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Lorne Giroux

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Résumé de l'article

Cet article étudie l'évolution récente du rôle joué par la Cour supérieure pour assurer la protection des droits individuels dans le secteur du droit de l'aménagement et celui du droit municipal. L'étude porte sur deux champs d'intervention publique sur les droits individuels, en particulier le droit de propriété, et illustre les modes divers d'intervention utilisés par la Cour supérieure dans son rôle de surveillance.

D'une part, la *Loi sur la protection du territoire agricole* sert à illustrer un modèle d'aménagement sectoriel fondé sur l'usage de la discrétion administrative comme méthode de protection. L'intervention des tribunaux se révèle sous trois aspects. D'abord la Cour supérieure se préoccupe d'imposer un minimum de discipline aux procédures devant la Commission de protection du territoire agricole, surtout dans les cas où il peut en résulter des injustices. Ensuite, le droit d'accès aux tribunaux ordinaires est protégé par la Cour grâce en particulier à une interprétation restrictive de la juridiction de la Commission. Enfin, le droit de propriété lui-même est protégé par la Cour supérieure qui restreint les pouvoirs d'intervention de la Commission mais favorise une interprétation libérale des droits acquis.

A l'opposé, les interventions des collectivités locales en matière d'aménagement et d'urbanisme sont fondées sur le pouvoir réglementaire plutôt que sur la discrétion administrative. Même si le contrôle judiciaire sur le pouvoir réglementaire est un domaine déjà riche de tradition au Canada et au Québec, la jurisprudence récente tout en rappelant des principes déjà connus illustre également de nouvelles tendances. En effet, alors que les tribunaux continuent à préserver l'élément de certitude et de sécurité que le règlement fournit aux citoyens, ils sont prêts à protéger les citoyens contre les interventions publiques abusives et ils ont à cette fin revitalisé le critère de la rationalité comme mode de contrôle du pouvoir réglementaire. De plus, au besoin, ils vont être prêts à intervenir dans l'allocation même des usages et des affectations du sol lorsqu'ils doivent se prononcer sur des questions de discrimination et d'intérêt public.

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Property Rights, Municipal Corporations and Judicial Review

Lorne GIROUX *

Cet article étudie l'évolution récente du rôle joué par la Cour supérieure pour assurer la protection des droits individuels dans le secteur du droit de l'aménagement et celui du droit municipal. L'étude porte sur deux champs d'intervention publique sur les droits individuels, en particulier le droit de propriété, et illustre les modes divers d'intervention utilisés par la Cour supérieure dans son rôle de surveillance.

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Introduction

While municipal law has always been a traditional area of judicial review by the Quebec courts, the past fifteen years have witnessed a dramatic increase in the scope of public intervention over private property rights resulting from the unprecedented development of planning law. Not only have local planning powers been increased and strenghtened but recent statutory trends have been oriented towards specific and single purpose legislation setting up administrative authorities with wide discretionary powers to deal with a sectorial planning problem such as environmental protection [1], the preservation of cultural property [2] and agricultural land [3] and the preservation of housing stock [4].

Parallel with these legislative developments one can notice a significant increase in planning litigation and the creation of a new planning case law by the Quebec courts. An overview of the rights and values protected by the

1. *Environment Quality Act*, R.S.Q., ch. Q-2.
2. *Cultural Property Act*, R.S.Q., ch. B-4.
3. *An Act to Preserve Agricultural Land*, R.S.Q., ch. P-41.1.
4. *An Act Respecting the Régie du Logement*, R.S.Q., ch. R-8.1.

Superior Court in the field of planning and municipal law in Quebec would reveal that the courts are still concerned with the protection of property rights but that they will also intervene to prevent undue invasions of privacy, abuse of discretion and unwarranted administrative harassment. Furthermore, even if the protection against the taking of property without compensation is not entrenched in the *Constitution Act* of 1982[5] as in the United States[6], the Courts have been very efficient in safeguarding this principle.

As we shall see, some of the protective measures given by the Courts are procedural in character. This is especially the case when they are involved with due process issues and when they are requested to discipline the procedures of administrative agencies exercising powers of decision over private property. In other cases, the courts will tend to guarantee access to judicial review by restrictively interpreting administrative powers and jurisdiction. In some instances, they will use their discretion to sanction undue delays by local or other planning authorities in enforcing statutes or by-laws.

But the courts will also get involved in substantive issues especially when exercising their supervisory powers over subordinate legislation. The concept of *ultra-vires* has been expanded in recent years so as to extend to new areas of judicial control. The Courts have always been very alert to prevent sub-delegation of regulatory powers and to prohibit attempts to transform powers to enact by-laws into administrative discretion. Lately, new life has been brought to the tests of unreasonableness and uncertainty as applied to the validity of planning regulations and these tests are dealing with substantive questions. Other substantive issues tackled by the Courts are those of public interest and the very important question of acquired rights which bring the courts to declare private properties or uses immune from planning policies embodied in by-laws.

Such values and the means of protecting them can best be illustrated in different areas of municipal and planning law since there is a wide diversity of planning regimes and authorities having jurisdiction over private property in Quebec.

Even if municipal corporations have a general jurisdiction over local matters, the last years have witnessed a proliferation of single purpose administrative authorities entrusted with powers to deal with a specific planning problem such as agricultural land protection or cultural property protection. These provincial planning powers and authorities have not only eroded the jurisdiction of local governments but they also have been

5. *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, ch. 11 which came into force on April 17, 1982.
6. *Constitution of the United States*, Amendments, Article V.

established and based on the use of administrative discretion as their principal planning tool while local authorities land use control powers are traditionaly regulatory and not discretionary in nature. Therefore, the problems faced by the Courts are very often different from one regime to the other.

Our examination will focus on two main areas. Agricultural land protection will be the first subject of our study. Enacted at the end of 1978, the *Agricultural Land Protection Act*[7] has had a very important impact on Quebec planning law both because of its scope and of the powers given to the commission then created. After outlining the Act we will try to identify the different areas and trends of judicial intervention. A second area of examination will be judicial control over local governments with particular focus on the supervisory role of the Courts over the exercise of municipal planning powers.

1. Agricultural land protection

In order to be able to illustrate the role and attitude taken so far by the Courts since the adoption of the *Act to Preserve Agricultural Land*[8] it is necessary to give an outline of the statutory regime that it established.

1.1. An outline of the *Act to Preserve Agricultural Land*

1.1.1. The Commission de protection du territoire agricole du Québec

Central in the new statute is the establishment of a new agency, the Commission de protection du territoire agricole du Quebec whose single function is to secure the preservation of the agricultural land of Quebec[9]. For that purpose, the Commission is empowered to decide an application for authorization made pursuant to the Act, to issue permits when they are required, to describe with the municipal corporation the permanent agricultural zone of a municipality, to give notices or advice on matters referred to it by the Minister of agriculture and to supervise the administration of the Act.

At the time of writing seven members sit on the Commission although the Act allows for a maximum of twelve. They are appointed by the provincial government for a term not exceeding five years[10]. Three members

7. *Supra*, note 3.
8. *Supra*, note 3.
9. Sect. 3.
10. Section 4.

are a quorum of the Commission but the bulk of the work is done by divisions of at least two members one of whom is the President or one of the three vice-presidents. All matters submitted to the Commission can be dealt with in divisions except when it is requested to give an opinion or when the Commission sits in review of one of its decisions. The decision of a division must be unanimous or the matter is referred to the Commission where the president enjoys a casting vote in case of a tie-vote [11].

The Commission is empowered to make the investigations necessary for the exercise of its functions and can also hire investigators for that purpose. The members of the Commission are vested with the powers and immunities of commissioners appointed under the *Act Respecting Public Inquiry Commissions* [12]. These include the powers to hold a public inquiry, summon witnesses, request the production of documents and take depositions under oath.

1.1.2. Statutory restrictions and powers of the Commission

For land to be subjected to the provisions of the *Act to Preserve Agricultural Land*, it must be specially designated as such. This designation is done in three stages. The Government first decrees a designated agricultural region out of which the Minister of Agriculture prepares a provisional plan identifying a reserved area for each municipality included in a designated agricultural region. After negociations between the Commission de protection du territoire agricole and each municipality, the Commission then submits to the Government, for approval, a plan for an agricultural zone in the municipality which is then approved by governmental decree [13]. At the time of writing in almost all of the more than 1 500 municipalities subject to the Act the agricultural zone has been determined.

For land that is included in a reserved area or in an agricultural zone, the statutory scheme to preserve its agricultural potential rests with the requirement that a number of operations over such land are prohibited without the authorization of the Commission de protection du territoire agricole du Quebec. In other words, rather than an absolute prohibition the statutory scheme is based on the granting of a permission such as is the case in the British planning system. While the Commission can decide that land be altogether excluded from the agricultural zone [14] in which case the land

11. Sections 6 and 7.
12. R.S.Q., ch. C-37.
13. *Agriculture Land Protection Act, supra*, note 3, sections 22–25, 34–38 and 47–52.
14. Sections 58, 62, 65, 67–69.

ceases to be subject to the statutory restrictions, in most instances requests made to the Commission are for individual authorizations to conduct some controlled operation on land included in a reserved area or in an agricultural zone.

The basic restriction imposed by the Act is that no person may use a lot situated in a reserved area or an agricultural zone for a use other than agriculture without the authorization of the Commission [15]. « Agriculture » under the Act means the cultivation of the soil and plants, leaving land uncropped or using it for forestry purposes, or the raising of livestock, and, for these purposes, the making, construction or utilization of works, structures or buildings, except residences [16]. Protection is thus extended not only to land already under cultivation but also to any land with agricultural potential even if not in actual production since the fact of leaving it uncropped is deemed to be an agricultural use. Some specific uses are also the subject of special protection by the Act. Thus, section 27 states that no person may, except with the authorization of the commission, use a sugar bush in a protected area for any other purpose, nor fell maple trees therein, except for the purposes of selection or thinning within the framework of forest management. Thus, while the production of maple syrup or maple sugar does not require permission, the felling of trees for lumber in a sugar bush would require the authorization of the Commission. Topsoil conservation is the object of a special division in the Act [17] which requires the issuing of an operating permit for the removal of topsoil for the purpose of sale from a lot protected by the Act or for the expansion of the area of such an operation already in progress [18]. The mere removal of lawn turf constitutes the removal of topsoil [19]. Among other conditions attached to the permit, the Commission may require that the applicant restore the land to its former condition as agricultural land before the date of expiry of the permit and that security be furnished [20].

It is not only the use of land that is controlled under the Act but, in order to limit the parcelling out of farmland, permission is required from the Commission to subdivide a lot and even to sell part of an estate. The rationale behind such drastic measures is that they are necessary to insure

15. Sections 26, 39 and 54.
16. Section 1 (1°).
17. Division V, sections 70–79.
18. Section 70. A person conducting such an operation on the date of the coming into force of a designated agricultural region decree had six months to obtain an operating permit from the Commission : Section 71.
19. Section 72.
20. Section 74.

that agricultural estates are not dismembered to the point where agricultural exploitation ceases to be economical.

Thus section 28 states that no person may, except with the authorization of the Commission, effect the subdivision of a lot protected under the Act. The concept of subdivision includes any parcelling out of a lot and encompasses the registration of a real servitude (easement) affecting part of that lot[21]. Section 29 goes further. This time the owner of an estate composed of a number of lots protected under the Act may not, except with the authorization of the Commission, effect the alienation[22] of a lot while retaining a right of alienation on a contiguous lot or on a lot that would otherwise be contiguous if it were not separated from the first by a public road, a railway, a public utility right of way or the surface of a lot in respect of which there exists an acquired or vested right. Under sections 28 and 29 an owner can thus alienate his whole lot or all his lots without authorization only if there is no parcelling out of one lot or if he does not retain a right of alienation on a contiguous lot.

The essential feature of the *Agricultural Protection Act* is that it rests on the notion of administrative discretion. The Commission de protection du territoire agricole decides each request for authorization on its merits by applying a set of general criteria set out in the Act. The first and most important of these and one which in itself encompasses all others is given in section 3 specifying that the function of the Commission is to secure the preservation of the agricultural land of Quebec. All other criteria mentioned in the Act are always seen by the Commission in the light of its essential and only mandate to preserve agricultural land.

Section 12 contains a list of criteria to be taken into consideration by the Commission in rendering a decision or giving its advice. It is to be noted that there is no order of priorities in the statutory enumeration nor is there any obligation by the Commission to make a decision on one or more criteria with respect to a specific request. Thus the very large discretion left with the Commission :

> « La discrétion octroyée à la Commission est donc encadrée par certains paramètres. Il ne faut pas cependant se faire d'illusions. En pratique, il sera extrêmement difficile, sinon quasi impossible, de contrôler l'usage que fait la Commission de sa discrétion et ce, d'autant plus que le fardeau de la preuve repose sur l'administré et que l'institution ne remplit pas toujours de façon adéquate son obligation de motiver. Si le législateur avait le choix entre la souplesse réclamée par l'administration et la protection due aux droits des administrés, il nous paraît avoir choisi sans équivoque la première alternative.

21. Section 1 (10°).
22. For the definition of « alienation », see section 1 (3).

En effet non seulement ces facteurs sont flous et imprécis mais leur interprétation est laissée à la discrétion de la Commission. De plus, il n'existe entre eux aucune pondération, aucune hiérarchie : il sera alors facile à la Commission de privilégier l'un ou l'autre à sa convenance selon les circonstances des différents dossiers »[23].

The biophysical conditions of the soil and of the environment, the possible uses of the lot for agricultural purposes and the economic consequences thereof relate to the physical conditions of the soil as well as to the specific conditions of the lot involved in the application in terms of location for example. The repercussions that the granting of the application would have on the preservation of agricultural land in the municipality and in the region and on the homogeneity of the farming community and farming operations have led the Commission to evaluate the impact of requests according to their long term consequences and have been used as criteria to refuse applications that it felt detrimental because they would bring urban pressures on farming communities even if the specific area involved in the application for a residential use for instance had no agricultural value[24].

When the request is in respect of a lot which is situated in an agricultural zone, two other criteria may be examined by the Commission in considering an application for a use other than agriculture, subdivision, alienation, inclusion or exclusion. Those new criteria are the compatibility of the application with the use of the neighbouring lots and the consequences a refusal would have for the applicant but always « taking into account the criteria mentioned in section 12 »[25].

The Commission can attach to a decision on an application such conditions as it considers appropriate[26]. This power has been used extensively by the Commission to minimize the negative impact of an authorized operation on agriculture, to identify specific parcels of land affected by a decision or to insure that a lot be restored to its former condition.

Subject to the right given the Commission to review its own decisions, the decisions of the Commissions on applications for authorizations or for exclusion or inclusion are final and without appeal[27].

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23. J.M. LAVOIE et M. POIRIER, « La Loi sur la protection du territoire agricole et le droit public », in M. Poirier, éd., *Droit québécois de l'aménagement du territoire*, Sherbrooke, Éditions Revue de Droit Université de Sherbrooke, 1983, 195, at p. 273.
24. J. GASCON, *Analyse des décisions de la Commission de protection du territoire agricole; les critères de décision*, Unpublished essay, Programme de maîtrise en aménagement du territoire et développement régional, Université Laval, août 1980, pp. 8–10.
25. Section 62.
26. Sections 45 and 62.
27. Sections 44 and 64.

1.1.3. Privileges and acquired rights

As already noted, a residential use is excluded from the definition of agriculture in the Act[28] and would thus require an authorization of the Commission before it can be established on a lot protected under the Act. To give a temporary measure of relief to owners of property who had acquired a piece of land before the Act came into force and to farmers who want to provide a residence for their children or employees, special provisions are made in the Act.

Section 31 allows the owner of a vacant lot to erect one residence on such lot without the authorization of the Commission provided his land title is registered before the date his lot became subject to the Act and provided he does so before December 31, 1986 and uses for that purpose an area not exceeding one half-hectare. Furthermore in a reserved area or in an agricultural zone, a natural person whose principal occupation is agriculture may, without the authorization of the Commission, erect on his lot a residence for himself, for his child or for his employee. In the case of an agricultural corporation or partnership the same right can also be exercised for a shareholder or a member whose principal occupation is agriculture[29].

A very important Division IX of the Act is devoted to acquired rights. Its importance stems from the fact that a lot protected by vested or acquired rights can be used for a purpose other than agriculture, subdivided and alienated without the authorization of the Commission.

Thus, according to section 101 a person may, without the authorization of the Commission, alienate, subdivide and use for a purpose other than agriculture a lot situated in a reserved area or in an agricultural zone to the extent that it was used or was already under a permit authorizing its use for a purpose other than agriculture when the provisions of the Act requiring the authorization of the Commission were made applicable to that lot.

If the acquired right does not cover the whole of the lot, that part of the surface of the lot on which it exists can be enlarged to a half-hectare if the use for a purpose other than agriculture or a permit for such a purpose was residential on the relevant date for that lot. It can be enlarged to one hectare if its use or its authorized use under the permit was for commercial, industrial or institutional purposes[30]. The interruption or abandonment of the use other than agriculture or the change to another use other than agriculture does not extinguish an acquired right under the *Act to Preserve*

28. Section 1 (1°).
29. Section 40.
30. Section 103.

Agricultural Land. It is however extinguished if the area over which it exists is left uncropped for over one year from the time when the provisions of the Act requiring the authorization of the Commission were made applicable to that lot [31].

Finally, section 29 provides that the surface of a lot in respect of which an acquired right is recognized is not deemed contiguous which means that such lot or a contiguous lot belonging to the same owner can thus be alienated without the authorization of the Commission while retaining a right of alienation on the other one. However, according to the same section, if two lots belonging to the same owner are separated by a lot on which acquired rights are recognized, they are not deemed contiguous to such lot but they are deemed contiguous to one another so requiring the authorization of the Commission before one of them is alienated while a right of alienation is retained on the other one.

1.1.4. Enforcement

To ensure enforcement of the Act a monitoring system is established whereby no municipal building permit can be issued nor can subdivision plans be approved unless the application be accompanied with a certificate of authorization from the Commission or a declaration by the applicant that no authorization is required, in the case of an operation allowed by sections 31 or 40 for example, or when the owner has acquired rights. If the application for a municipal permit is accompanied by a declaration that no authorization is required from the Commission, the applicant must also furnish proof that a copy of such declaration has been transmitted to the Commission [32]. This enables the Commission to inquire about the true factual situation.

Should the Commission, through its investigators, become aware that there is a contravention to a provision of the Act or the conditions of an order or permit, it may issue an order enjoining that person, as the case may be, to effect no subdivision or work on the lot contemplated, to cease the contravention, to demolish the works already executed or to restore the lot to its former condition. The order is served on the person contemplated and a copy thereof is sent to the municipal corporation in whose territory the contravention is committed [33]. If there is no compliance with this order of the Commission, the Attorney-General, the Commission itself or the municipal corporation where the lot is situated, may, by motion, obtain from the

31. Section 102.
32. Sections 32, 39 and 56.
33. Section 14.

Superior Court an order enjoining that person to comply with the order or even enjoining that work be done at the expense of the person subject to it [34].

Subdivision and alienation made in violation of sections 28 and 29 of the Act may be annulled by the Superior Court on the application of any interested person, including the Attorney-General, the Commission or the municipal corporation where the lot is situated. The Court may also order the cancellation of all rights, privileges and hypothecs (mortgages) created or resulting from any deed in violation of the prohibition of the Act as to use, subdivision, alienation and the removal of topsoil for the purpose of sale. The judgment declaring the nullity of a deed may also order that the lot be restored to its former condition at the expense of one or the other parties to the deed. If a person does not comply with the judgment, the Commission may have the necessary work done and upon registration of a notice against the lot the Government is entitled to a privilege (lien) against the lot for work done, expenses and interest [35].

Finally the penal provisions for enforcement are set out in sections 87 to 94. Proceedings relating to offences are instituted in accordance with the *Summary Conviction Act* [36] and stiff fines can be imposed.

1.2. The role played by the Superior Court

There is no doubt that the impact of the *Act to Preserve Agricultural Land* has been very important especially around the main urban centers of the Province where it has had the effect of stopping urban sprawl and the destructuration of agricultural land. With respect to that goal the Act has been an unqualified success although there have been reservations about its usefulness in other outlying regions where agriculture as an economic activity is marginally viable at best [37].

On the other hand, the effectiveness of this piece of legislation is not the only concern for the lawyer. The means used to attain the end must also be evaluated in order to make a realistic assessment of the statute and the policies that are embodied in it. Of special relevance to the lawyer is the protection of individual rights. In the *Act to Preserve Agricultural Land*, there is no right of appeal to either an administrative tribunal or to the courts from

34. Section 85.
35. Sections 82–84.
36. R.S.Q., ch. P-15.
37. B. VACHON, *La loi de la protection du territoire agricole (90) et le développement de l'espace rural dans les régions périphériques : le cas de l'est du Québec*, Conférence prononcée au Congrès annuel de la société québécoise de Sciences politiques, A.C.F.A.S., Sherbrooke, 13 mai 1981.

a decision of the Commission. The Commission itself may, for cause, review or revoke any decision or order after giving any person concerned the opportunity to make representations. Where a decision or an order whose review is applied for was not rendered after the holding of a public hearing, the Act requires the Commission to hold a public hearing in review if an interested party so requests. In its decisions the Commission de protection du territoire agricole has made it clear that such a power of review is not an appeal and will only be used when new facts or evidence are submitted or when one can establish that the original decision is affected by an error of law such as to cause an injustice [38]. This situation is in sharp contrast to what observers of the British Planning system and of other regimes based on administrative discretion have pointed out. They have noted that the establishment of such a system is accompanied by a number of guarantees including the right to appeal [39]. In England furthermore it appears that a statutory right of appeal to the courts on questions of law or jurisdiction has had the effect of disciplining adjudication processes without impairing the powers of administrative authorities over substantive matters [40]. Thus only the traditional supervisory power of the Superior Court is left as a protection against abuses from the Commission and even that power is limited both by the existence of the privative clause of section 17 and by the extent of the discretion granted to the Commission.

But even granted these difficulties, the courts, when called upon to exercise their supervisory powers, are becoming increasingly active in the protection of individual rights including property rights as against encroachments in the name of agricultural land preservation.

1.2.1. Disciplining the procedures before the Commission

One of the main areas of concern for the Superior Court has been the procedures and the manner of exercise of its powers by the Commission.

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38. See: L.A. CORMIER et V. SYLVESTRE, *Loi sur la protection du territoire agricole. Commentaires, décisions et jugements*, Montréal, Wilson & Lafleur, 1984, 173; J.M. LAVOIE et M. POIRIER, *supra*, note 23, pp. 261-264.
39. P. KENNIFF, « Le contrôle public de l'utilisation du sol et des ressources en droit québécois », (1976) 17 *Cahiers de Droit*, 85, 155.
40. M. PURDUE, « The Respective Jurisdiction of the Courts and the Secretary of State for the Environment in Controlling the Exercise of Development Control Functions in the English Planning System », in *Aspects of Anglo-Canadian and Quebec Administrative Law*, Travaux du laboratoire de recherche sur la justice administrative, Québec, Faculté de droit, Université Laval, March 1979, p. 362, 373-382.
41. *Quebec Code of Civil Procedure*, art. 846.

Thus the Court has authorized the issuance of a writ of evocation[41] against the Commission for refusal of giving the applicant a public hearing as required by section 44. The Court decided that the Commission was in breach of the *audi alteram partem* rule and had therefore lost the protection given by the privative clause of section 17[42]. Section 44 applies when the application is in respect with a lot situated in a reserved area. Once the agricultural zone has been decreed for a municipality the application is first submitted to the municipal corporation for a recommendation and then transmitted to the Commission. In such a case section 60 does not specifically require the Commission to hold a public hearing and there has yet to be a decision on whether, should an applicant so request, the Commission could refuse to give a hearing. It has however been submitted that because of section 23 of the Quebec *Charter of Rights and Freedoms*[43] such a refusal by the Commission would be equivalent to an excess of jurisdiction[44].

The exercise by the Commission of the power to review and revoke its own decisions or orders given by section 14 has been litigated in the courts especially since there is no right to appeal its decisions. In practice, it very often occurs that one of the members of the Commission who sat for the decision rendered on the original application for authorization is also sitting on the review panel[45]. As of now there have been four instances where the Superior Court has been requested to quash a decision of the Commission on that ground. In *Gavard* c. *C.P.T.A.Q.*[46] justice Landry decided that such a practice did not warrant the issuance of a writ of evocation against the Commission since the power to review was to be distinguished from an appeal and since there was nothing in section 18 to infer that Parliament wanted to exclude from a review panel any member of the Commission[47].

But in three other instances[48] the Superior Court took a more liberal approach emphasizing the quasi-judicial functions of the Commission and

42. *Benoit* c. *C.P.T.A.Q.*, C.S. Trois-Rivières, nº 400-05-000599-812, Nov. 30, 1981, Lacoursière J. reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, pp. 557–559.
43. R.S.Q., ch. C-12.
44. J.M. LAVOIE et M. POIRIER, *supra*, note 23, p. 251.
45. As a general rule, the Commission will sit in divisions composed of two members but a quorum of three members is needed when the Commission is sitting to review a decision. Sections 6 and 7.
46. C.S. Hull, nº 500-05-000594-831, July 4, 1983, Landry J., J.E. 83–741, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, pp. 223-224.
47. The Court relied on *Commission des relations de travail du Québec* c. *Société d'administration et de fiducie*, [1971] C.A. 489.
48. *Les Équipements Mailloux Inc.* c. *C.P.T.A.Q.*, [1983] C.S. 26, an appeal from this decision was quashed by the Court of Appeal on January 13, 1984 on the ground that it was without object following a desistment by the applicant before the Commission; *Robert* c.

the wide scope of the power of review which enables an applicant to submit representations and even request a hearing. In those cases, the judges expressed the view that such a situation reveals a reasonable apprehension of bias and can only be permitted when Parliament expresses such an intention which was not the case in the *Act to Preserve Agricultural Land.*

> « La Loi sur la protection du territoire agricole (sanctionnée le 22 décembre 78, avec effets rétroactifs au 9 novembre 78) n'autorise pas, dans ses termes, un cumul des fonctions à l'égard de la procédure en deux étapes qu'elle prévoit à l'égard de l'audition sur une demande et la révision de la décision prononcée sur icelle.
>
> Même si elle le prévoyait, pareille disposition autorisant un certain chevauchement ne devrait être appliquée que le moins souvent possible, tout organisme administratif exerçant des pouvoirs judiciaires ou quasi judiciaires ayant le devoir, non seulement d'être scrupuleusement équitable envers le justiciable, mais à la fois d'éloigner toute probabilité raisonnable de parti pris ou de préjugé.
>
> En l'espèce, l'un des commissaires a participé aux auditions des deux étapes prévues, a siégé aux deux étapes prévues et a signé les deux ordonnances, la seconde confirmant la première. En l'occurrence l'existence d'une crainte raisonnable justifiait, dans l'intérêt de la bonne administration de la justice, que le même commissaire évite de prendre part aux deux décisions de sorte que l'impartialité de la Commission ne puisse être mise en doute »[49]

A good example of the attitude of the Commission towards the courts and individual rights is the fact that the Commission relies on the *Gavard* case and the fact that the other cases are under appeal to justify maintaining its practice of letting members to sit in review of their decisions[50].

The power to issue cease and desist orders given the Commission by section 14 of the Act has given rise to situations which prompted the Superior Court to intervene in order to protect the rights of individuals.

In a very recent instance[51] an electronics technician had requested from the Commission an authorization under section 26 to erect a residence on a recently acquired tract of land. On its application form he had stated that he was a farmer explaining in a letter annexed to its application that, although

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C.P.T.A.Q., C.S.M., nº 500-05-008664-839, August 3, 1983, Barbeau J. reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 217-219 (on appeal); *Turmel* c. *C.P.T.A.Q.*, C.S.Q., nº 200-05-002491-830, September 26, 1983, J. Desmeules, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 219-222.

49. Mr. J. Barbeau in *Robert* c. *C.P.T.A.Q.*, note 48, p. 217.
50. For instance in *Michel McDonald*, C.P.T.A.Q., nº 3313D/60330, Feb. 3, 1984, pages 12-13 (unreported).
51. *Dagenais* c. *C.P.T.A.Q.*, unreported, C.S. St-François, No. 450-05-000738-837, March 27, 1984, Toth J.

he worked as a technician, it was his intention to farm his land. In January 1981 the Commission rendered a decision stating that it had no authorization to give because under section 40 of the Act a person whose principal occupation is agriculture can erect a residence on his lot without the authorization of the Commission. The Commission informed him that to avail himself of the privilege afforded by section 40 the applicant had to send a declaration to the Commission to the effect that his building project did not require the authorization of the Commission as foreseen by section 32. So did the applicant who then proceeded to build his residence.

In January 1983, the applicant was summoned to appear before the Commission « to give testimony » as to his declaration under section 40. At that public hearing the applicant was interrogated both by the Commission and its attorney. On March 14, 1983 the Commission issued a cease and desist order in which it concluded that it had been clearly established that the applicant could not avail himself of section 40 and pretend to make agriculture his principal occupation in order to build his residence. It thus ordered the technician to cease any use other than agriculture and to remove the residence erected on the lot.

The applicant then requested the Superior Court to issue a writ of evocation against the Commission. Mr. Justice Toth, in a carefully reasoned judgment, found a number of reasons to give relief to the applicant. First and foremost the Commission had not acted fairly toward him in leading him into error by its first decision and then trying to change it under the guise of a cease and desist order. Since the second decision had the effect of modifying the first one, this could not be done « proprio motu » by the Commission under section 18 but only upon request by an interested party. Mr. Justice Toth explained what should be the attitude of a body empowered to radically limit property rights such as the Commission :

> « Plus un organisme, tel l'intimée, a des pouvoirs étendus et plus par ses pouvoirs il peut limiter radicalement l'exercice d'un droit aussi fondamental que le droit de propriété, plus l'organisme doit agir avec circonspection et minutie pour demeurer strictement à l'intérieur de sa juridiction et dans la légalité et afin d'éviter de créer des situations telles que celles qui se présentent dans ce dossier. Si l'intimée s'est trompée en rendant sa première décision en ne la basant pas sur tous les motifs et sur tous les faits qu'elle aurait dû envisager, son erreur ne doit pas aboutir à une injustice pour le requérant. Le moins que l'on puisse dire c'est que par sa première décision l'intimée a induit le requérent en erreur »[52].

Not only was the attitude of the Commission at fault but its procedures were also a gross violation of natural justice. In September 1982 the

52. *Dagenais* c. *C.P.T.A.Q.*, note 51, at p. 10.

Commission held an « ex parte hearing » where evidence was presented in the absence of the applicant. The inquiry was then continued in January 1983 in a « public hearing » following which the order was issued against him. At this public hearing the applicant was summoned as a witness, not as a party, and was not informed of the evidence already presented in the « ex parte hearing », nor was he informed that a decision could be rendered against him or of his right to retain counsel and to bring forth any evidence. Failure to give him prior notice and an opportunity to rebut the allegations was a breach of natural justice. Finally, one member of the Commission participated in the decision even if he did not sit during the first part of the hearing.

In another case [53] a pensioner having retired on a farm invoked section 40 to build a residence for each one of his three sons. Two years after the sending of his declaration to the Commission under section 32, the Commission ordered him to demolish those residences on the ground that, being a pensioner, the petitioner's principal occupation could not be agriculture. On a petition to issue a writ of evocation, the Superior Court held that the Commission committed an error going to jurisdiction in its interpretation of section 40. The fact that petitioner's pension revenue exceeded his farming revenue was not the criteria of section 40. The land being cultivated by the petitioner was the essential requirement. But the Court went further and ruled that the attitude of the Commission was also sufficient ground to intervene. The Court held that it had abused its discretion in its administration of the Act in waiting over two years after the petitioner's declaration of its intention to take advantage of section 40 before acting on such a declaration. Here again the judgment provides guidance as to what should be the proper standard of fairness in the exercise of the discretion provided by the statute :

> « Le principe de l'équitabilité dans la mise en application des lois est depuis longtemps reconnu en droit administratif canadien ; l'affaire *Roncarelli* [1958] R.C.S. 121, n'en a illustré qu'un aspect bien caractérisé. La discrétion inhérente à l'application d'une loi publique, d'un devoir au terme de celle-ci ou d'une initiative au cours de son exercice, doit toujours s'exercer dans une perspective donnée qui, de toute nécessité, se doit d'être empreinte de bonne foi, d'équitabilité, voire d'intégrité et d'impartialité. Il serait trop facile autrement de détourner l'intention exprimée par le législateur.
>
> Nous sommes en présence ici d'une commission administrative qui doit se comporter comme le ferait une cour de justice. Le devoir statutaire implicite de cette dernière lui dictait d'agir, dans les circonstances susrelatées dans un délai raisonnable afin d'éviter au requérant Robert de s'engager dans la voie qu'il avait signifiée à la commission plus de 2 ans auparavant »[54].

53. *Robert* c. *C.P.T.A.Q.*, *supra*, note 48.
54. *Id.*, at p. 219.

Finally, there is at least one case in which the Superior Court has intervened in the very exercise of the discretion which the Act gives to the Commission when it decides on an application. In *Turmel* c. *C.P.T.A.Q.*[55] the petitioners who wanted to buy a lot on which to build their residence had inquired about its agricultural zoning status prior to its acquisition. They were informed that the Commission had rendered a decision in which it had stated that the lot in question was protected under section 101 by virtue of acquired rights. Having bought the lot they were informed that in order to get the building permit they had to transmit to the Commission a declaration that an authorization was not required since the lot was protected under section 101. An information officer of the Commission even completed their declaration stating that the Commission had already recognized acquired rights on the lot. The petitioners then proceeded to build a residence valued at about 125,000 $ before being notified by attorneys for the Commission that the house had been illegaly built. They tried in vain to obtain an authorization from the Commission and their request for a review was also dismissed by the Commission who finally ordered them to remove or demolish the residence.

The Superior Court, on their motion, authorized the issuance of a writ of evocation against the decisions of the Commission. Among other grounds the Court held that the Commission had failed to exercise its jurisdiction in refusing to take into consideration the consequences that a refusal to grant an authorization would have on the applicants as mandated by section 62. This is to our knowledge the only case in which the Superior Court has exercised its supervisory control over the criteria of decision. Foremost in the Court's willingness to intervene was its appraisal of the fairness of the applicant's position and its reliance on the representations of the Commission as evidenced by the following passage:

> « La bonne foi des requérants n'a aucunement été mise en doute et ceux-ci étaient en droit de se fier aux représentations ou renseignements émanant d'un représentant autorisé de la commission intimée. S'il s'avérait que ces renseignements étaient inexacts, il répugnerait au simple bon sens et à la plus élémentaire justice que les requérants aient maintenant à en supporter les conséquences »[56].

These cases illustrate the very important role played by the courts in giving the individual a minimum of protection against the excesses of administrative discretion. They also reveal a frightful overtone of insensitivity and blind single-mindedness in planning policies against which judicial review is unfortunately the only resort. Therefore it is not surprising that the

55. *Supra*, note 48.
56. *Id.*, at p. 222.

Superior Court is protecting its jurisdiction as against the Commission in order to facilitate access to judicial review.

1.2.2. Protecting access to the courts

A review of the cases decided under the *Act to Preserve Agriculture Land* shows a number of examples where the Superior Court has had to decide on the extent of its jurisdiction over matters dealt with in the Act. On the whole they reveal that the Court will tend to protect its jurisdiction and that this judicial policy is beneficial to individual and property rights.

For instance, in *Dagenais* c. *C.P.T.A.Q.* where judicial review was requested against an order of the Commission under section 14, it was argued on behalf of the Commission that judicial review was premature since the Commission would have to obtain an order from the Court to insure compliance as foreseen in section 85. This argument was rejected. The Court held that an order of the Commission has in itself an element of finality since not complying with an order of the Commission constitutes per se an infraction under section 87(3)[57].

The role of the Court on an application for an order enjoining a person to comply with an order of the Commission as foreseen in section 85 provides another case in point. In early cases[58] under that section it was argued by the Commission that on such an application the Superior Court had to assume that the Commission's order was well founded and had to take it in its entirety according to its tenor. The only question left to the Superior Court, it was submitted, was whether, on a factual basis, there was indeed a contravention to an order of the Commission. This interpretation was rejected by the Court who decided in favor of an extended jurisdiction enabling the Court to exercise its power of judicial review on such an application and enabling the respondent to invoke in his defence all grounds in fact or in law that he could have adduced against the order of the Commission, including the existence of acquired rights.

The Superior Court has also decided that an application under section 85 is premature if a request has been made to the Commission to revoke its order issued under section 14[59] and that, on such an application, the onus to

57. *Dagenais* c. *C.P.T.A.Q.*, *supra*, note 51, at p. 14. *Contra*: *C.P.T.A.Q.* c. *Martel*, C.S. St-Hyacinthe, nº 750-05-0228-82, August 6, 1982, J.E. 82-906, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, p. 749.

58. *C.P.T.A.Q.* c. *Meunier*, C.S.Q., nº 200-05-003428-79, September 18, 1979, Moisan J., reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 745-748; *C.P.T.A.Q.* c. *Asselin*, (1980) 14 M.P.L.R. 152 (C.S.).

59. *C.P.T.A.Q.* c. *Dagenais*, C.S.M., nº 500-05-007964-800, August 29, 1980, Aranovitch J. reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 748.

prove a contravention to an order of the Commission rests upon the petitioner upon a preponderance of evidence test[60]. The Court cannot modify nor correct an order of the Commission under section 85 and thus, should the order be impossible of application, the motion for an order of the Superior Court under section 85 will be dismissed[61].

The same attitude is evident in the willingness of the Courts to allow property owners to gain access to the Superior Court on motions for declaratory judgments[62] thus by-passing the Commission de protection du territoire agricole and having their rights under the Act declared by the courts. In *Lefebvre* c. *C.P.T.A.Q.*[63], Mr. Justice Nichols, then of the Superior Court, held that since according to section 101 acquired rights can be exercised without the authorization of the Commission, the owner of a tract of land protected by acquired rights could always come to the ordinary courts to have them recognized:

> « Celui qui prétend avoir des droits acquis n'a pas à s'adresser à la commission pour aliéner, lotir et utiliser à une fin autre que l'agriculture. Si la commission refuse de reconnaître les droits acquis qu'un tel propriétaire prétend avoir, ce dernier pourra toujours s'adresser aux tribunaux de droit commun pour les faire reconnaître parce que leur juridiction n'a pas été affectée par cette loi. La juridiction conférée à la commission vise le territoire qui, au sens de la loi, avait une vocation agricole le jour où la loi a pris effet, soit le 9 novembre 1978. Les lots auxquels la loi reconnaît des droits acquis aux articles 101 et s. continuent d'être soumis à la juridiction des tribunaux de droit commun.
>
> En s'adressant d'abord à la commission pour obtenir son autorisation, le requérant n'a pas renoncé à la juridiction des tribunaux de droit commun »[64]

The fact that an application for authorization has been presented to the Commission does not prevent the applicant from coming to the Superior Court for a declaration of his rights[65] and the motion for declaratory

60. *Aylmer (Ville)* c. *Entreprises R. Scholle Ltée et al.*, unreported, C.S. Hull, nº 500-05-000727-837, September 23, 1983, Landry J.
61. *C.P.T.A.Q.* c. *Benard*, C.S. Richelieu, nº 765-05-000380-80, December 23, 1980. Deslandes J., J.E. 81-238, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, p. 754-755.
62. *Code of Civil Procedure*, section 453.
63. *Lefebvre* c. *C.P.T.A.Q.*, C.S. Drummond, nº 405-05-000120-824, November 10, 1982. Nichols J., J.E. 82-1153, reported in L.A. CORMIER et L.V. SYLVESTRE, *supra*, note 38, 873-878, confirmed by C.A.M., nº 500-09-000021-832, August 21, 1981, *J.E.* 84-720, leave to appeal refused by the Supreme Court on Dec. 5, 1984; see also: *Morin* c. *C.P.T.A.Q.*, C.S. Quebec, nº 200-05-001983-816, June 17, 1982, Gervais J., J.E. 83-711 reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 894-900 (on appeal); *Winzen Land Corp. Ltd.* c. *C.P.T.A.Q.*, [1981] C.A. 383, 387.
64. *Lefebvre* c. *C.P.T.A.Q.*, note 63, at p. 876.
65. *Lefebvre* c. *C.P.T.A.Q.*, *supra*, note 63, at. p. 876.

judgment is not affected by the privative clause of section 17[66]. This recourse has been allowed by the courts not only for declarations of acquired rights but also for declarations by the courts that an owner is entitled to build on his lot a residence in accordance with section 31[67] that his lot does not fall under the jurisdiction of the Commission[68] or that a particular transaction does not constitute an « alienation » as defined by the Act[69].

1.2.3. The protection of property rights

The right to hold and enjoy private property free from any interference is also a right which the Superior Court will try to protect and preserve even in the face of such an invasion as that permitted by the *Act to Preserve Agricultural Land*. For instance the Court will readily adopt a restrictive interpretation of the statute that will limit the scope of the restrictions imposed on property rights[70]. On the other hand the Superior Court has had a much more liberal view of acquired rights as that of the Commission[71]. This is especially important if one considers that free access to the courts to have such rights recognized enables the private owner to choose a forum where his rights will be better protected. This is true not only of the scope and extent of the definition of acquired rights under section 101 but also of the right to enlargement as given by section 103. Thus in a recent case, the Superior Court has held, contrary to the Commission's position, that, under section 103, the enlargement of acquired rights can be made on two parts of the same lot even if such parts are not contiguous[72]. In another case, the Court has granted protection against loss of acquired rights under section 102

66. *Gauthier* c. *C.P.T.A.Q.*, C.S. St-François, nº 450-05-000762-837, October 25, 1983, Peloquin J., J.E. 83-1081, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 500-503.
67. *Idem.*
68. *Villiard* c. *C.P.T.A.Q.*, [1982] C.S. 380.
69. *Ouellet* c. *C.P.T.A.Q.*, C.S.Q., nº 200-05-00747-803, July 11, 1980, Laflamme J., reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 365-369, rvd by C.A.Q., nº 200-09-000463-809, April 6, 1983, J.E. 83-459, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, 369-371.
70. *Lefebvre* c. *C.P.T.A.Q.*, *supra*, at p. 876; *Morin* c. *C.P.T.A.Q.*, *supra*, at p. 900; *Robert* c. *C.P.T.A.Q.*, *supra*, at p. 218.
71. Louis V. SYLVESTRE, « Interprétation des droits acquis par la Commission de protection du territoire agricole du Québec », [1982] Justice municipale, 111-150; see also, *C.P.T.A.Q.* c. *Lefebvre*, on appeal, *supra*, note 63.
72. *Mondor* c. *C.P.T.A.Q.*, unreported, C.S. Joliette, nº 705-05-000518-830, December 6, 1983, Tannenbaum J. (on appeal).

by deciding that the delay foreseen by that section does not apply when a person is before the courts [73].

In other cases interpretations given by the courts have had the result of reducing the scope of the prohibitions or of granting immunities from their application. In *Villiard* c. *C.P.T.A.Q.* [74] Mr. Justice Biron held that properties held by the Federal Government or its agencies in Quebec were not subject to the Act. In *Boissonneault* c. *Varennes* [75] the same judge interpreted the definition of a « sugar bush » [76] as requiring that there be enough maple trees to justify production with the necessary equipment, thus reducing the scope of section 27 of the Act.

But relying on judicial review alone is not sufficient to control the Commission de protection du territoire agricole and insure a satisfactory protection against undue invasion of individual and property rights. Judicial review is limited to questions of jurisdiction and cannot result in the granting of an authorization by the courts. One of the reasons why frustrated applicants do not use judicial review is that, even if successful, they will ultimately be back again before the Commission. For this reason, the absence of a right of appeal is, in our opinion, a very serious defect of the Act and should be corrected along the lines of the British model of an administrative appeal followed by an appeal to the courts on questions of law and jurisdiction.

Limiting the extent of discretion conferred to the Commission should also be a priority. After over six years and more than 50,000 individual decisions, the Commission should be required to determine by regulation some of its policies in order to reduce the number of cases decided by administrative discretion and give a minimum of certainty to applicants. While adopting administrative discretion as the basis of agricultural land preservation in the name of efficiency, our legislators have failed to adopt the guarantees which should accompany the granting of discretionary powers to give the individual a modicum of protection against arbitrariness. It is comforting to notice that the courts are increasingly using judicial review to correct some of the abuses and excesses resulting from such a lack of guarantees.

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73. *Rheaume* c. *C.P.T.A.Q.*, C.S.Q., n° 200-05-002006-802, July 2, 1981, Masson J., reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, at pp. 868–873 and on other grounds; C.A.Q., n° 200-09-000563-814, June 11, 1984, *J.E.* 84-551.
74. *Supra*, note 68.
75. *Boissonneault* c. *Varennes*, C.S. Richelieu, n° 765-05-000358-79, June 16, 1981, Biron J., J.E. 81-753, reported in L.A. CORMIER and L.V. SYLVESTRE, *supra*, note 38, 778–785, conf.: C.A.M., n° 500-09-000-996-819, Oct. 19, 1984.
76. « A stand of trees suitable for the cultivation of maple sugar » Sect. 1(7).

2. Judicial review over local governments

As noted at the very outset, the supervisory power of the Superior Court has always been an essential part of Quebec and indeed Canadian Municipal Law. In recent years however there have been tremendous developments in local planning law especially with the coming into force in 1979 of the *Land Use Planning and Development Act*[77]. Recent years have also witnessed increased recourse to the supervisory power of the Superior Court over local planning policies and practices. The Courts have been active and the judicial developments have been as spectacular as the legislative developments although they have often taken the form of traditional judicial review of regulations.

In order to better understand the scope and trends of the courts' intervention over local planning we shall first determine the principal characteristics of local planning. Such characteristics can be best identified when contrasted with those of the *Act to Preserve Agricultural Land.*

In 1979, after the coming into force of the *Agricultural Land Protection Act*, a new planning act was adopted for Quebec. Announced as the main element of a government policy of decentralization, the *Land Use Planning and Development Act*[78] fostered the setting up of regional county municipalities comprising urban and rural local municipalities which send representatives to sit on the council of the regional county municipality. That regional council is required by law to prepare and adopt a development plan that must include the general aims of land development policy and the general policies on land use for the territory of the regional county municipalitie[79]. In turn, after the coming into force of the regional development plan, each local municipality must adopt for its own territory a local planning programme, a zoning by-law, a subdivision by-law and a building by-law. The local planning programme and by-laws must be in conformity with the objectives of the regional development plan[80].

The coming into force of the *Land Use Planning and Development Act* has not brought about any modification to the *Agricultural Land Protection Act* and thus, while regional councils in theory are responsible for land use planning policies over their territories, in practice, the delimitation of agricultural zones[81] and, thus, the definition of urban perimeters are left in

77. R.S.Q., ch. A-19.1.
78. *Id.*
79. Section 5.
80. Sections 33 and 34.
81. Even if, officially, there has been a memorandum of agreement over the agricultural zone decree between the Commission de protection du territoire agricole and the municipalities

the hands of the Commission de protection du territoire agricole. The Commission's control is absolute over all the lands in the agricultural zone because, according to section 98 of the *Act to Preserve Agricultural Land*, that Act prevails over any inconsistent provision of any statute applicable to a municipal corporation and it also prevails over any provision of a land use and development plan, a master plan or a zoning, subdivision or construction by-law. Thus, the regional development plan is placed in a straightjacket and the decision-making power of the regional council is eroded.

The distance between the two statutes and their policies becomes even greater following a quick comparison. The philosophy behind the *Planning Act* is that the planning function must be in the hands of local or regional authorities composed of elected officials. The philosophy behind the *Agricultural Land Protection Act* is that the preservation of farmland is an objective of far too great an importance to be left in the hands of locally elected officials who cannot be trusted[82]. Secondly, the *Act to Preserve Agricultural Land* creates a regime of control with a single objective in mind : that of farmland protection. This regime centralizes all powers in the hands of a provincial board whose members are appointed and not responsible to the electorate. On the other hand, the *Land Use Planning and Development Act* is a general act which does not give precedence to any land-use policy but simply sets out the rules of the planning process while leaving to locally elected officials the choice of content of such policies. Thirdly, the *Agricultural Land Protection Act* is based on the principle of administrative discretion by which a centralized Commission deals with applications on a case by case basis by applying any or all of a set of general criteria mentioned in the Act. In the *Land Use Planning and Development Act*, all land-use policies are to be set out in by-laws so that the officer responsible for the issuance of permits has no discretion but simply verifies if the application is in conformity with the provisions of the by-law[83].

There we have the main characteristics of local planning. The plan itself does not directly and legally affect the rights of any property owner, this is done by the by-laws or regulations which implement the plan or the planning

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in 92% of the cases (*Agricultural Land Protection Act*, sects. 47–53) in practice, since the Commission had the last word in any case (section 48) it in fact imposed its will over a great number of municipalities. Michel POIRIER, « Observations sur les lois de l'aménagement », in *Bilan des lois sur l'aménagement, Compte rendu de la journée d'étude tenue le 16 octobre 1981 à Magog*, Sherbrooke, Association québécoise d'urbanisme et Urbanitek, 1982, p. 49.

82. *Document de consultation sur la protection du territoire agricole québécois*, Gouvernement du Québec, ministère de l'Agriculture, 7 juillet 1978, pp. 29-30.

83. *Land Use Planning and Development Act, supra*, note 77, sections 113–122.

programme[84]. The system is thus regulatory and does not rest on administrative discretion but on compliance with the by-law. This is what distinguishes local planning from development control:

> « The main difference between the two (development control and zoning) is that with development control an administrative official determines whether or not the proposed use of the land is satisfactory on the merits of each individual application. When the land is zoned the owner need only comply with the zoning by-laws and he may use the land in accordance with the zoning »[85].

There are three main regulatory controls in Quebec local planning. The subdivision by-law regulates the subdivision of land into lots and determines their area and dimensions, the laying of streets and the provision of parkland[86] while the building by-law is concerned with the quality of materials used in a building and the manner of their assembly for security and salubrity purposes[87]. The zoning by-law, probably the best known planning tool in North America, regulates the use of land. Its name derives from the division of the municipality in zones or districts for the purposes of uniform regulation of the use of land and building within each zone[88]. Even if such matters as height, spacing, parking facilities, access, etc. can be regulated in the zoning by-law, its essential object is the regulation of the use of land and all other elements are in fact ancillary to the use or uses permitted in a given zone.

These controls are administrated by way of a permit system[89]. The issuance of a permit is entrusted to a local official whose duty it is to verify whether a permit application complies with the by-law[90]. If a permit application complying with the provisions of the by-law is refused by the officer, the owner can compel its issuance by the courts[91]. On the other hand,

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84. *Campbell* c. *City of Regina*, (1967) 63 D.L.R. (2d) 188 (Sask. C.A.); *Subilomar Properties (Dundas) Ltd.* c. *Cloverdale Shopping Center*, [1973] R.C.S. 596; *Salvas* c. *Tracy*, [1966] R.L. 513; *Rogers* c. *District of Saanich*, (1983) 22 M.P.L.R. 1 (B.C.S.C.); J. L'HEUREUX, « Schémas d'aménagement et plans d'urbanisme en vertu de la Loi sur l'aménagement et l'urbanisme », (1980) 11 *Revue générale de droit*, 7, 51-56.
85. Moir J. in *Tegon Developments Ltd.* c. *Edmonton*, (1977) 81 D.L.R. (3d) 543, 5 Alta L.R. (2d) 63 (Alta C.A.) affd (1979) 1 R.C.S. 98; see, also, P. KENNIFF, « Development Control in Canada: Evolution and Prospects », (1974) *J.P.E.L.* 385, 388-389.
86. *Land Use Planning and Development Act, supra*, note 77, (hereinafter cited *L.U.P.D.A.*), section 115.
87. *L.U.P.D.A.*, section 118.
88. *L.U.P.D.A.*, section 113(1) and (3): P. KENNIFF, *supra*, note 85, p. 387.
89. *L.U.P.D.A.*, sections 119-122.
90. *Id.*, sections 120-121.
91. *Hull* c. *J.G. Bisson Construction and Engineering*, [1964] B.R. 148.

a permit issued by the administrative officer is of no avail if the use of the building is in contravention of the by-law[92].

2.1. Judicial control over the manner of exercising local planning powers

As can be inferred, one of the main features of the local planning system in Quebec and, indeed, in most of Canada, is to provide the landowner with a good measure of certainty about how he should govern himself according to the regulations. The fact that the officer whose duty it is to administer the by-law has no discretion in deciding whether a permit should issue enables the landowner to know in advance his rights and obligations under the planning regulations. The courts have been very effective in preserving this feature of the local planning system.

This is the essence of the manner of exercising the power to zone and the courts have always seen to it that such power remains at the regulatory level and not at the administrative level. Thus a municipal council cannot, under the guise of a by-law, try to give itself an absolute discretion to decide each permit application on its merits without laying down any principle governing the manner of exercise of this discretion. The municipal council when adopting the zoning by-law must « specify, for each zone, the structures and uses that are authorized and those that are prohibited »[93] and the conditions according to which a use or a structure will be permitted in a given zone. The courts will tend to reduce the margin of discretion that the council will try to grant to itself in deciding to classify and allocate land uses within the municipality. They will do so by declaring *ultra-vires*, as an illegal exercise of the power to adopt by-laws, the allocation of discretionery powers in a local planning regulations such as the zoning by-law.

Therefore, it has been held that the municipal council cannot in its by-law leave to itself the authorization to put a lot to a specific use or its location[94] nor can it try to do the same thing indirectly by way of a discretionary exception to a prohibition of certain uses in a zone or over the whole of its territory[95]. They have also invalidated enactments in by-laws authorizing council to give a derogation to a specific regulation in the zoning by-law such as height regulations[96].

92. *Mountain Place and Valet Shop Ltd.* c. *Montréal*, [1971] C.A. 815, 818-819; *Le Moine* c. *Notre-Dame-du-Portage*, [1974] C.S. 46, 51.
93. *L.U.P.D.A.*, section 113(3).
94. *City of Verdun* c. *Sun Oil Co.*, [1952] 1 R.C.S. 222, conf. [1950] B.R. 320.
95. *City of Outremont* c. *Protestant School Trustees for the Municipality of Outremont*, [1952] 2 R.C.S. 506, conf. [1951] B.R. 676.
96. *Ville St-Laurent* c. *Marien*, [1953] B.R. 792; *Ville de Kamouraska* c. *Bossé*, unreported, C.S. Kamouraska, n° 250-05-000287-79, June 26, 1980, Jacques J.

As recently stated by the Supreme Court of Canada the principle that a regulatory power cannot be transformed into an administrative discretion provides certainty for the landowners and developers and should be respected even when the municipal council is faced with complex planning problems. Failure to provide this element of certainty and predictability in the local planning system will warrant judicial intervention [97].

It has been written that « the test of uncertainty is uncertain » as a motive to pronounce by-laws invalid [98]. Still, the Quebec courts have used it of late to exercise judicial control over planning regulations and provide relief to individuals that would otherwise fall under questionable provisions. For a long time the test of uncertainty had not been used by Courts in Quebec while it was a more familiar occurrence in the rest of Canada [99]. But the decision of the Court of Appeal in *Cie Miron Ltée* c. *La Reine* [100] has had the effect of making the Courts more familiar with the test of uncertainty and has given rise to more successful attacks on by-laws. In that case a majority of the Court of Appeal quashed a conviction for violation of provisions of the air pollution by-law of the Montreal Urban Community whose terms were couched in such broad language [101] that it was not possible for citizens to know what were their duties and obligations under the regulation. The Court held those provisions to be void on the ground of vagueness and stated that the tendency to enact general and abstract laws and by-laws, leaving it to the Courts to define the extent of their application, should be avoided.

Since then, have been declared void for such defect, provisions of a zoning by-law which are drafted in terms so general and so vague as to leave to the local planning officer complete discretion to decide whether a residential building should be allowed in the municipality [102]. In an Ontario case [103], the municipality purported to amend its general zoning by-law creating a new use category, seasonal residential, which provided that certain

97. *Canadian Institute of Public Real Estate Companies* c. *Toronto*, [1979] 2 R.C.S. 2; 7 M.P.L.R. 39.
98. De Smith's *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans, London, Stevens, 1980, 355.
99. P.A. CÔTÉ, « Le règlement municipal indéterminé », (1973) 33 *R. du B.* 474.
100. [1979] C.A. 36, 7 M.P.L.R. 28.
101. « Il est interdit de répandre dans l'atmosphère de quelque source que ce soit, volontairement ou non, des matières qui polluent l'atmosphère et portent atteinte à la vie, la sécurité, à la santé, à la propriété ou au confort du public, ou qui entravent l'exercice ou la jouissance de droits communs ».
102. *Descheneaux* c. *St-Jean-Baptiste-de-Nicolet*, C.S. Trois-Rivières, nº 400-05-000104-82, October 10, 1982, Lacoursière J., J.E. 82-1094.
103. *Mueller* c. *Township of Tiny*, (1976) 1 M.P.L.R. 1 (Ont. H.C., Garret J.).

lands could only be used by a person who maintained and regularly resided in a permanent dwelling in another location. Said the Court :

> « By-law 33-73 is void for uncertainty in that the most important part of the same is not fairly and readily understandable. The question is asked what is the meaning of the words "who maintains and regularly resides in a permanent dwelling in another location". Do they operate to prohibit married women who do not work for a salary and maintain a permanent dwelling at another location from using lands in an area affected by this by-law ? Do they similarly prohibit university students who live at home and make no contribution to a permanent dwelling, people who travel extensively, people who live in boarding houses and rented rooms and who move frequently and many other persons of this kind ? It is clear that if the words "maintain" and "permanent dwelling" are given their plain meaning, they could operate to prohibit the use of lands to which this by-law is made applicable by a fairly significant percentage of the population »[104].

In a very recent case[105] the Court of Appeal, relying on its earlier precedent in *Miron*, came to the same conclusion about a provision of a zoning by-law purporting to classify industrial uses according to their environmental impact on neighbouring uses. The by-law put in the same class all establishments conforming to the following provisions :

> « Ces établissements ne comportent pas de risques d'incendie et/ou d'explosion, ni d'inconvénients pour le voisinage par la fumée, les poussières, le bruit ou tous autres facteurs semblables ».

The Court simply said that it was too vague to constitute valid regulation.

It is to be noted that the test of uncertainty has been used as a motive for judicial control over by-laws in areas other than zoning and environmental protection. In *Cormier* c. *Lasalle*[106] a by-law prohibiting the keeping of more than three cats in a dwelling or its outbuildings was declared invalid because the expression « in a dwelling or its outbuildings » was vague, imprecise and promoted an arbitrary application more so since it did not indicate with sufficient precision who had a duty and was liable under the by-law. In *Desbiens* c. *Rimouski*[107] a by-law purporting to regulate chimney sweeping was also invalidated on the grounds that its drafting left to the municipal council discretion to grant licences to whom it wanted without determining any criteria.

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104. *Mueller* c. *Township of Tiny*, note 103, p. 4.
105. *Les Entreprises B.C.P. Ltée* c. *Bourassa et al.*, unreported, C.A.M., n° 500-09-000995-84, February 27, 1984, J.E. 84–279.
106. (1982) 20 M.P.L.R. 185 (Que. S.C.).
107. C.S. Rimouski, n° 100-05-000517-81, January 26, 1983, Larue J., J.E. 83–236.

2.2. Protection against invasion of privacy and abuse of planning powers

The revival by the Supreme Court of Canada of the doctrine of unreasonableness permitting the declaration of invalidity of municipal by-laws has given a new weapon to the Courts in their fight against abuse of powers in the planning field. In *Bell* c. *Regina*[108] the Court was asked to quash a conviction resulting from an alleged violation of a municipal zoning by-law adopted by the Ontario Borough of North York. The by-law limited the uses of certain residential zones to « dwellings, semi-detached dwellings and duplex dwellings » as defined in the by-law. « Dwelling unit » was defined as a separate set of living quarters designed or intended for use by an individual or one family alone and « Family » was defined as a group of two or more persons living together and interrelated by bonds of consanguinity, marriage or legal adoption occupying a dwelling unit. The appellant, the tenant of a detached duplex whose costs he shared with two other persons unrelated to him, was convicted for a violation of the by-law. Appellant's argument that the by-law was unreasonable was accepted by the Supreme Court even if such a doctrine was thought to be almost extinct. The Court said that, even as limited, the doctrine still existed in the case of by-laws found to be partial and unequal in their operation as between different classes, found to be manifestly unjust or disclosing bad faith or involving such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men[109]. In view of the many possible inequitable applications of the definition of « family », the by-law in its device of adopting « family » as being the only permitted occupants of a self-contained dwelling came exactly within Lord Russel's words as being « such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men » and thus unreasonable.

Surprisingly enough the Court could probably have achieved the same result of declaring void that provision of the zoning by-law without having to invoke the doctrine of unreasonableness simply because the power to zone by reference to the personal relationship of occupants rather than the use of the building is not a power that was granted the municipality and is therefore *ultra-vires*. As was said by Brooke J. in the Ontario Court of Appeal :

> « This is land zoning by people zoning and is not within the scope of the Planning Act »[110].

108. [1979] 2 S.C.R. 212.
109. Spence J. at [1979] 2 S.C.R. 212, 222 citing Lord Russell in *Kruse* c. *Johnson*, (1898) 2 Q.B. 91.
110. (1977) 150 R. 2d 425 cited by Spence J. at [1979] 2 S.C.R. 212, 221.

Still, the revival of the doctrine has encouraged courts to use it in the exercise of their supervisory power of local governments' planning regulations and the *Bell* case has also led them to intervene when the allocation of uses in zoning by-laws is dependent on personal characteristics rather than planning imperatives. In *Gauthier* c. *Canton de Brompton*[111], Mr. Justice Gervais of the Superior Court declared void provisions of a zoning by-law which prohibited mobile homes in a particular district except for farmers, their employees or sons :

> « Une étude des articles 3 et 4 du règlement 239 révèle que le but dudit règlement, tout en étant justifié, interdit l'aménagement de maisons mobiles à certaines personnes et non à certains territoires ou parties de territoire.
>
> Il s'infère qu'un fermier pourrait aménager une maison mobile pour son fils mais qu'une personne occupant d'autres fonctions, soit un homme d'affaires, un professionnel, un professeur ou autres, ne pourrait le faire.
>
> Pour en arriver au but recherché, la municipalité aurait dû imposer des restrictions en se basant sur des superficies de terrain et non sur la nature des occupations du propriétaire ou du locataire d'une ferme.
>
> J'en conclus donc que le règlement, tel que rédigé, est discriminatoire et doit être annulé »[112].

The same result was obtained in *Goudreau* c. *Laval*[113] where in a particular zone, the by-law permitted homes for senior citizens when managed by a public body or non-profit corporation while, in the case of corporation for profit, there was the additional requirement of a minimum of 100 units. Such additional requirement was annulled by the Court.

Finally in *Boissonneault* c. *Varennes*[114] the test of reasonableness was applied with respect to the validity of provisions in a zoning by-law prescribing uses permitted in a particular zone. The petitioner was a landowner whose intention it was to erect a residence and building for the raising of mink on her property. Her permit application was refused since the only permitted uses were those compatible with forestry conservation such as public recreation and the cultivation of maple sugar. The land being also under the jurisdiction of the Commission de protection du territoire agricole du Québec, Mr. Justice Biron evaluated the actual uses to which the land could be put by bringing together the provisions of both the municipal zoning by-law and the *Act to Preserve Agricultural Land*[115]. On the one hand uses allowed under the by-law were not permitted under the Act without an

111. C.S. St-François, nº 450-05-001294-76, June 29, 1979, Gervais J., J.E. 79-768.
112. *Idem*, pp. 3-4.
113. C.S.M., nº 500-05-015640-830, February 1, 1984, Brossard J., J.E. 84-267.
114. *Supra*, note 75.
115. *Supra*, note 3.

authorization from the Commission [116] while, on the other hand, cultivation of maple sugar, the only use permitted under both the by-law and the Act was not possible in fact because of an insufficient number of maple trees. Thus, the growing of trees being the only use she could make of her land, the by-law was held to be unreasonable in depriving her of a meaningful use of her property.

The willingness of the Courts to test the reasonableness of zoning by-laws has permitted them, as we have seen, to question the legality of local land-use policies based on grounds which are tantamount to an invasion of privacy or which constitute undue interference with the liberty of the subject. But their intervention is not confined to questions of validity and they also see to it that local governments do not abuse their powers with respect to administration.

The classic example of such judicial attitude is revealed when a municipal corporation tries to illegally obtain concessions from permit applicants. The Courts have consistently held that a municipal corporation cannot impose as a prerequisite to the issuance of a subdivision or building permit, conditions that are not required by statute or valid regulation [117]. They have even decided that an individual is not bound to respect an agreement that the municipality forces him to enter into as a condition precedent for the issuance of a permit if the agreement purports to impose charges or requirements exceeding those provided for in the by-laws [118]. What the courts are here offering is protection against planning blackmail.

2.3. The courts and the allocation of uses

These last developments will be devoted to situations where the courts will be asked to intervene into decisions made by council about planning policies in order to rectify substantive defects and to defeat council's will as expressed in its by-laws.

In the first situation a landowner submits a permit application in conformity with the existing zoning by-law to realise a permitted development and council, before the issuance of the permit, changes the by-law or causes a

116. A possible authorization by the Commission for a use permitted under the by-law was said to be too problematical to warrant consideration.

117. *Etobicoke Board of Education* c. *Highbury Developments Ltd.*, [1958] S.C.R. 196; *Du Lac Development* c. *Boucherville*, [1959] R.L. 484; *Landreville* c. *Boucherville*, [1978] 2 S.C.R. 801, 810; *Lambert-Bédard* c. *Sillery*, (1980) 13 M.P.L.R. 307 (Que. C.S.).

118. *Village de Gracefield* c. *Bériault*, [1979] R.P. 279 (C.S.).

notice of motion to be given [119] with the consequence that the use which was permitted so far becomes prohibited under the new by-law therefore precluding the issuance of the permit.

For a long time, Canadian and Quebec case law was to the effect that, in such a situation, the rights of the parties in presence, the landowner and the municipal corporation, had to be decided as of the date of the issuance of a writ of *mandamus* when the matter came to court on the petition of the landowner to force the issuance of the permit. In practice, unless the landowner were to take proceedings in *mandamus* at the same time he submitted his permit application, this meant that the municipal authorities could defeat its application at will:

> « The race would seem to be to the swift in these matters, and the goal is not reached merely when the application for the permit is made, or even when the proceedings are launched, but only when the matter comes to be dealt with by the Court. So that the passing of an effective by-law by the council before the Court has adjudicated has the effect, as I understand the judgment of the Judicial Committee, of defeating the applicant in the exercise of what but for the by-law, would be his right to erect upon his land such buildings as the law as then permitted »[120].

This situation could be very frustrating for the landowner who only wanted to use his property according to the by-law especially so if the rezoning by council in order to defeat the permit application was not based on planning principles but on neighbour pressure or political clamouring as was often the case.

In 1965, the Supreme Court in the *Boyd Builders Case* [121] tackled the problem in a case arising in Ontario and came out with a test to be applied in such a situation:

> « An owner has a prima facie right to utilize his own property in whatever manner he sees fit subject only to the rights of surrounding owners, e.g. nuisance, etc. This prima facie right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, a) a clear intent to restrict or zone existing before the application by the owner for a building permit, b) that council has proceeded with good faith and c) that council has proceeded with dispatch »[122].

119. *L.U.P.D.A.* section 114 « when a notice of motion has been given to amend a zoning by-law, no building plan may be approved nor may any permit or certificate be granted for the carrying out of works or use of an immoveable which, if the amending by-law is adopted, will be prohibited in the zone concerned ».
120. Orde J. in *Re Upper Canada Estates & MacNicol*, (1931) 4 D.L.R. 459, at p. 462; *Spiers* c. *Toronto Township*, (1956) 4 D.L.R. (2d) 330, 335-336; *Frank* c. *Laurin*, (1978) 13 M.P.L.R. 94 (Qué. S.C.) and cases cited therein.
121. *City of Ottawa* c. *Boyd Builders Ltd.*, [1965] S.C.R. 408.
122. Spence J., note 121, at 410.

The Court also decided that, in such a situation, the rights of the parties are to be determined as of the date of the filing of the landowner's application for a permit and the onus of establishing good faith is on the municipality.

After a very long wait, one of the most important developments in the area of zoning has been the application, by the Quebec Courts, of the judgment of the Supreme Court in *Boyd Builders*. In *Mirabel* c. *Carrières T.R.P. Ltée* [123] the respondent company obtained approval in principle from the competent provincial agencies as well as from the appellant municipality to establish a quarry in the town. Following protests by a group of citizens the municipality adopted two by-laws in order to amend the existing zoning by-law so as to forbid the establishment of the quarry in question. The Superior Court maintained a motion for a writ of *mandamus* from the company and its judgment was upheld in appeal. The Court of Appeal applied the test given by the Supreme Court in *Boyd Builders* and held the town did not act in good faith in rezoning the property following the application for a permit, nor did it have a prior intention to rezone before such application. Since then there have been at least two instances where Quebec courts have followed the *Boyd Builders Case*. In *Belœil* c. *Guy* [124], the Superior Court held, on the basis of *Boyd Builders*, that the giving of a notice of motion in council to prevent the issuance of a permit pending the adoption of an amendment which would prohibit the erection of the intended building, did not operate on an application for a permit made before the giving of such a notice of motion. Before such filing there was no intention of changing the zoning by-law and the amendment had been prepared following neighbour complaints. In *Amireault* c. *Paroisse de l'Épiphanie* [125] the same problem arose in conjunction with an application for a building permit for a pig farm and the Superior Court said that in bowing to political pressure based on the fear of pollution the municipal council did not act in good faith towards the applicant in amending its zoning by-law therefore making it impossible to erect the pig farm. The Court applied the criteria established in *Boyd Builders* and issued the injunction requested by the applicant. The Court of Appeal affirmed [126].

These judicial developments show the concern of the Courts to establish an equilibrium between the rights of a landowner and the legitimate interests

123. (1979) 12 M.P.L.R. 104 (Que. C.A.), leave to appeal refused: [1980] 1 S.C.R. X; for a commentary: J. L'HEUREUX, « De l'octroi du permis de construire », (1980) 40 *R. du B.* 512.
124. (1979) 9 M.P.L.R. 44 (Que. S.C.).
125. (1980) 13 M.P.L.R. 213 (Que. S.C.).
126. C.A.M., nº 500-09-000992-800, September 16, 1983.

of the municipal collectivity. The *Boyd Builders* test, as we have seen, decides the rights of the parties according to substantive standards, that of a prior committment to rezone and that of the equities in presence. Even if, in a given case, the test may result in the political will being defeated, the statement of Spence in *Boyd Builders* is less conducive to abuse on the part of municipal authorities than the old « race to the swift » test.

One of the most difficult issues to be resolved by courts in local planning is when they are requested to decide whether a planning policy or decision is in the public interest. In Canada, the Supreme Court has clearly affirmed that it is the function of the courts to pass upon the question of public interest [127] but such control being at the frontier of questions of opportunity it is exercised with great restraint by the Quebec courts. A typical situation would be that in which an amendment to a zoning by-law affecting only a small area, for instance one lot, has the effect of providing an economic or other advantage to one property owner while imposing inconvenience in the form of reduced amenities, noise, increase traffic and pollution to neighbouring landowners. In some instances they can take to the courts and request that such by-law or amendment be declared void because it was not adopted in the public interest but only to further private interests. The judge is then called upon to weigh the advantages of a planning decision which results in a windfall to one landowner as against the inconvenience caused to his neighbours. If there is no public interest motive justifying the prejudice caused, the by-law can be annulled.

Such an example occurred in the case of *Aubé* c. *Loretteville* [128]. In this case, the disputed by-law was an amendment to the zoning by-law adopted to legalize the situation of a landowner who had erected a private garage inside the side-yard normally required to be free from any building. The general zoning by-law required a 7 foot side-yard but the garage had been erected at a distance of only two feet from the lot line. The amending by-law under attack specifically purported to authorize the existence of the garage. The neighbor who felt aggrieved by such a structure being too near his property asked the Superior Court to declare such amending by-law null and void for the motive that its adoption had been motivated by private interest.

The town of Loretteville argued in defense that the amendment had been adopted in the public interest. Specifically, it argued that in allowing the construction of the garage, the amendment permitted the demolition of a number of old sheds and that therefore the public in general and even plaintiff benefitted from an improvement of the site.

127. *Kuchma* c. *Rural Municipality of Taché*, [1945] S.C.R. 234.
128. [1981] Justice municipale 132 (C.S.).

Mr. Justice Moisan of the Superior Court rejected the town's argument. For one thing, the landowner in whose favor the amendment had been adopted had enough available land to build in accordance with the requirements of the zoning by-law and furthermore, the town could use other legal means to bring about the removal of the old sheds without letting the neighbouring landowner support by himself the inconvenience caused by the amending by-law. The amending by-law was held to be void because the Court found that there was no public interest warranting the prejudice caused to the neighbouring landowner.

But even if an amendment benefits one individual and causes inconvenience to some other citizens, this can be justified in the public interest. For instance, in *Bider* c. *Baie d'Urfé* [129], thirteen residents of Baie d'Urfé sought the quashing of an amending by-law purporting to rezone two lots to permit the construction of a medical-dental building arguing that the by-law was discriminatory and had not been adopted in the public interest but was based on the private interest of the owner of the site. According to them the amendment would have the effect of creating more vehicular traffic thereby increasing safety hazards, would detrimentally affect their view and the character of their neighbourhood and decrease their property values. The Court, in rejecting the application to quash, pointed out that the amending by-laws imposed conditions to minimize the negative impact of the new building on its environment and that there were already other commercial uses intruding in this residential neighbourhood. Finally the Court disposed of the petitioners argument that the by-law had not been adopted in the public interest:

> « While Petitioners, through their evidence, established their private interest in that their "tidy community" would be affected, the public interest was demonstrated by the need in Baie d'Urfé for dental and medical facilities — the creation of a dental-medical building in the area in question » [130]

In a similar case it was held that the redevelopment of the center city and the added fiscal revenues resulting from the erection of new commercial buildings were sufficient public interest objectives to justify relaxing by amending by-law the normal off-street parking requirements of the zoning regulations [131].

These latter cases [132] reveal that the Courts are restrained in the exercise of judicial control on questions of public interest. Such restraint comes from

129. C.S.M., nº 500-05-008365-767, May 9, 1980, Aranovitch J.
130. *Id.*, at p. 6.
131. *Bland* c. *Beaconsfield*, C.S.M., nº 05-015489-808, January 29, 1981, Barbeau J.
132. See also *Napier* c. *Winnipeg*, (1962) 67 Man. R. 322 (Man. Q.B., Monnin J.).

the fact that they cannot be concerned with the wisdom or opportunity of a policy decision without then substituting their opinion for that of an elected council[133]. It is only when there is no justifiable public interest present in a planning amending by-law that will they intervene. Should the question be debatable, they will favor the will of the council as expressed in the by-law under scrutiny.

After a perusal of some of the issues before the courts in matters of municipal planning, one cannot help to notice the greater extent of judicial involvement over local planning policies. Because the *Land Use Planning and Development Act* has maintained the tradition of regulatory controls at the local level, the courts have been keeping abreast of the development of the local planning function and have continued to exercise their supervisory powers over delegated legislation. The contrast between the role of the courts over local planning and their role in the field of agricultural land preservation is a reminder that, in our jurisdiction at least, a regulatory system of land use planning still has a lot to offer in terms of protection of the individual against the possible abuse of the state.

Conclusion

We have chosen the field of planning law to illustrate the role of the courts in the protection of property rights and in their exercise of their power of judicial review over municipal corporations. Planning law offers the possibility of interesting comparisons between the British and Quebec systems both when they offer similarities such as those existing between the British Planning system and the Quebec agricultural land protection regime and when they exhibit radical differences such as those that exist between British planning and local planning in Quebec and Canada.

Planning law also offers a diversity of issues not present in other fields of municipal law like local taxation. Furthermore, it transcends local government law with the direct involvement of provincial public agencies such as the Commission de protection du territoire agricole, in the field of planning.

The Courts have to adapt to these different circumstances and situations in order to play their supervisory role and insure their ability to provide redress to those whose rights have been affected by planning policies. In the field of agricultural protection due process and questions of fairness have been paramount along with problems of jurisdiction. In matter of local

133. *Sillery* c. *Sun Oil Co.*, [1964] S.C.R. 552 reng [1962] B.R. 914.

planning there have been refinements in judicial control over delegated legislation and the courts are more and more able and ready to provide substantive protection to aggrieved individuals.

Coping with unfettered and unappealable discretion is, in our opinion, the biggest problem facing the Quebec Courts in the field of planning law today. While we have been looking at the *Act to Preserve Agricultural Land*[134] this statute in but one, albeit the harshest, in a series of legislative interventions designed to cope with planning problems by giving administrative authorities discretionary powers on a case by case basis instead of relying on traditional regulatory powers as in the case of local planning. The protection of cultural property[135] the preservation of housing stock[136] and, to a lesser extent, the protection of the physical environment[137] are examples of such an approach. Given the scarcity of protective measures incorporated in those statutes such as rights of appeals, it becomes the duty of the courts to pursue a policy of active judicial review.

134. *Supra*, note 3.
135. *Supra*, note 2.
136. *Supra*, note 4.
137. *Supra*, note 1.