional Plan": s. 65(1).
Another provincial planning device is found in Part IV of the Act. The Minister can indicate a "Local Area Plan" for any area not covered by a "Municipal Plan" or "Joint Municipal Plan". Upon the Minister's approval of the plan, the Provincial Planning Board may exercise the same development control powers with respect to the area as the municipal council has in the case of a Municipal Plan.

Finally, the Minister can also declare a "Development Control Area" — the effect is basically the same as where a Local Planning Area has been established.

These three planning mechanisms all permit governmental authorities to designate certain special areas and to protect them from development. However, there are two important qualifiers which must be considered whenever one discusses the use of these planning mechanisms to protect the built environment. Those potential impediments will be described later.

(iv) *The Historical Objects Protection Act* (NS)

Under this Act the Minister of Education has the power to designate any land of historical significance as a "protected site". The effect is that persons are prohibited, except on their own land, from altering the site without a permit. The permit is issued by the Director of the Nova Scotia Museum and may contain such conditions as he considers advisable.

(v) *The Heritage Property Act* (NS)

Nova Scotia recently enacted the above statute. It provides for a Provincial Registry of Heritage Property, and an Advisory Council on Heritage Property.

This Advisory Council may recommend to the Minister of Education that a site be placed on the Register. Such recommenda-

46. S. 48. Municipal Plans and Joint Municipal Plans are discussed in the section on municipal planning later.
47. S. 55
48. S. 56(1)
49. S. 56(2)
50. S. 2(1)
51. S. 2(3)
52. S. 3(1), (3)
53. Assent by the Lieutenant Governor was on June 5, 1980.
54. S. 6
55. S. 4
The registration of a site as a "provincial heritage property" must be accompanied by notice to the owner. The Minister has between 30 and 120 days, from the date of service of the notice, to register the site. Once registered, the site acquires the title of "provincial heritage property". Henceforth, it "shall not be substantially altered in exterior appearance or demolished" without the approval of Cabinet, which consults with the Advisory Council but has discretion to decide whether or not alteration or demolition can take place.

(vi) The Nova Scotia Planning Act

The Minister of Municipal Affairs can, in certain circumstances, designate an area to be a "special development control area." The Cabinet can also designate "planning regions." In these areas, it is possible to enact plans which are heritage-oriented; and there is some authority (albeit tenuous) that this could indirectly restrict incompatible infill construction.

56. S. 7(2)
57. S. 2(h)
58. S. 10(1)
59. S. 19(3)
60. S. 10(6)
61. The Minister of Municipal Affairs can designate a "special development control area" in cases where no municipal zoning exists in the area in question and where there is either no regional development plan or the municipal development plan is in preparation but not yet in force: Section 32(1). (These plans are discussed in detail later infra). It is thus an interim measure pending a municipal or regional plan.
62. A more direct vehicle for the provincial protection of heritage properties is the "regional development plan": See Part II of the Act. Where a "planning region" has been designated by the Cabinet, the Minister of Municipal Affairs can have a plan prepared containing "a statement of policies for the orderly economic and physical development of the region" and land use regulations necessary for implementing these policies: Sections 3(1), 4(1), 4(3). Upon Cabinet approval the regional development plan is binding on the region in areas where no municipal plan is in force, "development is prohibited except under the terms of a regional development permit, and the permit must not be inconsistent with the plan: Section 5(1), (2), (7). Since any municipal plans and zoning by-laws in force in the region must conform to the regional plan (Section 9), and since development in areas affected by such plans and by-laws requires a municipal development permit (Section 43), the result is that no development in the region will be permitted which is contrary to the regional development plan.
63. S. 4(3) (c)
64. The subject of a regional plan's ability to protect historic sites received attention in a recent case before the Nova Scotia Planning Appeal Board in Re Waverley Ratepayers Assn. (1976) 1 M.P.L.R. 57. In dismissing an appeal from the decision of a development control officer granting a development permit, the Board ruled that a site cannot be protected against unsympathetic infill construction even when the plan contains a specific statement regarding the preservation of historic sites, and
(vii) Limitation on Planning Statutes

As discussed earlier, the use of planning mechanisms for heritage conservation purposes can lead into uncharted waters. However, two further important qualifications should be noted.

First, it is a moot question whether heritage conservation is even a legitimate use to which planning mechanisms can be put. This problem appears solved in Nova Scotia, to the extent that the Minister is specifically empowered to take action "for the preservation of scenic, historic or recreational qualities" of an area. No comparable provision, however, is found in the Newfoundland statute.

In one complicated case, called the Tegon case, the court of another province said, among other things, that preservation of historic sites was not a "planning purpose". That point was not, however, the deciding issue in the case; instead, the case was decided upon "remarkable semantic footwork". Consequently, it has been argued that the allegation concerning "improper purpose" can be disregarded. Finally, the Tegon case was criticized as being inconsistent with established jurisprudence and other legal

when the historic character of the site has been conclusively proved. The Board effectively concluded that the stipulation of the plan with respect to historic sites was inoperative since the site in question had not been designated as a Registered Historic Property under the Historic Property Designation Act. The inference, still untested, is that if a site has been designated under that statute or some equivalent, it can be protected by a heritage-conscious plan insofar as unsympathetic infill is concerned.

65. Planning Act, S.32(1)
66. Tegon Developments Ltd. et al. v. Council of the City of Edmonton et al., Appellate Division of the Supreme Court of Alberta, December 12, 1977; appeal to the Supreme Court of Canada dismissed November 30, 1978
67. In the words of Mr. Justice Moir, speaking to the Supreme Court of Alberta (Appellate Division), "it is not a valid exercise of the (planning) power to use it to preserve historical sites and to induce others to advance money to protect historical sites. . . . It was not a planning purpose" (at 8 of the judgement).
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.
69. See Heritage Canada Magazine, Feb. 1979, at 32
70. "Some lawyers took the whole declaration about 'improper purpose' with a grain of salt. They argued that it was all superfluous and expandable ('obiter dicta,' to use the legal phrase). According to them, the real reason for the judgement was the semantic argument; the rest could be disregarded. (Heritage Canada Magazine, Feb. 1979, at 33.)
authority. The Supreme Court of Canada could have decided the issue when Tegon was appealed to that body; instead, the Court confined its decision to semantic issues, and thereby left open the question as to whether conservation is a legitimate planning purpose. This decision was also criticized.

It may be argued that this decision is inapplicable in Newfoundland and Nova Scotia, insofar as these governments are empowered by statute to protect historic sites. It would be incongruous, to say the least, if a government was empowered to do something but was not empowered to plan ahead for what it was going to do. The power to protect appears to imply, of necessity, the power to plan for protection. However, in light of Tegon and until the issue has been more authoritatively decided, it would probably be prudent for authorities in Newfoundland to either avoid using “Regional Plans”, “Local Area Plans” or “Development Control Areas” for overt “heritage” purposes (i.e. by using other protective mechanisms instead). Alternatively, if they must use these “planning” mechanisms, it would be prudent to downplay the “conservation” aspects and to emphasize other laudable objectives instead.

The second difficulty in planning legislation is the ambiguity of the definition of “development”. The planning statutes of the two provinces are similar in this respect, and the argument which applies to one also applies to the other.

Taking the case of the Newfoundland Urban & Rural Planning Act — it defines “development” as any “operations in, on, over or under land, or the making of any material change in use, or the intensity of use of any land, building or premises.” 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 under any of Newfoundland’s five planning mechanisms or their Nova Scotia counterpart.

71. See Protecting the Built Environment, Part I, op. cit., at 11
72. S. 2 (j). The Nova Scotia Planning Act’s definition of “development” is similar: “development” includes “any change or alteration in the use made of land, buildings, or structures: S. 1(e). This would seem to cover demolition; in that case the regional development plan could presumably be used to prevent demolition of certain structures in the region.
73. This proposition is supported by the extended definition given to “development” in s. 2(j) of the Nfld. Statute. “Development” specifically excludes alterations “which affect only the interior of the building or which do not materially affect the external appearance or use of the building”: s. 2(j) (iv).
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,\textsuperscript{74} with some courts holding that controls cannot be inferred. Thus, the Planning mechanisms 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 statutes 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 mechanisms for heritage conservation purpose — 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 these statutes should be used relatively cautiously for purposes of controlling demolition; although they may be used to supplement \textit{The Historic Objects, Sites and Records Act 1973} and \textit{The Heritage Property Act}, they are less well adapted as a first line of defense.

(viii) \textit{Nova Scotia Legislation Governing Particular Areas}

In two instances Nova Scotia has created special legislation enabling the province to exercise tighter controls over heritage

\textsuperscript{74} Rogers, Ian McFee, \textit{Canadian Law of Planning and Zoning}, Carswell, Toronto, 1973, p. 11

For a case in which the court equated the threat to heritage with a state of emergency, see \textit{Murphy v. City of Victoria}, (1976) 1 M.P.L.R. 166. In that case, the City was empowered to designate buildings for protection as heritage buildings, but nothing in the City's \textit{ordinary} powers prevented the owner from demolishing the building between the time he received notice of the implending 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 it may use in such circumstances. 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 listed. Furthermore, all demolition permits then in force were revoked. The court refused to overrule the "state of emergency". The case has been described as running "counter to traditional interpretations of municipal powers" (S. M. Makuch, 1 M.P.L.R., p. 167). The commentator nevertheless balances this statement with a number of cases both pro and con.
areas. Under the Sherbrooke Restoration Commission Act\textsuperscript{75} a commission largely appointed by the Cabinet is given the task of recommending and administering ministerial regulations for the restoration and development of the "Sherbrooke Planning Area".\textsuperscript{76} Regulations respecting "the destruction or demolition of buildings" are specifically authorized.\textsuperscript{77}

The Peggy's Cove Commission Act\textsuperscript{78} creates a similarly appointed commission whose purpose is "to preserve the unique scenic beauty, character and atmosphere of the area."\textsuperscript{79} The Commission's powers include the power to make by-laws designating areas "in which it shall be unlawful to erect, construct, alter, reconstruct, repair or maintain designated types of buildings"; it can also pass by-laws in respect of any matter which it deems necessary "to the carrying out of its purpose."\textsuperscript{80} While unsympathetic construction and alteration can clearly be prevented, no mention is made of demolition. The fact that the Commission has such tight controls on replacement buildings and uses was apparently expected to discourage the destruction of existing structures. It is now open, of course, for the Nova Scotia government to control demolition under the Heritage Property Act if it chooses to do so.

(C) Effects of Provincial Designation

(i) Effect Upon Individual Sites

As mentioned above, a site designated under Newfoundland's Historic Objects, Sites and Records Act or Nova Scotia's Historical Objects Protection Act cannot be changed without governmental permission, except that in the case of the latter statute the owner is free to do as he wishes. For that reason, the latter statute will not be mentioned further.

An area declared a "Protected Area" under the Newfoundland Urban and Rural Planning Act can presumably be as large or as small as the Cabinet desires. It may conceivably be as small as an individual lot, or even smaller.

\begin{itemize}
\item 75. S.N.S. 1969, c. 18 as amended
\item 76. Ss. 5(1), 6 (re-en. 1972, c. 66, ss. 2, 3)
\item 77. S. 12 (1) (a), (en, 1972, c. 66, s. 6)
\item 78. S.N.S. 1962, c. 10
\item 79. Ss. 4, 7 (1). The Commission is deemed to be part of the Department of Municipal Affairs: s. 4(6).
\item 80. S. 7 (2) (b), (h)
\end{itemize}
The designation of a Protected area, however, does not have any immediate legal consequences: a "plan" or "scheme" must first be drafted providing for the "conservation and development for public use of the natural amenities of the area." Once the plan or scheme is prepared the Cabinet may issue a "Protected Area Order" prohibiting all development that conflicts with or is inconsistent with the plan or scheme. The Order may also authorize "any public authority" to make regulations for the implementation or enforcement of such plan or scheme.

The effect of the designation of a "Protected Road" is not immediate either. The Minister (of Municipal Affairs and Housing) must first make regulations "for the purpose of controlling development" along the Protected Road. Since the provision obviously contemplates development control along a stretch of road or highway, it is unlikely to be used to protect single properties.

The effect of planning mechanisms, whether under the Nfld. Urban & Regional Planning Act or the Nova Scotia Planning Act, has already been described. Finally, as mentioned earlier, designation under the Nova Scotia Historical Objects Protection Act has virtually no legal consequences and will not be mentioned further. On the other hand, the province's Heritage Property Act protects registered properties from unauthorized alteration and demolition.

One unusual feature of the Nova Scotia Heritage Property Act is that it specifies that "substantial alteration" of registered sites is controlled; this creates the inference that the controls do not apply when the alteration is not "substantial". How does one define "substantial" alteration?

This expression is not found in the heritage legislation of the nine other provinces. Its closest equivalent is in American tax legislation, which provides tax incentives to renovations of a heritage structure which may be "substantial". However, in the absence of any direct Canadian analogy, this expression could cause difficulties. Accordingly, it is reputed to be the intention of

81. S. 67
82. S. 68
83. Id.
84. S. 70
85. SS. 7(4), 10(1)
86. The renovation must be "certified" by the federal Secretary of the Interior. For a description of this system, along with the rules for eligibility, see Tax Incentives for Historic Preservation. National Trust for Historic Preservation, Washington, 1980.
governmental authorities to define the word “substantial” in regulations, which the Cabinet may enact.87

(ii) Motives for Designation
What kinds of reasons are required to sustain a designation under the above statutes? If, for example, the Newfoundland or Nova Scotia authorities were to designate (or “register”) a property for reasons which were overtly extraneous to the Act, the designation would be open to challenge in the courts.88 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: “If 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.”89

(iii) Effect Upon the Surroundings of Sites
Unlike the legislation of certain other jurisdictions,90 the Newfoundland and Nova Scotia 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 site it would be necessary to specifically include them in the designating order.

(iv) Effect Upon Areas
Under Newfoundland’s *Historic Objects, Sites and Records Act* the treatment of areas, as opposed to individual sites, is not as clear as, for example, for those under the Quebec legislation.91 This does not mean, however, that the Newfoundland statute is incapable of giving blanket protection to areas. There is nothing to prevent the Cabinet from designating an entire built-up area as an “historic

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87. The Cabinet may enact regulations “defining any expression used in this Act and not defined herein”: s. 24 (1) (c).
88. It is settled law that even ministerial discretion is subject to the purpose for which it was granted to the Minister: *Roncarelli v. Duplessis*, (1959) S.C.R. 121.
89. As stated by Mr. Justice Gould of the British Columbia Supreme Court in *Murray v. Richmond*, (1978) 7 C.R.L.R. 145
90. E.g., Quebec’s *Cultural Property Act*, 1972 S.Q., c. 19, art. 31
91. *Id.*, art. 45 et seq.
site" under the Act: indeed the Act specifically includes "areas" as being subject to designation. 92

It is not clear how large an area can be covered in the case of a Protected Road designation under the Urban and Rural Planning Act. The statute does not specify any limit to the width of the protected strip of property along the road. Probably only those lots fronting on the road could be included in the designation and subjected to special controls. Again, the matter awaits judicial determination.

In Nova Scotia, the situation is clearer: a provincial heritage property can, under sections 2 (h) and 8 (1) of the Heritage Property Act, be a "streetscape or area".

(v) Interim Protection

Unlike the legislation of several other provinces, 93 Newfoundland's Historic Objects, Sites and Records Act does not specifically empower the Minister to halt work pending study of an interesting site. Consequently, immediate designation (by the Cabinet) is the only way to protect an endangered building or structure. It may even be necessary, on occasion, to designate structures without substantial documentation, and later to "undesignate" them.

The broad "protective measures" found in statutes elsewhere are also lacking; for example, no mention is made of the Minister ordering the suspension of any licence or permit (such as a construction or demolition permit) issued by a municipality.

In the case of "Protected Areas" and "Protected Roads", the Urban and Rural Planning Act is similarly silent with respect to interim protective measures. The need for such measures is even more apparent here since, as has been noted, designation itself does not restrict development pending the preparation of detailed controls. 94

92. S. 17 (1)
93. E.g., Alberta Historical Resources Act, S.A. 1974, c. 5, s. 35; British Columbia Heritage Conservation Act, S.B.C. 1974, c. 37, s. 14 (note that where the municipal council, not the Minister, is given the right); Quebec Cultural Property Act, s. 29; Saskatchewan Heritage Act, R.S.S. 1978, s. S-22, s. 8.
94. See, e.g., the Alberta Historical Resources Act, s. 22 (2), (3)
It may nevertheless be conceivable to introduce some interim protection without statutory amendment. *The Historic Objects, Sites, and Records Act, 1973* empowers the Cabinet, at section 9(c) and (f), to enact regulations "for the preservation and protection of historic objects and historic sites" and generally respecting any matter "for carrying out the true intent and purpose of the Act." *The Urban and Rural Planning Act* contains a like provision authorizing the Minister, with the Cabinet's approval, to make regulations promoting the objects of the statute.\(^9\) Such regulations could conceivably set up a system of interim protection pending designation (or at least provide such protection in individual cases), although its validity remains untested.

Nova Scotia's *Heritage Property Act* is clearer. Once the Minister has served notice of the Advisory Council's mere recommendation to register a site, alteration or demolition is prohibited for 120 days without ministerial consent.\(^9\)

(vi) **Applications and Information**

In Newfoundland, requests for protection under the *Historic Objects, Sites and Records Act* should be addressed to the Minister of Tourism, Recreation and Culture.\(^9\) Information concerning the *Urban and Rural Planning Act* is available from the Urban and Rural Planning Branch of the Department of Municipal Affairs and Housing.\(^9\)

In Nova Scotia, requests for designation under the *Historical Objects Protection Act* or the *Historic Property Designation Act* should be directed to the Minister of Education or the Nova Scotia Museum.\(^10\) Inquiries with respect to registration under The Heritage Property Act should be addressed to the Minister of Culture, Recreation and Fitness.\(^10\)

(D) **Enforcement**

(i) **Inspection**

While Newfoundland's *Historic Objects, Sites and Records Act*

96. S. 71 (1). The power given by s. 70 to make regulations with respect to Protected Roads might also support interim control measures.

97. S. 7 (4).

98. Confederation Building, St. John's, Newfoundland, (or to the Historic Resources Division, Newfoundland Museum Building, St. John's, Nfld.)

99. Confederation Building, St. John's, Newfoundland

100. c/o Department of Education, 1747 Summer Street, Halifax, N.S. B3H 3A7

101. P.O. Box 864, Halifax, N.S. B3J 2V2
does not directly stipulate the right of officials to inspect historic sites (except archaeological digs\textsuperscript{102}), it does make specific provision for Cabinet regulations respecting the inspection of historic properties.\textsuperscript{103} Under the \textit{Urban and Rural Planning Act} the right of inspection is clearly specified.\textsuperscript{104}

Unlike the statutes of several other provinces,\textsuperscript{105} Nova Scotia’s \textit{Heritage Property Act} does not confer on officials the right to inspect any of the sites which they are supposed to be cataloguing. Although such action has not been taken, the Cabinet could conceivably enact a regulation specifying the right of inspection of designated sites and sites being considered for designation.\textsuperscript{106} The \textit{Historical Objects Protection Act} is similarly silent on the subject of inspection.

The Nova Scotia \textit{Planning Act} gives the Minister and his agents the power of inspection for purposes of the preparation and implementation of a regional development plan.\textsuperscript{107}

(ii) \textit{Penalties}

Three kinds of penalties are possible. The first and most effective penalty restores the situation to the \textit{status quo ante}: the owner is required, at his expense, to reconstruct an illegally altered or demolished structure (or, to pay the cost where the authorities undertake the restoration). While such a penalty cannot be imposed under the Newfoundland \textit{Historic Objects, Sites and Records Act}, it is available in appropriate cases under the \textit{Urban and Rural Planning Act} for breach of the Act or any regulation, order or plan made under it.\textsuperscript{108}

In Nova Scotia, the Minister may apply to the Nova Scotia Supreme Court for an order compelling restoration of a property damaged in contravention of \textit{The Heritage Property Act}.\textsuperscript{109} Furthermore, the \textit{Planning Act} includes a provision for obtaining a court order that an illegally erected structure be demolished (an

\begin{flushleft}
\textsuperscript{102} S. 37 \\
\textsuperscript{103} S. 9 (c.2) (en. 1977, c.80, s. 1 (1)) \\
\textsuperscript{104} Ss. 128 (1), 133 \\
\textsuperscript{105} E.g., \textit{Alberta Historical Resources Act}, s. 22, B.C. \textit{Heritage Conservation Act}, s. 7 (2), Quebec \textit{Cultural Property Act}, s. 29, Saskatchewan \textit{Heritage Act}, s. 8 \\
\textsuperscript{106} See s. 24 (1) (e) \\
\textsuperscript{107} S. 59 \\
\textsuperscript{108} S. 134 (3) \\
\textsuperscript{109} S. 23 (3).
\end{flushleft}
important deterrent to unauthorized infill construction). The second form of penalty is a fine. Offences against Newfoundland's Historic Objects, Sites and Records Act are punishable by a fine of up to $1,000. Under the Urban and Rural Planning Act the maximum fine is only $200.

In Nova Scotia, offenders against the Heritage Protection Act face fines of up to $10,000 in the case of individuals and $100,000 for corporations. Offences under the Planning Act are punishable by fines of up to $100. In the case of the Planning Act, a continuing offence faces an additional fine of $25. per day.

The third form of penalty is a term of imprisonment. Offenders against The Historic Objects, Sites and Records Act, 1973 face a term of up to three months as an alternative to a fine or an addition to one. A prison term can be imposed under The Urban and Rural Planning Act only in default of payment of a fine; Nova Scotia’s Planning Act and Heritage Property Act have similar provisions.

(iii) Binding Authority

It appears that the heritage and planning statutes of Newfoundland and Nova Scotia are not binding upon all owners of heritage in the two provinces. As mentioned earlier, they do not affect federal lands and their applicability to federally-regulated land (for example, railway property) is currently the subject of debate.

As for the provincial government and its agencies, Newfoundland’s Environmental Assessment Act was mentioned earlier. The Historic Objects, Sites and Records Act, unlike the heritage statutes of some other provinces, does not clearly state that the Crown is subject to the Act. As a general rule, the Crown is bound by a statute in the absence of such a provision. However,

110. S. 57 (2) (b)
111. S. 39
112. S. 134 (1)
113. Ss. 23 (1) and 23 (2) respectively
114. S. 61 (1)
115. S. 39
116. S. 134 (1)
117. Heritage Property Act s. 23(1) Planning Act s. 61(1)
118. See "Federal Aspects"
119. E.g., Quebec Cultural Property Act, s. 55; Alberta Historical Resources Act, s. 39; Saskatchewan Heritage Act, s. 13
120. See, e.g., Newfoundland’s Interpretation Act, R.S.N. 1970, c. 182, s. 13
the Act contains a statement that all government departments are “bound to assist the Minister in carrying out (his) duty (‘to ensure the preservation of all historic objects, sites and records within the meaning of this Act’)”. This unusual wording creates an inference that the Crown is in fact bound by the statute. The proposition has not been tested in the courts.

In the case of protected areas set up under *The Urban and Rural Planning Act*, the Protected Area Order referred to above can be binding on all “public authorities”, including the Crown. The same is true of Regional Development Orders where a Regional Plan is in effect. Local Area Plans, like Municipal Plans, do not appear to be binding upon the province, nor do regulations made for the purpose of controlling development along Protected Roads.

The Nova Scotia *Planning Act* does not stipulate that the Crown is bound by that Act. On the other hand, section 25 of the *Heritage Property Act* states clearly that the Crown is bound by the Act.

The above Acts are binding on municipalities and, of course, any non-government owner.

3. **THE MUNICIPAL LEVEL**

(A) *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, second, 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.

Newfoundland municipalities wishing to act on their heritage concerns will be governed by the provisions of the new *Municipalities Act* as well as the *Urban and Rural Planning Act*.

The above statute does not apply to the cities of St. John’s and Corner Brook which have their own enabling legislation in the *City

121. S. 5 (2) read in conjunction with s. 5 (1)
122. S. 68
123. S. 2 (m)
124. S. 65 (1)
125. According to s. 55 it would seem that s. 29 applies: compare s. 65 (1)
126. See s. 70
of St. John’s Act\textsuperscript{128} and the City of Corner Brook Act.\textsuperscript{129}

In Nova Scotia the Heritage Property Act is again the main vehicle for heritage-oriented initiatives. Municipalities are also subject to the Planning Act; furthermore, The Municipal Act\textsuperscript{130} governs municipalities other than incorporated towns, to which the Towns Act \textsuperscript{131} applies; these statutes can occasionally be employed on behalf of the built environment. The three cities, Halifax, Dartmouth, and Sydney, have their own city charters.\textsuperscript{132} As mentioned above, new legislation to protect heritage is under discussion; it is expected to include municipal powers to protect local structures of historic or architectural significance.

(B) Planning

(i) General

It would undoubtedly be desirable for every community to consider heritage conservation in its planning process. Unlike in some other jurisdictions in Canada\textsuperscript{133} and elsewhere,\textsuperscript{134} there is no obligation on either Newfoundland or Nova Scotia municipalities to do so. Indeed, the planning statutes of the two provinces do not even specify that the preservation of historic sites and districts is a purpose of municipal planning. This may potentially cause problems, as illustrated by the Tegon case mentioned earlier.

(ii) The Urban and Rural Planning Act (Nfld.)

In Newfoundland municipal planning authority is found in the Urban and Rural Planning Act. A municipality will normally undertake the preparation of a “Municipal Plan” on its own initiative\textsuperscript{135} — it has no obligation to draft a plan or plan amendment unless ordered to do so by the Minister of Municipal

\textsuperscript{128}. R.S.N. 1970, c. 40 as amended
\textsuperscript{129}. R.S.N. 1970, c. 39 as amended
\textsuperscript{130}. R.S.N.S. 1967, c. 192 as amended
\textsuperscript{131}. R.S.N.S. 1967, c. 309 as amended
\textsuperscript{132}. Halifax City Charter, S.N.S. 1963, c. 52 as amended; Dartmouth City Charter, S.N.S. 1978, c. 43A; City of Sydney Act, S.N.S. 1903, c. 174 as amended
\textsuperscript{133}. E.g., Winnipeg must take into account heritage sites and areas (see City of Winnipeg Act, s. 573 (e.1))
\textsuperscript{134}. See, e.g., Britain’s Civic Amenities Act, (1967) Ch. 69
\textsuperscript{135}. S. 11 (1). The municipality may also combine with other municipalities for planning purposes in which case the resulting plan is known as a “Joint Municipal Plan”: s. 42 et seq.
Once a plan has been drafted it is discussed at a public hearing and forwarded to the Minister. Upon his approval the plan becomes "binding" upon the municipality and all other persons. The plan also commits the municipality to a certain course of legislative action: "When the municipal plan comes into effect the . . . Council shall develop fully a scheme for the control of the use of land in strict conformity with the Municipal Plan . . . and shall prepare . . . land use zoning regulations." 

While the Act declares that a municipal plan is binding on all persons, it also requires that its proposals for land use be implemented by zoning regulations. This suggests to some observers that the plan may not, after all, be enforceable against private owners in the absence of implementing by-laws. The matter has yet to come before the courts. This means that a plan could be insufficient by itself to control development, including demolition (assuming demolition constitutes "development" within the meaning of the Act).

The argument that Newfoundland plans can directly control development is much stronger where municipal works are concerned. If a municipal plan specifies heritage conservation in an area it would be very hazardous for the municipality (or even the province) to undertake public works projects which would detract from the heritage value of the area. Consequently, any

136. S. 131
137. See ss. 16-24
138. S. 29
139. S. 37 (1)
140. Only two other provincial planning statutes have similar provisions: New Brunswick’s Community Planning Act at s. 18 (7) and Saskatchewan’s Planning and Development Act at s. 48 (1).
141. This is Rogers’ view (op. cit., at 59). The fact that the interim development order provided for by s. 13 (1) authorizes the council to exercise interim control of development until zoning regulations are in effect supports such an interpretation.
142. 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 working of the official plan, the testimony of experts and many other factors." (Opinion rendered to Heritage Canada, July 25, 1977. Unpublished.)
municipality which is serious about conservation should consider heritage-oriented provisions in the municipal plan.\textsuperscript{143}

(iii) \textit{The Planning Act (N.S.)}

In Nova Scotia the local planning instrument is known as the "municipal development plan".\textsuperscript{144} The municipal council must give notice of its intention to adopt the proposed plan and consider any written objections to it.\textsuperscript{145} Following adoption by the council, the plan comes into effect upon the approval of the Minister of Municipal Affairs.\textsuperscript{146} Once it has adopted a plan, the council must pass a zoning by-law "for the purpose of carrying out the intent of the plan"; since all existing zoning is automatically repealed upon the Minister's approval of the plan,\textsuperscript{147} the new zoning controls will have to be prepared contemporaneously with the plan.

It is clear that it is the implementing zoning, and not the local plan itself, which will be enforceable against private owners.\textsuperscript{148} However, as in the case of Newfoundland the municipality itself is prevented from undertaking any development that would be inconsistent with the plan.\textsuperscript{149} In addition, no zoning by-law can be passed that would be contrary to the plan.\textsuperscript{150} As in the case of regional plans, the importance of express plan provisions for the preservation of the community's heritage is obvious, if the municipality is so inclined.

(C) \textit{Controlling Governmental Demolition}

Unlike the situation in some other jurisdictions, municipalities in the two provinces are under no obligation to file impact assessment reports when contemplating public works.\textsuperscript{151} However, the

\begin{thebibliography}{99}
\bibitem{143} The experience of other jurisdictions may be helpful in this regard. For example, sample plan amendments can be obtained from the Ontario Heritage Foundation, 77 Bloor St. W., Toronto, Ontario, M7A 2R9.
\bibitem{144} S. 15
\bibitem{145} Ss. 16-18
\bibitem{146} S. 33 (1)
\bibitem{147} S. 31 (5)
\bibitem{148} S. 19 (2)
\bibitem{149} S. 19 (1). See also note 143
\bibitem{150} S. 33 (3)
\bibitem{151} This situation could, of course, change in Newfoundland depending upon the regulations to be enacted under the \textit{Environmental Assessment Act}.
\end{thebibliography}
destruction of heritage by municipal authorities might be prevented to some extent by the municipal plan as discussed above.

(D) Controlling Other Demolition

(i) In Newfoundland

In the provincial capital a heritage structure may be designated by by-law pursuant to Section 367A of the City of St. John's Act.152 Areas as well as individual buildings may be designated.153 The effect of the designation is that the property "shall not be demolished or built upon, as the case may be, nor shall the facades or exterior of the building or structure be altered, except with the approval of the Council."154 The new Municipalities Act confers comparable powers to designate and protect heritage "buildings, structures, or lands" on other Newfoundland municipalities.155

(ii) In Nova Scotia

Municipalities in Nova Scotia have powers that resemble, in many ways, those of the provincial government. They can have their own registry of heritage property,156 with their own heritage advisory committee.157

Once registered, the building, streetscapes or area "shall not be substantially altered or demolished without the approval of the municipality."158 However, the municipality cannot refuse for a period longer than one year:159 Unlike counterparts elsewhere,160 municipalities in Nova Scotia cannot halt destruction definitively, but only delay it for a year.

The specific situation of Halifax is not as clear. Halifax had begun an inventory of "heritage resources",161 for which it sought

152. Particularly as amended 1975-76, No. 72, s. 9
153. S. 367A (1)
154. S. 367A (2)
155. Bill 58 at ss. 243, 244
156. This is called a "municipal registry of heritage property": Heritage Property Act s. 11(1)
157. S. 11 (2)
158. S. 15(1)
159. S. 16
160. Aside from the Newfoundland situation mentioned earlier, see: City of Charlottetown Act, 1948 S.P.E.I. c. 43, as amended s. 36(49); New Brunswick Municipal Heritage Preservation Act, S.N.B. 1978, c. M-21.1 s. 10(d); City of Winnipeg Act, S.M. 1971, c. 105, as amended, s. 483 (c); British Columbia Heritage Conservation Act, S.B.C. 1977 c. 37, Part III.
161. An Evaluation and Protection System for Heritage Resources in Halifax, City
permanent protection.\textsuperscript{162} The \textit{Heritage Property Act} gives the City until January 1, 1982, to state its intentions concerning these buildings; if the City wants to protect them, it must further declare them to be "heritage resources" in the prescribed form.\textsuperscript{163}

Is Halifax left with a \textit{choice} whereby it can either "register" sites (like other municipalities in Nova Scotia) or alternatively "declare them" to be "heritage resources"? Nothing in the Act precludes that option.\textsuperscript{164} If the latter is chosen, the building appears to be protected at least until January 1, 1982;\textsuperscript{165} it is expected, however, that Halifax will enact an ordinance specifying its protective measures. When Halifax does so, the protective period will not be able to exceed 270 days,\textsuperscript{166} under the terms of the enabling legislation.

Can more permanent protection be granted by Nova Scotia municipalities? The only way to attempt an affirmative answer would be by giving an extremely liberal construction to Section 33(2) (c) of the \textit{Planning Act}. That section empowers a municipality, where its plan so provides, to establish "comprehensive development districts". The municipality must "describe the purposes for which (the) district is to be developed";\textsuperscript{167} those purposes could presumably include heritage conservation. The municipality can then "prohibit any development inconsistent with the comprehensive development of the district for those purposes" and require that no development permit be issued unless the proposed development has been approved by council.\textsuperscript{168} The Act also states that approval of any development "shall only be granted subject to the condition that the registered owner . . . enter into an agreement with the council containing such terms and conditions as the council may direct".\textsuperscript{169}

\textsuperscript{162} of Halifax Planning Department, Halifax, 1977. The department recommended the adoption of a similar approach to that of St. John's, Newfoundland (p. V-3), i.e. a charter amendment giving it powers like those under s. 367A of the \textit{City of St. John's Act}, including the power to refuse demolition permits indefinitely.

\textsuperscript{163} City Council endorsed the recommendations of the report \textit{ibid} on July 27th, 1978.

\textsuperscript{164} Section 2(g) defines "municipality" as including "a city, incorporated town or municipality of a county or district" without excluding Halifax.

\textsuperscript{165} S. 27(3)

\textsuperscript{166} S. 27(13) (e)

\textsuperscript{167} S. 33(2) (c) (i)

\textsuperscript{168} S. 33(2) (c) (ii), (iii)

\textsuperscript{169} S. 34 (1). It appears that in the absence of statutory authority there is no power
If demolition is considered to be a form of "development" as defined in the Planning Act,\textsuperscript{170} then a municipality could presumably control it in the same manner as it controls other development in the comprehensive development district, and prohibit demolition of any or all buildings in the district except with its approval. While this approach has not been tried, some observers have felt that it deserves closer examination by Nova Scotia municipalities concerned to protect their heritage.\textsuperscript{171}

A more indirect means of controlling demolition may be available. The Act provides for what might be called conditional development zoning.\textsuperscript{172} Theoretically, a municipality could pass a zoning by-law defining a heritage conservation district and stating that development of land in the district could proceed only on the condition that the development did not entail the replacement of structures of a certain class (defined so as to include the buildings the community wanted to preserve). The legal validity of such a measure is uncertain. Yet another method, potentially available on an ad hoc basis, would be to extract restoration and non-demolition assurances from a developer in return for a zoning change.\textsuperscript{173}

(E) \textit{Controlling Construction}

(i) \textit{General}

In Newfoundland, "development control" is available on an interim basis under provincial supervision. The \textit{Urban and Rural Planning Act} provides for the exercise of development control by a municipality pending the preparation and coming into force of a municipal plan and its implementing regulations.\textsuperscript{174} Once the

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\textsuperscript{170} That is a large "if"; see footnotes 72 and 73.
\textsuperscript{171} See An Evaluation and Protection System for Heritage Resources in Halifax, \textit{op cit}, p. V-9
\textsuperscript{172} S. 33(5)
\textsuperscript{173} This device was used by the City of Halifax in the case of the Barrington Place development in downtown Halifax (taking heritage restoration covenants from a developer in return for the transfer of city-owned property).
\textsuperscript{174} S. 13. S. 14 directs the municipal council to forward the completed municipal
planning process has been initiated, the issue of an "interim development order" is virtually automatic. The order is made by the Cabinet and suspends the application of existing controls affecting a planning area and prohibits development in the area without the approval of the municipal council. It also prescribes guidelines for the exercise of the council's discretion. As soon as the municipal plan is in effect and until permanent controls implementing it have been adopted, as required by the Act, the practice is to require the council to approve only those new developments that conform to the plan. Presumably interim development orders may also be made in the case of an amendment to the plan or zoning regulations.175

As previously indicated, the Nova Scotia Planning Act contains special provisions for the control of development in "comprehensive development districts". In such districts development inconsistent with the purposes of the district is prohibited and no development permit can be granted without the council's approval.176

There is some question as to the scope of the council's discretion — the issuing of permits is probably mandatory rather than discretionary where the proposed development is not inconsistent with the purposes of the district. These purposes must be described in the by-law;177 but depending on how specific such purposes must be in order to be enforceable, the council may have considerable leeway in applying the test of inconsistency to a development proposal. As in the case where a development officer refuses a permit, an appeal lies from the council's decision to the Provincial Planning Appeal Board.178

(ii) Direct Heritage Controls

Since new construction necessarily alters buildings, "streetscapes" or "lands", it can be controlled on designated sites in the same

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175. S. 36 (re plan amendments) and s. 41 (re zoning amendments) provide that amendments may be made "in the same manner in which the [plan or scheme] was brought into effect," unless the Minister otherwise directs. S. 13 would appear to authorize interim development orders in cases where an amendment is pending.
176. S. 33(1) (c) (iii). In the normal case a "development officer" is responsible for issuing development permits: 43 (2).
177. S. 33(2) (c) (i)
178. Ss. 35(1), 43(5)
manner as alterations or demolition. 179

Alternatively, development in the two provinces can be regulated by enacting a package of land use controls dealing with specific matters of size, height, use, etc. The various components of this package are described below.

(iii) **Scope of Municipal Powers**

Prior to an examination of a municipality’s 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 the 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. 180

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 enabling legislation, the municipality will have resort to its general powers to control “development”. Again, such action may be vulnerable to attack in the courts.

(iv) **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 the 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 restricted size or height by-law can indirectly discourage unwanted development. 181

179. See Newfoundland Municipalities Act ss. 243, 244; Nova Scotia Heritage Property Act, s. 15(1)
180. See, e.g. Re H. G. Winton Ltd. and Borough of North York (1979), 20 O.R. (2d) 737
181. In several American jurisdictions, a new kind of height control, which is both precise and flexible, has been developed. The permitted height of the 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 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
Like municipalities in Nova Scotia, the City of St. John’s is specifically empowered to control the size and height of buildings. Since there is no similar provision in the case of other Newfoundland municipalities, they may enact such controls only where a plan requires them.

(v) Design Control Through Zoning

Design control is another essential feature of heritage areas. Under Newfoundland’s new Municipalities Act, municipalities acquire clear design control powers: the Act says that they “shall” make regulations controlling the design of buildings generally and of any class of buildings. Such regulations will require ministerial approval.

St. John’s is given wide powers with respect to the design of individual buildings.

Nova Scotia municipalities are empowered to regulate the “architectural design, character and external appearance of buildings or structures.”

Note that neither the Nova Scotia nor the Newfoundland legislation confers discretion upon most municipalities to accept or reject design proposals as they please (as appears to be the case in St. John’s). Rather, design is to be regulated by by-law in the sense that acceptable designs would have to be clearly spelled out in the by-law itself. Otherwise, the by-law could be quashed for vagueness. already have a slightly irregular roof line. Whether such controls would be upheld in Newfoundland or Nova Scotia remains to be seen.

182. Planning Act, s. 33 (2) (a) (v)
183. City of St. John’s Act, ss. 367 (2), 391
184. The Urban and Rural Planning Act and the new Municipalities Act are silent in this regard.
185. S. 208 (1)
186. “The Council may in its sole discretion refuse to issue a permit for any building or any extension or any alteration or repair of any building the size, design or appearance of which, or the location of which is, in the opinion of the Council, unsuitable for the locality in which it is proposed to be erected or constructed or inferior in general character to other buildings in that locality: s. 367 (2).

“Design” is defined to include “general appearance, size, shape and massing, texture and maintenance qualities of exterior materials, landscaping, relationship of building for structure to its site, and any other matter relating to the nature of exterior design:” S. 367 (3). It would appear that even colour could be regulated under such a provision.

187. Planning Act, s. 33 (2) (a) (ix)
188. See, e.g. Re Mississauga Golf and Country Club Ltd., (1963) 2 O.R. 625, 40
This 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.\(^{189}\)

**(vi) Use Zoning**

Both Newfoundland and Nova Scotia municipalities are empowered to regulate the uses to which property can be put.\(^{190}\)

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 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, etc., 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 together. 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.\(^{191}\)

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\(^{189}\) D.L.R. (2d) (C.A.). Although the case was decided in Ontario, it is conceivable that a Newfoundland or Nova Scotia court would reach the same conclusion.

\(^{190}\) At the very least a design control by-law should specify facade materials. 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 content and format of such by-laws, Heritage Canada can be contacted, P.O. Box 1358, Station B, Ottawa, Ontario. K1P 5R4

\(^{191}\) Urban and Rural Planning Act, s. 37 (1) (c); Planning Act, s. 33 (2) (a) (i)

See Re District of North Vancouver Zoning By-Law 4277, (1973) 2 W.W.R.
(vii) **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 the streetscape. Location of buildings can be regulated by municipalities in both provinces.192

(F) **Signs**

Regulation of signs is essential to the maintenance of a building or heritage area, since outdoor advertising may have a significant impact upon appearance. Municipalities in Newfoundland and Nova Scotia can regulate all forms of signs.193 Again, precision is required — see, for example, Vancouver's Gastown Sign Guidelines.194

(G) **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 of "buildings" or "structures" and be regulated in the same manner. However, special provisions are usually made for fences.

Newfoundland municipalities can regulate the features of fences,195 and can require owners to fence any vacant lot abutting a street.196 In Nova Scotia, municipalities can regulate the building and maintenance of fences along public roadways and prescribe the material to be used in such fences.197

192. Newfoundland Municipalities Act, s. 168; City of St. John's Act ss. 378 (re-en. 1973, No. 16, s. 7), 402 (1) (c), 403 (1) (b); City of Corner Brook Act, s. 103; Nova Scotia Planning Act, s. 33 (2) (a) (vi). 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 has not been tested in Newfoundland or Nova Scotia.
193. Newfoundland Municipalities Act, s. 221; The City of St. John's Act s. 177 (e); City of Corner Brook Act s. 146 (1) (v). Nova Scotia Planning Act, s. 33 (2) (a) (viii)
194. Available from the Central Area Division of the Vancouver City Planning Department
195. Municipalities Act, s. 176 (a); City of St. John's Act, s. 171 (2); City of Corner Brook Act, s. 146 (1) (o)
196. Municipalities Act, s. 176 (a); City of St. John's Act, s. 171 (1)
197. Municipal Act, s. 191 (29); Towns Act, s. 160; Halifax City Charter s. 437 (1). The City of Sydney Act refers only to the control of wire fences for safety purposes (s.
(H) Maintenance

Maintenance is obviously essential if the quality of buildings and areas is to be preserved. In Newfoundland, as part of the development of appropriate controls to implement a plan, a municipality may request that it be given power to enforce maintenance and occupancy standards. It is the Minister’s practice to then introduce by regulation (with the Cabinet’s approval) certain standardized maintenance and occupancy controls in the community and delegate administration of the regulation to the council.

St. John’s is endowed with explicit powers to control the maintenance and occupancy of residential and commercial property. Municipalities in Nova Scotia are permitted to exercise regulatory powers to enforce maintenance. In the absence of any indication to the contrary, these powers apparently affect both the interiors of buildings and the appearance of their exteriors. There is also power to control “unsightly premises”.

Examples of draft by-laws providing for building maintenance standards are available from the Nova Scotia Department of Municipal Affairs.

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 undertaking costly renovations: “Provisions such as (typical maintenance and)

198. See Urban and Rural Planning Act, s. 71 (2)
199. Under s. 73
200. City of St. John’s Act, s. 403 (B) (en. 1973, c. 16, s. 10) with respect to residential property; s. 403 (c) (en. 1974, c. 14, s. 5) with respect to commercial property.
201. Municipal Act, s. 191 (95); Towns Act, s. 221 (77); Halifax City Charter, s. 431; Dartmouth City Charter, s. 147 (a). The first two provisions apply only with respect to residential buildings. As the Heritage Trust of Nova Scotia has pointed out, both these provisions and those relating to unsightly premises are concerned with minimum standards, while conservationists are interested in a “higher level of standard”. This perhaps explains s. 27(13) (d) of the Heritage Property Act which empowers Halifax to enact ordinances for “the regulation of the repair . . . of a heritage resource.”
202. Municipal Act, s. 204; Towns Act, s. 222 (2); Halifax City Charter, s. 363 (3) (a); Dartmouth City Charter, s. 152 (a); City of Sydney Act, s. 416 (1) (a). The province also has this power under the Unsightly Premises act, R.S.N.S. 1967, c. 321
203. For example, in a recent Ontario case, George Sebok Real Estate Ltd. 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.**204 Unlike certain other provinces,205 Newfoundland and Nova Scotia have no specific provision for the development of alternative standards especially for heritage buildings.

(I) Trees and Landscaping

Trees and landscaping can enhance a heritage site or area. Newfoundland municipalities can regulate the planting and protection of trees in streets and other public places,206 but unlike some counterparts elsewhere,207 have no control over private landscaping. Again, St. John’s is an exception.208

The power given to Nova Scotia municipalities to protect trees appears to extend to trees in public places only.209 The legislation does not mention other forms of greenery (shrubs, hedges, etc.).210 While there is no direct authority for the control of private landscaping, it may nevertheless be possible to exercise some control over landscaping either by making it a condition of

David E. Marlow v. The Corporation of the City of Woodstock, the Court of Appeal held that a by-law passed under s. 36 of the Ontario 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 orbit 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 only prove to be an incentive for the owner to demolish the building in question.

205. E.g., the Alberta Historical Resources Act, s. 37
206. The Municipalities Act, s. 176 (e); City of St. John’s Act, ss. 167-169; City of Corner Brook Act, s. 146 (1) (p)
207. See, e.g., Quebec Cities and Towns Act, art. 429 (36); New Brunswick Community Planning Act, s. 34 (3) (a) (vii), (xiv); Manitoba Planning Act, s. 121 (5)
208. City of St. John’s Act, s. 367 (2)
209. Municipal Act, s. 191 (49); see also Towns Act, s. 221 (41), Halifax City Charter, s. 354 (d); City of Sydney Act, s. 368 (55). S. 152 (g) of its charter gives Dartmouth the power to protect all elm trees in the city, both publicly and privately owned. A recent amendment to the Towns Act provides for the creation of a Tree Committee to plan street tree planting, to ensure that public trees are properly protected, and to “recommend and encourage” the planting and protection of trees on private property: ss. 173A-173F (en. 1977, c. 51, s. 15).
210. One exception is the City of Sydney Act: s. 368 (55).
development in certain areas, or, in a comprehensive development district, by requiring that it be included as a condition in a development agreement.

Examples of a model tree by-law are currently available from the Canadian Environmental Law Association.

(J) Interim Control

(i) 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. Some provincial heritage statutes anticipate such situations by providing for the issue of a "stop order", for a delay until an assessment of and report on the proposed changes are done, or for the ordering of whatever "protective measures" are considered necessary.

As indicated above, all Newfoundland municipalities now have the power to designate and protect heritage properties. The City of St. John's Act provides for the withholding of a demolition permit for any building for a period of up to 90 days. If the building is designated within that time, the permit stands refused; if not, the permit "may" be issued — presumably permission must be granted if the application meets other requirements. Other Newfoundland municipalities do not have this specific right to withhold permits pending designation; and it is not clear whether the courts would uphold a by-law which created a regulatory framework for interim controls. Such an approach to interim controls has, however, been upheld for new construction (as described later); consequently, it is possible that a comparable framework respecting demolition would be upheld.

211. Under s. 33(5) of the Planning Act a by-law could presumably specify certain landscaping requirements as a condition of the granting of development permission. Such requirements would have to be clear, reasonable and enforceable. For a case in which landscaping controls in a by-law were ruled invalid, see Re Mississauga Golf and Country Club Ltd.

212. 8 York Street, Toronto

213. See Alberta Historical Resources Act, s. 35(1)

214. See Alberta Historical Resources Act, s. 22

215. S. 367A(7)

216. S. 367 A (8)

217. This by-law would presumably be enacted under ss. 243 and 244 of the Municipalities Act
In Nova Scotia, the situation is less clear. Does the owner of a yet unregistered property, who has received no notice, acquire a vested right to a demolition permit as soon as he applies for it? Is there anything which a municipality can do to defeat this right and protect the property? Unlike counterparts elsewhere, the Heritage Property Act does not answer these questions. On the other hand, a Nova Scotia municipality is required to postpone all "development" that might be inconsistent with the proposed by-law or by-law amendment for a period of 120 days following the giving of notice of its intention to pass the new by-law. Whether this provision can be used to delay demolition will depend, of course, on the interpretation of "development".

(ii) Control of Construction

Under the terms of an interim development order, a Newfoundland municipality will have the power to control "development", including any construction, according to certain guidelines. As mentioned earlier, such orders apply pending the introduction (or amending) of a plan and permanent land use controls consistent with it.

Presumably such an order could also suspend or cancel any extant construction or demolition permit.

As mentioned above, Nova Scotia municipalities must delay issue of development permits for 120 days where zoning changes are pending that might affect the proposed development.

(K) Provincial Intervention

"In 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-law that have already been adopted where there has been a failure to do so." In Newfoundland, such power belongs to the Minister of Municipal Affairs and Housing under the Urban and Rural Planning Act.
Planning Act. If he is satisfied that a municipality needs a plan amendment, he can compel it to draft one; the case is similar for zoning controls. As well, the Minister can compel a municipality to implement or enforce its plan and even do so himself where it fails to take action. It would appear that the province's reluctance to be seen to be meddling in municipal affairs will restrict such intervention to cases where the public interest clearly demands it.

In Nova Scotia, the Minister of Municipal Affairs can compel a municipality to draft a plan; he can also require the municipality to implement its plan by appropriate zoning (and take action himself where it fails to do so). He does not appear to have the power to compel amendments to the plan and zoning, however.

(L) Variances

Even the most stringent land use controls will not necessarily cause hardship to owners of property for which the controls are inappropriate. In Newfoundland an "Appeal Board" created by the Minister under the Urban and Rural Planning Act is empowered to vary the application of controls imposed under the Act where they would cause "special and unnecessary hardship", so long as the granting of relief from strict compliance will not in its opinion "be unduly adverse to the public interest." The Board also hears appeals from decisions "resulting from the exercise of discretionary powers", as in the case of a municipality's refusal to permit a development project under an interim development order. In St. John's there is also a "Building Regulations Board of Appeals."

Power to grant variances from a Nova Scotia zoning by-law is much more limited than that in Newfoundland and other provinces. The municipal development officer can grant "minor variances" from setback and coverage requirements only. However, the

222. S. 131 (1)
223. S. 131 (2)
224. Planning Act, s. 12 (1)
225. S. 12 (5)
226. S. 129 (1) (a), (5)
227. Ss. 129 (1) (b), 13 (4)
228. City of St. John's Act, ss. 402, 403. The Board determines appeals "in respect of any building regulations or any by-laws of the City . . . and may cancel, or vary . . . any such restrictions." The Board's decision must be confirmed by resolution of Council: s. 402 (g). Presumably a building regulation or maintenance standard inappropriate to a particular older building could be varied by the Board.
229. Planning Act, s. 44 (1)
council can pass a resolution approving a particular development which would ordinarily not be permitted under a zoning by-law so long as there consistency with the plan.\textsuperscript{230}

(M) 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. The fear is, of course, that a municipality will not designate at all if it has to pay compensation for such designation.

In Newfoundland, apart from expropriation situations,\textsuperscript{231} an aggrieved owner may demand compensation under Section 132 of the \textit{Urban and Rural Planning Act}.\textsuperscript{232} This section, the only one of its kind in Canada, provides a recourse where, as the result of land use controls (in force pursuant to a municipal plan, Local Area Plan, Regional Plan, or Protected Road or Protected Area Order), land has been rendered "incapable of reasonably beneficial use."\textsuperscript{233}

The situation in St. John's is less clear. If the city refuses to allow demolition of a designated heritage building (or one within the designated Heritage Conservation Area), section 367A (7) denies

\textsuperscript{230} S. 33 (2) (b)
\textsuperscript{231} Expropriation of land for the purposes of the \textit{Urban and Rural Planning Act} is dealt with in Part IX of the Act (s. 78 \textit{et seq.}). The new Municipalities Act, City of St. John's Act and City of Corner Brook Act also contain expropriation provisions. While expropriation is not defined in these Acts, the acquisition of land is clearly involved: see, for example, the introductory words of s. 78 (1) of the \textit{Urban and Rural Planning Act}.

While designation is arguably the acquisition of an interest in real property by the public, in that the owner no longer has the right to alter or demolish the property without official permission, the majority of the rights, incidental to property ownership would appear to remain in the owner's hands. It is therefore hard to see how a court could equate designation with expropriation so as to entitle an owner to compensation.

\textsuperscript{232} The section derives from the English practice and is similar to s. 180 of the U.K.'s \textit{Town and Country Planning Act}, 1971.
\textsuperscript{233} S.132 (1). The owner can serve on the municipality or other authority a purchase notice requiring it to purchase his interest in the land. It is then up to the Minister: if satisfied that the claim has merit, he "shall" confirm the purchase notice and compensation is then payable "as if" the land had been expropriated: S. 132 (2). Alternatively, he may grant the development permission sought by the owner or such permission as will render the land capable of reasonably beneficial use by the carrying out of the development project: 132 (4), (5).
compensation in the case where loss or damage has been suffered by the refusal to issue a demolition permit. But the provision appears to apply only to situations in which designation is pending, i.e., where the demolition was applied for before the designation was in place, was withheld pending the enactment of the designating by-law, and ultimately refused as a result of the designation.

In Nova Scotia, the Heritage Property Act specifies that compensation is at the discretion of the Minister.\(^2\)\(^3\)\(^4\) The Planning Act provides that property is deemed not to be injuriously affected by reason of the adoption of a municipal development plan or the passing of a zoning by-law.\(^2\)\(^5\) This means that no compensation could be obtained unless the zoning is being used for improper purposes (such as a municipal attempt to reduce property value prior to an expropriation),\(^2\)\(^3\)\(^6\) or is otherwise unlawful.

In any case a real problem of financial loss resulting from designation may sometimes exist. Accordingly, St. John's has devised an ingenious scheme to cover any additional costs which might result from designation. Other techniques have also been suggested,\(^2\)\(^3\)\(^7\) including a moratorium on tax increases resulting from renovation.\(^2\)\(^3\)\(^8\)

Proposals have also been made to provide incentives through the federal Income Tax Act.\(^2\)\(^3\)\(^9\) These recommendations, currently under study, would assist the renovations of all investment property (for example, rental property, business property, etc.); they would also provide preferential tax treatment for the owners of designated historic property.\(^2\)\(^4\)\(^0\)

(N) Enforcement

(i) Inspection

In almost all Canadian provinces it is customary to give municipalities a right of entry into premises in order to ensure

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\(^2\)\(^3\)\(^4\). S. 24 (1) (d)
\(^2\)\(^3\)\(^5\). S. 42 (1). S. 11 similarly provides in the case of regional development plans.
\(^2\)\(^3\)\(^6\). An extensive discussion of such purposes is found in Rogers, op. cit., at 122-126.
\(^2\)\(^3\)\(^8\). See Heritage Fights Back, op. cit. at 151-5
\(^2\)\(^3\)\(^9\). S.C. 1970-71-72, c. 63 as amended
\(^2\)\(^4\)\(^0\). See "Current Tax Proposals Affecting Renovation", op. cit.
by-laws are being observed. "'It is well settled that without a statutory right of entry on property, it does not exist.'"\textsuperscript{241}

In Newfoundland, the right of municipalities to inspect with respect to matters governed by the \textit{Urban and Rural Planning Act} is clearly enunciated.\textsuperscript{242} A general power to enter upon premises to inspect any "works" which the municipality is empowered to undertake or control is found in the \textit{Municipalities Act}.\textsuperscript{243} St. John's is given the power to inspect dwellings for the purposes of ascertaining their "fitness for habitation".\textsuperscript{244} Also, since the city can appoint a "Building Inspector" to enforce zoning by-laws,\textsuperscript{245} presumably he has the power to inspect. Neither St. John's nor other municipalities have clear powers to inspect designated heritage sites or sites being considered for designation.

In Nova Scotia, municipal officials are given the right to inspect sites to ensure compliance with zoning by-laws.\textsuperscript{246} With respect to other by-laws, inspection powers also exist.\textsuperscript{247}

\textbf{(ii) Penalties}

As in the provincial context, a penalty may be one of three types. The first is the obligation to restore a site to its condition before the infraction occurred, or to require that the offender pay the cost where the authorities (in this case the municipality) undertake the restoration. In Newfoundland a judge can prescribe such a penalty for contravention of the \textit{Urban and Rural Planning Act} and any plan or regulation made under it.\textsuperscript{248}

St. John's has the power to compel compliance with its by-laws generally under the \textit{City of St. John's Act}.\textsuperscript{249} Like other municipalities it is given specific authority to order torn down or repaired at the owner's expense any structure which has been

\begin{itemize}
\item \textsuperscript{241} Rogers, \textit{op. cit.}, at 253
\item \textsuperscript{242} S. 133
\item \textsuperscript{243} S. 156. S. 154(4) of the \textit{City of Corner Brook Act} contains a similar provision; a right of entry for the purpose of carrying out any of the provisions of the Act is also given by s. 74.
\item \textsuperscript{244} \textit{City of St. John's Act}, s. 395 (1); see also s. 210 (2)
\item \textsuperscript{245} S. 402 (a)
\item \textsuperscript{246} \textit{Planning Act}, s. 58 (1)
\item \textsuperscript{247} \textit{Municipal Act}, s. 191 (93); \textit{Towns Act}, s. 221 (75); \textit{Halifax City Charter}, ss. 430, 431; \textit{Dartmouth City Charter}, ss. 152 (a), 178 (2) (o); \textit{City of Sydney Act}, s. 368 (43)
\item \textsuperscript{248} S. 134 (3)
\item \textsuperscript{249} Ss. 402 (f), 404 (1), (2)
\end{itemize}
illegally erected or altered. The new Municipalities Act gives municipalities explicit powers to order the removal of any structure built on designated property or the restoration of the exterior of designated buildings that have been illegally altered.

The Nova Scotia Heritage Property Act specifies that a municipality can apply for a court order to compel restoration of an illegally demolished building. The Planning Act also allow a municipality to get an order that an illegally erected structure be torn down at the owner’s expense. Disregard of maintenance by-laws or orders can be similarly dealt with by requiring the owner to pay for the repair or cleaning up of premises undertaken by the municipality.

Fines may be imposed for offences against Newfoundland’s Urban and Rural Planning Act and controls enacted pursuant to the Act: $200 is the maximum penalty. Infractions of other by-laws are punishable by a fine of up to $1,000 although in St. John’s and Corner Brook the maximum is only $100.

In Nova Scotia, offences against the Heritage Property Act face fines of $10,000 for individuals and $100,000 for corporations. Otherwise, Nova Scotia’s municipal legislation provides for a maximum fine of $250. In Halifax and Dartmouth, fines of up to $500 can be imposed. In contrast Sydney’s fines cannot exceed $50. Offences against the Planning Act are punishable by fines of

250. Municipalities Act, s. 210 (1); City of St. John’s Act, ss. 369 (1), 377; City of Corner Brook Act, s. 87 (1). See also Municipalities Act, ss. 248, 249, with respect to enforcement of anti-nuisance regulations.
251. Ss. 246, 274
252. Ss. 23 (1), 27 (15)
253. S. 57 (2) (b)
254. Municipal Act, s. 204 (4); Towns Act, s. 222 (4); Halifax City Charter, ss. 431 (b) (v), 438 (5), 439; Dartmouth City Charter, s. 182 (1); City of Sydney Act, ss. 368 (144), 416 (3)
255. S. 134 (1)
256. Municipalities Act, s. 443
257. City of St. John’s Act, s. 404 (1); City of Corner Brook Act, s. 83 (1). Corner Brook can, however, impose a greater penalty for specific offences: s. 83 (4).
258. S. 23
259. Municipal Act, s. 194 (1); Towns Act, s. 227 (1). In the case of violation of building regulations or standards the maximum fine is $1,000: s. 196 (1) and s. 228 (1) respectively.
260. Halifax City Charter, s. 578; Dartmouth City Charter, s. 130 (1). Failure to effect ordered repairs can result in fines as high as $2,000 under the Halifax Charter: s. 363 (4) (b).
261. City of Sydney Act, ss. 372, 416 (4)
up to $100. In all cases imprisonment can be ordered only where there has been failure to pay a fine.

Offenders against St. John's by-laws face imprisonment only in default of payment of a fine. Elsewhere in Newfoundland, both fine and imprisonment (of up to 90 days) may be imposed. Under the Urban and Rural Planning Act and Nōva Scotia’s Heritage Property Act and Planning Act imprisonment cannot be ordered except for non-payment of a fine.

(iii) Binding Authority

As mentioned earlier, 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.

As for the Newfoundland and Nova Scotia governments and their agencies, they do not appear to be bound by the provisions of a municipal plan. Neither are they bound by a municipality’s zoning regulations. However, the Heritage Property Act does bind the Crown; does that mean that a municipal by-law, enacted under the authority of the Act, is also binding? That prospect appears to be a distinct possibility until the courts rule otherwise.

Are municipalities bound by their own plans or by-laws? In the case of plans, municipal public works must respect the terms of the plan; similarly, land use regulations must be in strict compliance with the plan. As for by-laws and other regulations, it appears that a municipality will be bound by its own enactments; however, it can formally exempt itself from them.

262. S. 61 (1)
263. City of St. John’s Act, s. 404 (1)
264. Municipalities Act, s. 443; City of Corner Brook Act, s. 83 (1)
265. S. 134 (1)
266. In the absence of any statutory authority to the contrary, “municipal by-laws do not apply to the Crown: Rogers, op. cit., at 143. There is no “contrary authority” in the Newfoundland or Nova Scotia legislation
267. S. 25
268. The Urban and Rural Planning Act, s. 29; Planning Act, s. 19 (1)
269. The Urban and Rural Planning Act, s. 37(1); Planning Act, s. 34(3)
270. “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, op. cit., p. 144. Rogers bases his opinion on Dopp v. Kitchener (1928), 32 O.W.N. 275
4. THE PRIVATE LEVEL

(A) General
If a proprietor is willing to subject his property to control of 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 or covenant" it binds future owners as well as the present owner.

(B) Easements and Restrictive Covenants
(i) Contents
Easements and restrictive covenants are contractual agreements which prohibit the owner of the land from doing something on his land (called the "servient tenement").

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 conservationalists.

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.

271. 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.
(ii) 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.\textsuperscript{272}

Consequently, conservationalists 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 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)? 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."\textsuperscript{273} Consequently, a covenant to repair would not be binding upon future owners. The same principle applies to easements.\textsuperscript{274}

(iii) Statutory Reform

In order to circumvent the above-mentioned problems, Newfoundland’s \textit{Historic Objects, Sites and Records Act} empowers the Minister (of Tourism), municipalities, and heritage organizations approved by the Minister to enter into easements or covenants which will bind future owners, even if no other land is benefitted and even if the easement or covenant is positive in nature, i.e., involves expenditure of money.\textsuperscript{275}


For example, an easement of 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 \textit{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 \textit{Kelly v. Barret} (1924) 2 Ch. 379 at 404.

\textsuperscript{273} Megarry, \textit{op. cit.}, at 375

\textsuperscript{274} Megarry, \textit{op. cit.}, at 394

\textsuperscript{275} S. 20A (en. 1977, c. 80, s. 6). Registration against the title to the property
The Nova Scotia *Heritage Property Act* creates the same opportunity; however, one of the original parties must be either the Minister or a municipality.276

(iv) *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.277 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.

5. **PUBLIC PARTICIPATION**

(A) **General**

"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.

(B) **Organization of Conservation Groups**

(i) **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.

276. S. 18

Incorporation can be either provincial\textsuperscript{278} or federal;\textsuperscript{279} local groups usually choose to incorporate provincially. Heritage Canada can provide examples of the constitutions of similar groups.

(II) \textit{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.\textsuperscript{280}

(iii) \textit{Financial Support}

Fundraising is an inevitable necessity for conservation organizations.\textsuperscript{281} Funding for various enterprises related to

\begin{itemize}
\item[278.] In Newfoundland contact the Registrar of Companies, Department of Consumer Affairs and Environment, Confederation Building, St. John's. In Nova Scotia contact the Registrar of Companies, P.O. Box 1529, Halifax, N.S.
\item[279.] Contact: Department of Consumer & Corporate Affairs, Corporation Branch, 15th Floor, Place du Portage, Hull, Quebec
\item[280.] These rules are outlined in Revenue Canada's Information Circular No. 77-19. Contact: Revenue Canada, 400 Cumberland Street, Ottawa, Ontario, K1A 0X5
\item[281.] 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.
\item[281.] A useful introduction to the subject is \textit{Shortcuts to Survival}, by Joyce Young; \textit{Shortcuts}, Toronto, 1978.
\end{itemize}
conservation can be found at the federal and provincial levels, as well as in the private sector.

282. 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 Historical Sites and Monuments Act. Contact: Historic Sites and Monuments Board of Canada, Department of Indian Affairs and, Northern Development, Ottawa, Ontario, K1A 0H4
As mentioned above, the Canadian Register of Historic Property (sponsored by Parks Canada) would provide funds to enable each province to establish a Provincial Registry and would make grants to private owners to assist with the restoration and preservation of registered buildings.
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 8950, St. John's, Newfoundland, A1B 3R9, or at, 1660 Hollis Street, Halifax, N.S., B3J 1V7.
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 Street, Ottawa, Ontario, KIN 7Z2
283. In Nova Scotia The Emergency Home Repair Program makes loans of up to $8,000 available, with up to $3,750 forgiveable, depending on the applicant's income. For further information, contact: The Nova Scotia Housing Commission, P.O. Box 815, Dartmouth, N.S., B2Y 3Z3
Newfoundland makes grants for repairs undertaken by welfare recipients. Contact: Newfoundland Labrador Housing Corporation, P.O. Box 220, St. John's, Newfoundland, A1C 5J5
The Newfoundland and Nova Scotia Museums have limited budgets to support certain special heritage projects. Contact: Historic Resources Branch, Newfoundland Museum, Dartmouth Street, St. John's, Newfoundland, or: Director of Cultural Services, Nova Scotia Museum, 1747 Summer Street, Halifax, N.S.
Municipalities can introduce tax abatements and other incentives to encourage heritage preservation (e.g., under s. 205 of the Halifax City Charter). For details, contact the local municipality.
284. There are some 35,000 registered charitable organizations in Canada; some can be pursued 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 cooperative 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.
(C) Powers of Citizens' Groups

(i) 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 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 heritage legislation of Newfoundland such decision-making power regarding designation as exists is in the hands of the Cabinet and municipal officials. Similarly, there is no formalized system of continuous citizen input into the planning process, such as the right of compulsory referendum in Quebec municipalities.\textsuperscript{285} 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.

(ii) Access to information

Information from various government levels can be important for conservationalists, particularly in matters pertaining to public works. In certain jurisdictions, such as the United States, all government information is \textit{deemed public until declared confidential}; it cannot be so classified without valid reasons. Otherwise, the courts can invoke the \textit{Freedom of Information Act}\textsuperscript{286} to compel the government to disclose this information.

In Canada, things are at present quite different. Under the \textit{Official Secrets Act}\textsuperscript{287} (in conjunction with the civil service oaths), all governmental information is \textit{secret until its publication is authorized}. This authorization is at the exclusive discretion of the government and citizens have no means of compelling the

Further information on such projects is usually available from the local representative of the Norwich Union Insurance Company.

285. \textit{Quebec Cities and Towns Act}, art. 426 (1c). This right can be invoked (assuming a sufficient number of citizens demanded it) on any zoning amendment.

286. 1966 P.L. 89-554, 80 Stat. 383 as amended

287. R.S.C. 1970, c. 0-3
government to provide information on the protection of heritage or any other project. Corrective legislation is currently before Parliament.

At the provincial level, Nova Scotia’s *Freedom of Information Act*\(^{288}\) was the first provincial legislation of its kind. The Act has, however, come under strong criticism because of the exceptions it makes to the freedom-of-information principle and the nature of the appeal procedures where there has been a withholding of information.\(^{289}\)

Newfoundland has no freedom of information legislation; however, a Bill is expected before the Legislature during the current session.

(iii) *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* 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;\(^{290}\) 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*.\(^{291}\) Although “political action” is very difficult to define,\(^{292}\) any charitable organization which undertakes to promote heritage conservation must do so with caution.\(^{293}\)

(iv) *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

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288. S.N.S. 1977, c. 10
289. John McCamus, a professor at Osgoode Hall Law School in Toronto, and research director for the Ontario Government’s Commission on Freedom of Information and Individual Privacy, was quoted as telling a Canadian Bar Association panel discussion on freedom of information in Calgary in August, 1979 that the Nova Scotia Act was a “complete disaster” for the reasons given *infra* (reported in the *Toronto Globe and Mail*, August 28, 1979).
290. Section 210 (1) (cc)
291. *Revenue Canada Information Circular 77-14*, June 20, 1977, s. 6(c)
292. 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.
293. At the time of writing, litigation on this issue was pending between the Minister of National Revenue and the Manitoba Foundation for Canadian Studies, over deregistration on the ground of alleged “political” contents in the foundation’s publication *Canadian Dimension*. 
destruction of heritage, can the community sue? Alternatively, can a citizens’ group do so on behalf of the community? This question underlies the legal principle of local standi: this 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.

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, then except for certain rare instances he be denied access to the courts.294

In some exceptional cases, it is possible for the public to use “private prosecutions”: see Environmental Management and Public Participation.295

There are also cases where citizens may take legal action in their capacity of municipal ratepayers.296 Jurisprudence on this point, however, remains somewhat unsettled.

6. 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.

These questions are likely to grow in importance. In Nova Scotia, the new legislation which the government has enacted will probably give rise to increased public discussion of the role of “heritage” in

the planning process. In Newfoundland, much of that discussion has already taken place, and has resulted in measures such as the designation of the capital's Heritage Conservation Area; but pressure is being exerted from certain quarters calling for a reversal, on the pretext that offshore oil should lead the city to imitate the downtown image of a place such as Calgary. This prospect has already led to indignant denunciations from many Newfoundlanders.

A further factor to consider is the continuing importance of tourism to the economies of both provinces. A location such as Peggy’s Cove is approaching the saturation point; but there are numerous other coastal communities which would welcome a comprehensive heritage plan which would help put them into the same limelight. These various factors, in conjunction with the noticeable growth of active and vocal “heritage groups” throughout both provinces, is likely to lead to increasing efforts for the entrenchment of heritage conservation in the planning process.